

4 Natural Rights and Human Rights

While the idea of moral rights can be extended beyond the human race, historically it is the moral rights possessed by human beings that have preoccupied philosophers. Of those rights, the most celebrated and significant, particularly for political philosophers, have been natural rights and human rights. Those two sorts of right are closely related. Historically the idea of human rights descended from that of natural rights. Indeed some theorists recognise no difference between them; they regard ‘natural’ and ‘human’ as merely different labels for the same kind of right. Others are less happy with that simple conflation and, while acknowledging the historical link between the two sorts of right, want to free human rights from some of the features traditionally associated with natural rights. In examining these rights, I will treat them as distinguishable even though they possess some common features.

Natural rights

In the history of political thought, natural rights have been conceived in two different ways. One corresponds to what Dworkin describes as rights in the strong sense. In this tradition, natural rights were conceived as rights of the most fundamental moral importance. They represented the basic entitlements of all human beings and the first obligation of governments was to ensure that the natural rights of its citizens were respected. It was this conception of natural rights that was espoused by the Levellers, John Locke and Thomas Paine and which inspired the declarations of rights that appeared during the American and French revolutions. It was also from this conception of natural rights that the modern idea of human rights evolved.

The other tradition conceived natural rights as rights in Dworkin’s weak sense. In effect it reduced natural rights to mere

liberties. The most celebrated statement of this conception of natural rights was given by Thomas Hobbes in his portrait of the state of nature, but it was not unique to him. Earlier in the seventeenth century Selden had developed a theory of man's original condition of unfettered liberty, and that theory and its associated conception of natural rights were taken up and developed by other thinkers such as Dudley Digges, Henry Hammond and Jeremy Taylor (Tuck, 1979, pp. 82–118). Spinoza's understanding of natural rights also belongs to this tradition. However for ease of expression I shall refer to this as the Hobbesian conception of natural rights and I shall concentrate on Hobbes in describing it. The other tradition, which historically ultimately proved more important, I shall describe as the Lockean conception of natural rights, since Locke is probably its best known and most influential exponent. I shall begin by describing the Hobbesian conception.

Hobbes thought of natural rights as those rights individuals would enjoy in the state of nature. By a 'state of nature' Hobbes and other political thinkers writing during the sixteenth and seventeenth centuries understood the condition that humanity would be in if there were no government and no organised political community. Some of those who appealed to the idea of a state of nature thought of it as an actual historical condition that had preceded the formation of human society and the establishment of government. Others, such as Hobbes, were more inclined to regard it as an imaginary condition which had not necessarily occurred in human history, but which was still a 'true fiction' in that it described the condition that mankind really would be in if the 'artifices' of government and political society were removed.

Hobbes held that, in such a state of nature, everyone would possess the same right of nature. That right was 'the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life; and consequently, of doing any thing, which in his own judgement, and reason, he shall conceive to be the aptest means thereunto' (1957, p. 84). However, as Hobbes himself indicates here, this natural right of self-preservation was merely a 'liberty'; it was not a claim-right imposing duties upon others. Thus each individual's natural right of self-preservation did not impose correlative duties upon everyone else not to endanger his life. On the contrary, since each individual was a threat to every other individual, the right of nature entitled

each to attack and destroy anyone else. The state of nature was therefore a state of war in which mutual threat meant that the right of nature gave everyone 'a right to everything; even to one another's body' (*ibid.*, p. 85). Hobbes's natural rights were not therefore a body of mutually compatible claim-rights, respect for which would ensure social harmony and tranquillity. Rather they were a set of clashing liberty-rights which contributed to rather than solved the problem of conflict and disorder amongst mankind. Human beings could achieve the peaceful condition that they all wanted only by contracting to divest themselves of their 'right to all things' and by placing themselves under a common authority. Thus, for Hobbes, the creation of political society required men to renounce their natural rights (with certain limited exceptions¹) and to subject themselves to a ruler whose authority was unlimited.

In the Hobbesian tradition, then, 'natural rights' were understood as Hohfeldian liberty-rights. They played an important part in explaining the origin or (to put it non-historically) the rationale of political society. But, since they were given up, either wholly or for the most part, with the formation of political society, they ceased to be of any or of much significance in that society. They prescribed neither what governments should do nor what they should not do. All of this was in marked contrast to the Lockean tradition in which natural rights were used not only to explain the origin of political authority but also to define its duties and to limit its extent.²

The Lockean tradition of natural rights derived in a much more direct way than the Hobbesian from the centuries-old idea of natural law and it is best understood by way of its origin in that idea.³ 'Natural law' described a body of rules, governing human conduct, which were conceived as part of a natural order of things. It was most often understood as a law deriving from God and it is most plausible in that theocentric context. God was the creator of the universe and of everything in it. His creation was not a mere chaos of phenomena but an ordered whole in which everything occupied a certain position and was ordained to act in a certain way. Man was as much a part of that created order of things as any other existent and he was equally intended by God to conduct his life according to a particular pattern. Thus man, no less than the planets and the stars, the winds and the seas, the lion and the eagle, was ordained by God to conduct his life according to God's ordinance. That part of His law which God had laid down for man was described as natural

law. However, unlike plants and non-human animals, man was subject to God's law in a special way. Through his possession of reason he was able to be fully conscious of the God-ordained natural laws to which he should conform. Through his possession of free will he was able to will to follow those laws, which also meant that he was capable of defying them. The rest of the material creation followed the design God had ordained for them in an unknowing and unchoosing way. Unlike man, therefore, they were incapable of either good or evil. Natural law was not the only law to which man was subject. There were other injunctions, relating particularly to man's salvation, which man could not know merely through the use of his natural faculties and to which he had access only because they had been 'revealed' to him by God in the Scriptures. However natural law provided the basic rules that man needed to structure his relations with his fellow human beings during his earthly life.

Given this view of things, use of the term 'natural' in natural law is quite readily intelligible. These were laws laid down by God for human beings in general, just as 'positive' or 'civil' laws were laid down by rulers for the governance of particular bodies of citizens. They were 'natural' because they were not 'artificial' laws; that is, they were not man-made. They were as much part of a given natural order of things as what would nowadays be called scientific 'laws of nature'. Thus any particular individual was typically subject to two laws – the laws of nature and the laws of the particular state to which he belonged. Nor were these two bodies of law unrelated. The laws laid down by human rulers should be guided by, and should elaborate upon, the laws of nature laid down by God. A putative man-made law that flouted natural law was, for that reason, not truly a law at all. The laws of nature therefore dictated the basic content of man-made law and also set limits to what rulers could legitimately require of their subjects.

The link between natural law and the Lockean conception of natural rights is very simple. Laws bestow rights and impose duties (subject to the qualifications that we have considered in earlier chapters). Natural law bestows natural rights and imposes natural duties. Locke, for example, gave as the fundamental law of nature that 'no-one ought to harm another in his Life, Health, Liberty, or Possessions' (1960, II, s.6). He then restated that law in terms of the rights it bestowed and the duties it imposed: each individual had a

natural right to his life, liberty and property, and each individual had a natural duty not to harm the life, liberty or property of others.

As with the Hobbesian tradition, it is common to find theorists in this tradition investigating natural rights by picturing man in his natural condition – the state of nature. However natural rights theorists in the Lockean tradition understood the moral condition of man in the state of nature quite differently from Hobbes. For Locke, the basic moral rules that man needed to conduct his life were provided by the law of nature and that law was fully available to all men in the state of nature. The state of nature was neither a moral vacuum nor a moral chaos; it was characterised by a structure of moral rights and duties which was supplied by God's natural law. In order to live in peace and harmony and to enjoy their natural rights men had only to abide by that natural law. Thus, for Locke, unlike Hobbes, man's natural condition was not intrinsically one of conflict; on the contrary, morally it was a condition of peace and harmony. Conflicts and difficulties arose in the state of nature not because men lacked a common body of laws to follow but because they failed fully to recognise and to conform to the natural laws that God had provided for them. It was not so much the shortcomings of the state of nature as the failings of fallen mankind that made the state of nature unsatisfactory and that induced men to end it by establishing political authority.

However the establishment of political authority did not mean the disappearance of natural rights. On the contrary, men carried their natural rights forward with them into political society. Locke argued that, in the state of nature, individuals possessed both natural rights to their life, liberty and property and an 'executive right of nature' to do whatever they deemed necessary to protect those rights. When they placed themselves under political authority, men gave up their executive right of nature to that authority so that, henceforth, instead of each and every individual interpreting natural law and judging and punishing offenders, those functions would be performed on behalf of all members of the political community by a single authority. What individuals did not give up was their natural rights to life, liberty and property. The whole point of their establishing political authority was the better to protect their natural rights to life, liberty and property. It would therefore have been nonsensical for individuals to have abandoned those rights on leaving the state of nature. The possession of natural rights was

therefore as much a feature of man in political society as it was of man in the state of nature.

In addition the Lockean tradition regarded the upholding of man's natural rights as the primary function of government. For example, the American Declaration of Independence of 1776, having declared that God had endowed all men with rights to life, liberty and the pursuit of happiness, went on to state that 'to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed'. Similarly the French Declaration of the Rights of Man and the Citizen of 1789 stated that 'the end of all political associations is the preservation of the natural and imprescriptible rights of man'. But the governments which were set up to safeguard individuals' natural rights might themselves turn into offenders and violate the very rights they were supposed to protect. That they had no authority to do. A government which significantly infringed its citizens' natural rights lost its own right to rule and could legitimately be overthrown. It was in those terms that Locke justified the 'Glorious Rebellion' of 1688. The American and French revolutionaries used the doctrine of natural rights to similar effect. That is one way in which the doctrine of natural rights is said to constitute the 'radical' phase of natural law thinking.

Historically the doctrine of natural rights was also closely associated with social contract thinking. The idea of social contract took various forms (Lessnoff, 1986) but, in general terms it was the theory that, in some more or less literal way, citizens were contracting members of the society to which they belonged and the political authority to which they were subject derived ultimately from, and depended ultimately upon, their own consent. The very conception of man's natural condition – the state of nature – as a condition without human government was itself a part of the social contract tradition, for to suppose that man is naturally not subject to political authority is to suppose that political authority is humanly created. Why this association of natural rights and social contract? It did not have to be so. An Aristotelian conception of the state has been strongly associated with traditional natural law thinking ever since St Thomas Aquinas, during the thirteenth century, integrated Aristotelian philosophy into Christian theology. According to Aquinas man was, by his God-given nature, a social and political animal. He lived as God intended him to, and he was able to achieve the good earthly life that God had ordained for him

only by co-operating with others in an organised political community. In that sense the state was natural; man's natural condition was a political one and not the authority-less condition imagined by seventeenth-century political thinkers. Thus, in so far as Aquinas might have thought in terms of natural rights, those rights would have been held by people as members of a natural political order rather than by isolated individuals in a pre-political state of nature.⁴

Nor was every exponent of contractarianism a proponent of natural rights. However the association between natural rights and social contract was no accident and the shift in emphasis from natural law to natural rights does much to explain this transformation in the conception of the political order. Once individuals were reckoned to possess identical natural rights, particularly equal natural rights to freedom, they could no longer be regarded as destined for different pre-ordained roles in a natural political order. Individuals with equal natural rights stood shoulder to shoulder as moral equals. That equality meant that none could claim any natural authority over others. Thus if there was to be political authority; it had to be established by men themselves and those who possessed political authority had to be given it by the 'equals' over whom it was wielded. Sir Robert Filmer, the foremost English proponent of the doctrine of the divine right of kings, rightly traced the 'error' of contractarianism to the 'new, plausible and dangerous opinion' of the natural freedom of mankind (1949, p. 53).

Which rights were claimed as natural rights? Life and liberty were standard. The right to life generally meant the right not to be murdered. The right to liberty was understood as the right to conduct one's life as one chose within certain acknowledged limits. Thus Locke understood by an individual's right to liberty his right to live as he saw fit provided he remained within the bounds of the law of nature. Similarly the French Declaration of 1789 stated that 'Political liberty consists in the power of doing whatever does not injure another. The exercise of the natural rights of every man has no other limits than those which are necessary to secure every other man the free exercise of the same rights.' As I have already indicated, the right to liberty was also sometimes understood to entail the right of each individual not to be subjected to authority without his own consent.

Sometimes natural rights were claimed to specific liberties. For example, the French Declaration of 1789 asserted the right to freedom of opinion, including religious opinion, and the right to the 'free communication of thoughts and opinions'. Locke extended the range of natural rights to include ownership of property and that too became a frequently asserted natural right. In addition natural rights theorists were keen to spell out what individuals' natural rights implied for their rights as citizens and for their just treatment by the organs of the state. They also typically claimed that people had the right to resist and to unseat tyrants and oppressors who violated natural rights.

What is generally true of natural rights thinking of the seventeenth and eighteenth centuries is that the fundamental rights attributed to individuals were essentially negative in character. They were 'keep out' notices. They proclaimed that each individual should be left free to worship God in his own way, to express his thoughts, to tend his property, without interference from others, particularly without interference from the state. That generalisation requires some qualification. Conceptions of individuals' natural rights were often associated with conceptions of their rights as citizens, which rights, rather than merely limiting the scope of political life, regulated its conduct. There are also a few instances of eighteenth-century natural rights theorists asserting positive as well as negative claim-rights.⁵

The doctrine of natural rights has attracted a good deal of suspicion and hostility, particularly during the last two centuries, which is due in large part to its claim that rights can be 'natural'. Trees, bees and buttercups are all parts of nature; so, on this view it would seem, are rights. We cannot doubt the existence of trees, bees and buttercups, nor, it would seem, can we doubt the existence of rights. Yet rights clearly do not 'exist' in the same manifest way as these other things; we cannot see rights as we can see trees and bees, nor, unlike gravity or natural radiation, can we infer their existence from our experience of their effects. Not unreasonably, therefore, natural rights theorists have been accused of trying to pass off a highly questionable moral notion as though its presence in the universe were a matter of fact. In truth, it has been objected, there are no rights in nature.

Now if we reconsider the cosmology in which the doctrine of natural rights was originally embedded, the representation of

natural rights as natural facts was not at all odd. Clearly rights cannot be thought of as ‘existing’ in quite the same way as trees and bees, but there is nothing odd about regarding the question of what humanly made legal rights people have as a question of fact. Thus, for example, it is a fact that, currently, people in Britain and the United States have the legal right to smoke tobacco; it is also a fact that, currently, they have no legal right to smoke marijuana. By the same token, if we see the world as created by God and structured according to His laws, then the rights that men possess in virtue of those laws will also appear as matters of fact. Granted the natural law view of things, it is simply ‘true’ that human beings *qua* human beings possess certain God-given rights, just as it is true that bees live in hives and that oaks grow from acorns. Moreover, given that these are part of a comprehensive design that God has given to his creation, it is quite apposite to think of them as part of the nature of things and therefore to speak of them as ‘natural’ rights.

Of course, the cosmology that is crucial to this conception of natural rights is very much open to challenge. However, if we take exception to that cosmology, it is important to recognise (although people have frequently not recognised) that what we are faulting is not the use of the concept of a right outside the context of positive law, but simply the claim that there are rights embedded in nature. A rejection of that cosmology would equally entail a rejection of ideas of natural law or natural justice or natural duties.

Is there any justification for continuing to speak of ‘natural rights’ if we do not accept the theocentric cosmology of which it was originally a part? There are two related grounds on which the phrase might still be defended. First, if we ascribe moral rights to people, rights which we believe they have whether or not those are embodied in codes of positive law, we may call these ‘natural’ rights simply to distinguish them from the ‘artificial’ rights which we think of people having only because they have been created by some specific human act. For instance we might say that individuals have a natural right not to be murdered but no natural right to receive a pension. John Rawls (1971), for example, seems somewhat reluctant to speak of natural rights but he does speak of ‘natural duties’, which duties are ‘natural’ in precisely this sense. Second, the description ‘natural’ may be thought appropriate to those rights in so far as human beings are thought to possess them simply in their natural capacity as human beings rather than in their ‘artificial’ capacity as members

of particular organisations such as states. Thus, before we heap ridicule upon the idea that rights can be ‘natural’, it is important that we should be clear about the precise sense in which they are said to be natural.

Human rights

Even though the description of some rights as ‘natural’ is defensible in the ways I have indicated, it is perhaps best given up, except by those who share something like a traditional natural law view of the world and for whom natural rights remain ‘natural’ in a more substantial sense. In this century, the language of natural rights has been largely replaced by that of ‘human rights’, a term that is less open to misunderstanding. Even so, human rights might still be thought of as natural rights in the limited senses that I have just described. That is, they are rights which all people are thought to possess whether or not they are embodied in systems of positive law. They ought, of course, to be recognised in systems of positive law. But people’s possession of human rights does not depend upon such formal recognition, which is why we can speak of governments and laws ‘violating’ their human rights. Secondly, they remain natural rights in that people are conceived as possessing those rights in their natural capacity as human beings rather than as citizens of particular states. In addition what are called human rights might also be conceived as natural rights in a fuller sense. For many Christian thinkers they are. But the idea of human rights is no longer closely associated with that particular theocentric view of the world.

Human rights are, then, rights possessed by all human beings simply as human beings. They are what Hart describes as ‘general’ rather than ‘special’ rights (1967, pp. 60–6) since they are universal to all humanity. By contrast special rights arise only out of some special transaction or special relationship between people, and are therefore confined to those people who are parties to those special transactions or relationships. Examples of special rights are rights arising from promises and contracts, rights attaching to particular offices and social positions, and rights arising from special relationships. Human rights do not presuppose such special

transactions or relationships. Merely being human is sufficient to make one a possessor of those rights.

To that extent, the doctrine of human rights is an egalitarian doctrine. It ascribes a number of rights to human beings indifferently and those rights are held equally by all human beings. Just how egalitarian the doctrine turns out to be in effect will depend upon how extensive are the rights which all human beings are reckoned to possess. But at least the doctrine of human rights treats all humanity as its canvas and attributes an equal basic moral significance to all human beings as such. In that way it stands opposed to doctrines which give a fundamentally different moral standing to different categories of people. It is at odds with cultures and ideologies which give fundamentally different moral statuses to people belonging to different races or sexes or religions or classes or castes.

Human rights have also come to acquire a legal or semi-legal status, since they are now embodied in a number of international declarations, conventions and covenants. To that extent, even legal positivists can recognise human rights as 'real' rights. They are legal rights established by members of the international community, although the formal obligations that states acquire in putting their names to the relevant documents are often qualified or unclear. International lawyers do sometimes speak of human rights in this strictly legal sense. Nevertheless the idea of human rights remains fundamentally a non-legal one. That is, human rights are rights which humans are conceived as possessing whether or not they are recognised in positive codes of law. Thus, according to the full-blooded version of the doctrine, declarations and conventions of human rights do not 'create' and 'give' rights to human beings; they simply recognise and announce the rights that human beings have.

The content of human rights

What have been claimed as human rights? The answer is a wide variety of conditions and goods. The most celebrated statement of human rights is the 'Universal Declaration of Human Rights' adopted by the General Assembly of the United Nations in 1948. That document is far from perfect in the way it catalogues and formulates the rights it enunciates and its contents are controversial

even amongst those who are committed to the general idea of human rights. Nevertheless it provides a useful starting point for a survey of the sorts of rights that are most commonly claimed as human rights and which regularly appear in declarations of rights.

First, there is the right to life. That might be regarded as the most fundamental of rights since being alive is a prerequisite of enjoying other rights. However, as I indicated in Chapter 1, what more precisely the right to life is a right *to* is open to widely different interpretations. At a minimum, it can be understood as the right not to be murdered. It might also be understood as the right to be safeguarded from murder. Article 3 of the UN Declaration, which states that 'everyone has the right to life' also states that everyone has the right to 'personal security', which implies not only a right not to be murdered but also a right, typically held against a government, to be protected from murder and other forms of personal injury. But life may be threatened by more than just the wilful hostility of human beings. It may also be threatened, for example, by disease or famine. Thus the right to life may become linked to rights to certain material goods and services which figure in later articles of the UN Declaration. The right to life may also be circumscribed in different ways. For example, does a murderer retain his right to life in spite of his taking the life of another, or does he forfeit that right so that he himself can be sentenced to death without his own right to life being violated? Does the right to life permit killing in self-defence? Does it permit killing in wartime? None of these questions is satisfactorily settled merely by asserting a right to life and declarations typically leave these issues unsettled.

Second, rights to liberty or to liberties have always figured prominently in declarations of rights and do so in the UN Declaration. Sometimes what is asserted is a right to liberty as such. However this cannot really mean that people are rightfully free to do whatever they like – for one thing the existence of other people's rights, including their rights to liberty, must set limits to the liberty of any particular individual. The 'right to liberty' therefore is usually either a way of asserting a right not to be enslaved (which right is stated explicitly and separately in article 4 of the UN Declaration) or it is a right to a certain 'area' of personal liberty whose precise boundaries are not spelled out but whose general nature is left to be 'understood' by those to whom the declaration is addressed. It has also become common to assert rights to specific

liberties such as rights to freedom of opinion and expression, freedom of religion, freedom of movement, freedom of association and freedom from intrusions into one's privacy.

Third, there is the right to property. For centuries property was regarded as an entirely man-made institution and not something to which there could be a natural right. However Locke's argument that individuals could acquire natural rights to property has proved particularly influential and it has become a common ingredient of declarations of rights, including the UN Declaration (article 17). As with many other rights, just how we are to understand the scope and content of this right as it appears in declarations of human rights is usually left extremely unclear.

Fourth, there are a number of what may be called 'civil' rights – rights which concern the administration of justice and the possible abuse of governmental power. Article 5 provides that no one shall be subject to torture or to 'cruel, inhuman or degrading treatment or punishment'. Article 7 declares that 'All are equal before the law and are entitled without discrimination to equal protection of the law'. Article 11 provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty.

Fifth, the UN Declaration includes a number of 'political' rights, rights which relate to the workings of political processes. Article 21 of the UN Declaration, for example, states that 'everyone has the right to take part in the government of his country, directly or through freely chosen representatives'.

Finally, the UN Declaration includes a number of what are usually described as socioeconomic rights. Article 22 states that everyone has the right to social security and to the 'social and cultural rights indispensable for his dignity and the free development of his personality'. Other articles go on to declare that everyone has the right to work, to rest and leisure, to education, to health care and to a certain minimum standard of living. These are sometimes referred to as the 'new' human rights since they are largely, though not wholly, absent from earlier declarations of rights.

These are only loose groupings of rights. The UN Declaration does not itself group rights into 'families' and it includes some articles which do not fit easily into any of the above groupings – for example, article 15, which declares that everyone has the right to a nationality, and article 16, which declares that everyone has the right to marry and to found a family.

Although the UN Declaration is a very important document and an obvious focus for discussions of human rights, it should not be regarded as the definitive statement of human rights. It was produced under difficult circumstances and those who drafted it had to secure the support of governments espousing very different ideologies and of nations with very different cultural traditions. Whatever its defects, it represents a considerable achievement in international co-operation. But it is still a rather ramshackle document and it should not be treated as the touchstone by which the whole doctrine of human rights is to be judged. Some of what are claimed as human rights in the UN Declaration may not be rights at all; others may be rights but not truly human rights. There may also be human rights which go unrecognised in the UN Declaration. Critical discussion of the Declaration must not therefore be confused with critical discussion of the very idea of human rights. As we shall see in the next chapter, there is no single theory which can be spoken of as 'the' theory of human rights. Rather there are a number of theories which share the general idea of humans rights but which advance different reasons for ascribing rights to human beings and which, consequently, differ over what rights human beings have.

With that qualification stated, there are a number of observations to be made about the rights that figure in the UN Declaration. Firstly, the list of rights in the UN Declaration is a good deal longer than the list of rights that appeared in declarations of rights in the seventeenth and eighteenth centuries. Locke, for example, made do with the natural rights to life, liberty and property. The French Declaration of the Rights of Man and the Citizen (1789) stretched to 17 articles, whereas the UN Declaration extends to 30 articles with several rights sometimes figuring in a single article. Further declarations of rights inspired by the UN Declaration, such as the European Convention on Human Rights (1950), and the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966) contain still more detailed lists of rights. Generally speaking, many more rights have been claimed as human rights in the twentieth century than were claimed as natural rights in previous centuries.

In some measure this lengthening list of rights has resulted from a desire to give more precise and detailed statements of the rights that

people have. That is, a longer list does not always indicate that the scope of natural or human rights has been enlarged. It is simply that there has been an endeavour to state in greater detail just what people's rights entitle them to. For example, rather than making do merely with the 'right to liberty', the European Convention on Human Rights devotes several articles to spelling out the freedoms to which people have rights, along with details of the circumstances in which those freedoms may be limited or removed and the methods by which that may be done. Similarly the International Covenant on Civil and Political Rights runs to 53 articles, most of them consisting of several paragraphs; roughly half of these are given over to statements of rights, with the remainder devoted to machinery for implementing the Covenant.

However it is also true that, in the twentieth century, rights have been claimed to things that were not generally claimed as natural rights in earlier ages. This is most obviously true of rights associated with the welfare state. As one would expect, changes in moral and political thinking have affected people's thinking about the content of human rights. As people came to think that governments should play a larger role in promoting the well-being of their citizens, so they have been more generous in the rights they have claimed on behalf of individuals. In all of this one might suppose that the idea of natural or human rights has remained constant: all that has changed is people's thinking about what individuals have natural or human rights *to*. However, these changing ideas about the content of rights are also associated with changes in how those rights are conceived so that human rights in contemporary thought are not wholly identical in character with the natural rights of previous centuries.

Human rights and the rights of citizens

Natural rights, as we have seen, were typically thought of as rights that individuals would possess in a 'state of nature'. Since a state of nature was a condition without government and without organised political society, rights which presupposed the existence of government and of organised society could not be natural rights. Thus the socioeconomic rights that figure in the UN Declaration would not have been conceived as natural rights for, by and large,

those rights are understood to impose duties specifically upon governments or upon political communities acting through the agency of governments. But neither could political or civil rights be natural rights, nor could rights such as the right to security of person, for those rights also make sense only in the presence of government. They might be claimable as rights of some sort and they might be linked in some way to natural rights, but, within the state of nature cum social contract tradition, they could not themselves be truly 'natural' rights.

These reservations about what can be considered natural rights might also lead us to wonder whether the same should not be said of human rights. Human rights may no longer be (necessarily) associated with the cosmology of natural law but they are still conceived as rights that human beings enjoy simply in virtue of being human. That implies that they are rights which are common to all human beings no matter where they live or when they live, no matter what form of government they live under or whether they live under government at all, no matter what their social or economic circumstances. But, if human rights have to be that general, if they have to be tenable in every possible human condition, can they include rights such as the right to protection by government, the right to 'an effective remedy by the competent national tribunals' when rights are violated, the right to political participation, or the right to social security? The French Declaration of 1789 distinguished between the rights of man and the rights of the citizen. Are some of what are now claimed as human rights not human rights at all but rights which, if they are rights, are possessed by individuals only as citizens of particular states?

That would imply that individuals as members of political communities possess two clearly separate sorts of rights: rights which they hold along with all other human beings and which they possess in all circumstances, including the circumstances of political society, and rights which they hold only as citizens of particular states. There are, indeed, philosophers who interpret the adjective 'human' severely and who argue that rights that individuals can enjoy only as members of states cannot be reckoned truly human rights (for example, Melden, 1977, pp. 179–84).⁶ However, before we set about severing the rights of citizens from the rights of humans, we should recognise that they can be joined in a number of ways.

Firstly, there is bound to be a good deal of overlap between the contents of these two sorts of right. For example, freedom of expression and freedom of association can be thought of as rights which individuals have as human beings; but those are also rights which bear importantly upon the way that states conduct their affairs and which citizens can demand should be respected both by those in authority and by their fellow citizens.

Secondly, some rights which are specific to citizenship might be conceived as articulating no more than the constraints that human rights impose upon the way that governments and other agencies of the state exercise their powers. In the case of some of these rights the moral foundation of the rights of citizens in the rights of persons is readily apparent. The right to a fair trial, the right not to be subjected to 'cruel, inhuman or degrading treatment or punishment' and the right to 'recognition everywhere as a person before the law' may all be conceived in that way. In other cases, the link between human rights and citizens rights may be more institutional in character. Thus the right not to be subjected to arbitrary arrest or the right to be presumed innocent until proved guilty can be viewed as requiring institutions and procedures which do not place human rights at risk.

The rights of citizens to fundamental freedoms and their rights to be treated in accordance with the elementary canons of justice can therefore be seen as no more than rights governing the treatment of human beings by the institutions of the modern state. But what about rights that are associated more specifically with political life, such as rights of political participation? These too can be grounded in a conception of human rights. For example, if we hold that human beings possess a basic right of self-determination, we may also hold that, if they find themselves subject to political authority, they are entitled to share in the exercise of that authority (in so far as that is practicable). That is not to say that the case for democracy and its associated rights must be based on a conception of human rights, since democracy can be defended in a variety of ways. But it is at least arguable that political rights such as the right to vote can find a foundation in rights that individuals hold as human beings.

The common thread running through what I have argued so far is that citizens' rights can be seen as the rights that human beings possess under political conditions. Both the use that may be made of political authority and the form that it should take are constrained

by the fact that political authority is authority wielded over, and on behalf of, human individuals with rights. But what of those rights which are made *possible* only by the existence of organised political communities? It is one thing to say that the political processes must be of a sort that respect the rights of human beings. It is less obvious that goods and services that are brought into existence by a state can figure in a litany of *human* rights. Given that, for any particular individual, rights such as the right to social security or the right to security of person are claims against a particular government or a particular society, these look more like rights that individuals possess only in virtue of their membership of particular communities. Here, at last, the rights of citizens may seem to leave behind the rights of man.

Even that may be challenged by the determined proponent of human rights. Why should a theory of human rights be constrained by the seventeenth century fiction of a state of nature? Human beings have always lived in communities of one sort or another, so why should their rights as human beings be confined to those that they could reasonably claim in an entirely imaginary asocial condition? Given the ubiquity of the state in the modern world, is it not more plausible and more pertinent to think in terms of rights to which all human beings can lay claim as members of states? If we think in those terms, a catalogue of human rights can include all of those rights which are deemed universal to mankind under present circumstances, including those which, for any particular individual, constitute claims only against his or her state. Of course this extension of the idea of human rights will be plausible only so long as the *same* rights are attributed to the citizens of all states. Once we allow that the citizens of different societies can have different rights, those rights cannot be human rights (unless they are merely different instantiations of the same general entitlements under different local circumstances). As we shall see in Chapter 7, one of the doubts which hangs over the idea of socioeconomic human rights is whether proponents of those rights really mean to attribute identical rights to all human beings. If they do not, then, no matter how generously we interpret the concept of human rights, it is difficult to see how those socioeconomic rights can be *human* rights.

Thus the rights ascribed to individuals as citizens can be grounded in the rights ascribed to them as human beings. Of course that is not to say that *every* right an individual enjoys as a citizen must be

traceable to a right that he or she enjoys as a human being. I have sought to show only that the 'rights of man' and the 'rights of citizens' need not be conceived as two unrelated and mutually exclusive categories of right.

Scepticism about human rights

The phrase 'human rights' does not carry the same ontological overtones as 'natural rights'. That is, the adjective 'human', unlike the adjective 'natural', does not carry the suggestion that rights are 'existents' that are part of the given make-up of the world. Nevertheless proponents of human rights are sometimes given to talking about them in terms similar to those used by traditional natural rights theorists. People sometimes say that there 'are' human rights or that these rights 'exist'. They also 'declare' the rights that humans have as though they were merely announcing what is manifestly the case. The very universality of human rights perhaps encourages this way of thinking, for it is tempting to suppose that something that applies to all humanity must be obvious and indisputable. The doctrine of human rights has therefore attracted the same sort of suspicion and hostility as the doctrine of natural rights. Bentham famously dismissed natural rights as 'simple nonsense' and natural and imprescriptible rights as 'rhetorical nonsense, — nonsense upon stilts' (1962, II, p. 501). Some contemporary writers are similarly dismissive of human rights. Alasdair MacIntyre, for example, disposes of human rights with the comment, 'there are no such rights and belief in them is one with belief in witches and in unicorns' (1985, p. 69).

In so far as the critics' objection is that people do not 'have' human rights in the same sense in which they have legal rights, there is some justification for their complaints. Compare the claim 'I have a legal right to x' with the claims 'I have a moral right to x' and 'I have a human right to x'. The last two statements appear to be identical with the first, except that the adjectives 'moral' and 'human' have taken the place of the adjective 'legal'. But these statements are categorically different. The statement 'I have a legal right to x' is an assertion of fact. It is an assertion of institutional fact rather than of brute fact, but it is an assertion of fact nonetheless (Searle, 1969, pp. 50–3; MacCormick, 1974). As such it

is either true or false and, if we doubt the claim, we can check its truth against the relevant society's statute books, or its records of customary law, or its case law. Moreover the truth of the claim is quite independent of our opinions about whether it is a good or a bad thing that people should have a legal right to x.

I have already explained why traditional natural law theorists were given to talking about natural rights in the same existential way as we might talk of legal rights. Natural rights were simply rights vested in humans by God's laws, just as legal rights are rights vested in individuals by humanly made laws. There are those – usually described nowadays as 'moral realists' – who would claim the same matter of fact status for human rights. But proponents of human rights do not have to take that view, nor is it a view that most of them take. The claim 'I have a human right to x' may be understood simply as the claim that, in virtue of a moral principle, I, as a human being, am entitled to x. Understood in that way, there is nothing illicit in talk of people 'having' human rights or, more generally, of their 'having' moral rights. Indeed it is somewhat puzzling that so many people should have taken exception to the notion that, morally, people can be entitled to this or that. The belief that humans have rights is no more mysterious than any other moral belief and is utterly unlike a belief in witches or unicorns.

Of course rights which claim a moral foundation are subject to all of the doubts and difficulties that characterise any moral position. When people are in dispute about what is morally right, there is no straightforward equivalent to the statute book to which they can turn in order to resolve their differences. Equally, while the question of what legal rights people have can be resolved independently of whether we think it good or bad that they have those rights, the moral rights that we ascribe to people cannot be similarly independent of our view of what is good or bad. Human rights as moral rights cannot therefore be matters of indisputable truth; they must be controversial in the way that any moral position is controversial. But there is no reason why moral rights should be any *more* morally controversial than any other element of morality. A goodly part of the criticism which pretends to be criticism of the specific idea of human rights in fact relates not to their being 'rights' but to their being 'moral' rights and succeeds as criticism only to the extent that it casts doubt upon *any* moral position (cf. Nielson, 1968; Young, 1978; Frey, 1980, pp. 10–17).

Human rights and ideal rights

One way that some writers have sought to avoid confusion over the character of natural or human rights is by introducing the notion of 'ideal rights'. Real rights are rights which people really have. Ideal rights are rights which they would ideally have. Thus Bentham, on one occasion when he did not dismiss natural rights out of hand, suggested that, if I assert that someone has a natural right to something, 'all that it can mean, if it mean any thing, . . . is that I am of the opinion he ought to have a political right to it' (1962, III, p. 218). Similarly the evolutionary utilitarian, D.G. Ritchie, proposed that when people asserted natural rights they were best understood as referring not to rights which people could be said actually to possess but rather to rights which, in their opinion, 'ought to be recognised' by the law and the public opinion of a society. They were the rights that the would-be reformer would establish in his ideal society (Ritchie, 1895, p. 80). Others have followed Bentham and Ritchie in suggesting that moral rights in general, and human rights in particular, are best interpreted as ideal rights (Campbell, 1974, p. 447; Miller, 1976, pp. 78–82; cf. Campbell, 1983, pp. 18–22).

The attraction of handling natural or human rights in this way is that it emphasises the distinction between 'is' and 'ought' and it makes clear that natural and human rights belong to the realm of 'ought'. However, despite these merits, the representation of moral rights as ideal rights cannot be acceptable to those who take moral rights seriously. On this view, people cannot really be said to have moral rights at all – except in the 'positive' sense that I identified in the previous chapter: rights which are said to be 'moral' only because they are recognised and upheld by the public opinion of a society rather than by its law. But, if we understand the adjective 'moral' in its normal critical sense, proponents of the 'ideal rights' view are really saying that there are no moral rights; there are only moral reasons why rights ought to be brought into existence and, as Bentham remarked, 'a reason for wishing that we possessed a right, does not constitute a right' (1962, III, p. 221). Thus, for example, in the absence of legally or conventionally established rights, we could not say that torturing people or trying them unjustly violated their rights. We could only regret that there was not an established order of rules according to which such actions would be violations of their rights. In other words, reducing moral rights to ideal rights means

abandoning the very idea of moral rights and, more particularly, the idea of human rights as these are ordinarily understood.⁷

Of course showing that the idea of human rights is conceptually coherent is not the same as establishing that morally human beings really do have rights. We may find the notion of a centaur intelligible but our being able to imagine a being that is half man and half horse does not establish that there are centaurs. Similarly those who have doubts about human rights may concede that the notion of human rights is intelligible but still insist that it is morally unsound. They may accept that human beings just as human beings are proper objects of moral concern, but reject a morality structured in terms of rights. Or, conversely, they may accept that people have moral rights, but deny that they have any moral rights merely in virtue of being human. Or they may reject both the ‘human’ and the ‘rights’ components of the doctrine. So it is time that we turned from the concept to attempts to justify human rights.

Chapter 1

The Contemporary Idea of Human Rights

Human rights, as we know them today, are the rights of the lawyers, not the rights of the philosophers. “Human rights” is not just another label for historic ideas of natural rights. Instead, the term is typically used to describe the specific norms that emerged from a political project initially undertaken after World War I in the minority rights treaties and then continued on a larger scale after World War II. This political project, embodied in the contemporary human rights movement, aspires to formulate and enforce international norms that will prevent governments from doing horrible things to their people and thereby promote international peace and security.

Although today’s conception of human rights was surely influenced by ideas of natural rights, there are substantial differences. First, human rights are specific and numerous, not broad and abstract like “life, liberty, and property.” The Universal Declaration and the subsequent human rights treaties are lists of specific rights that address particular problems such as imprisonment without trial and suppression of political dissent. The Universal Declaration asserts that “All human beings are born free and equal in dignity and rights.” But it is not mainly a declaration of abstract political principles. It declares the specific and numerous rights of lawyers, not the abstract rights of philosophers. Historic bills of rights were the main inspiration.

Second, today’s human rights are not part of a political philosophy with an accompanying epistemology. They may make philosophical assumptions, but they do not require acceptance of a particular philosophy or ideology. Because the human rights movement was an international political movement with aspirations to create international law, it did not place great emphasis on identifying the normative foundations of human rights. Postwar efforts to formulate international human rights norms have gone forward despite obvious and persistent philosophical and ideological divisions. To gather as much support for the movement as possible, the

philosophical underpinnings of human rights were sketched broadly but vaguely in the Universal Declaration by saying that people are “born free and equal in dignity and rights,” and have “equal and inalienable rights.”

A dangerous aspect of Hitler’s rule, clearly demonstrated during World War II, was its lack of concern for people’s lives and liberties. The war against the Axis powers was often defended in terms of preserving human rights and fundamental freedoms. The carnage and destruction of World War II led to a determination to do something to prevent war, to build an international organization to address severe international problems and to impose standards of decency on the world’s governments. The United Nations Organization, created in 1945, has played a key role in the development of the contemporary idea of human rights.

The creators of the UN believed that reducing the likelihood of war required preventing severe and large-scale oppression within countries. Because of this belief, even the earliest conceptions of the UN gave the organization a role in promoting rights and liberties. Some early conceptions of the UN Charter suggested that it contain an international bill of rights to which any member nation would have to subscribe, but the idea did not succeed. Instead, the Charter simply committed the UN to promoting human rights. The Charter expressed “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small” (United Nations 1945: preamble). Its signatories pledged themselves to “take joint and separate action in cooperation with the organization” to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion” (United Nations 1945, article 1.3).

Shortly after the approval of the Charter, a UN committee was charged with writing an international bill of rights. It was to be similar in content to bills of rights already existing in some countries, but applying to all people in all countries. The UN took a familiar genre, a national bill of rights, and adapted it for use at the international level. An international bill of rights emerged in December 1948 as the Universal Declaration of Human Rights. The Universal Declaration was a set of proposed standards, rather than a treaty. It recommended promotion of human rights through “teaching and education” and “measures, national and international, to secure their universal and effective recognition and observance” (United Nations 1948b; for histories of the Universal Declaration see Glendon 2001; Lauren 1998; and Morsink 1999).

The first 21 articles of the Universal Declaration present rights similar to those found in historic bills of rights. These civil and political rights

include rights to equal protection and nondiscrimination, due process in legal proceedings, privacy and personal integrity, and political participation. But articles 22 through 27 make a new departure, incorporating economic and social standards. They declare rights to benefits such as social security, an adequate standard of living, and education.

The Universal Declaration has been amazingly successful in establishing a fixed worldwide meaning for the idea of human rights. Broadly speaking, the list of human rights that it proposed still sets the pattern for the numerous human rights treaties that have gone into operation since 1948. Those treaties include the European Convention on Human Rights (Council of Europe 1950), the International Covenant on Civil and Political Rights (“Civil and Political Covenant,” United Nations 1966a), the International Covenant on Economic, Social and Cultural Rights (“Social Covenant,” United Nations 1966b), the American Convention on Human Rights (Organization of American States 1969), and nearly a dozen others.

Defining Features of Human Rights

Human rights, as conceived in the Universal Declaration and subsequent human rights treaties, have a number of general characteristics. Eight important features are described briefly in this section. A fuller treatment of the defining features of human rights is provided in Chapter 3.

First, lest we miss the obvious, human rights are rights. But the exact import of this status is unclear and will be one of my subjects of inquiry. I will suggest that at a minimum it means that human rights have *rightholders* (the people who have them); *addressees* (parties assigned duties or responsibilities); and *scopes* that focus on a freedom, protection, or benefit. Further, rights are mandatory in the sense that some behaviors of the addressees are required or forbidden.

Second, human rights are universal in the sense that they extend to every person living today. Characteristics such as race, sex, religion, social position, and nationality are irrelevant to whether one has human rights.

Third, human rights are high priority norms. They are not absolute but are strong enough to win most of the time when they compete with other considerations. As such, they must have strong justifications that apply all over the world and support the independence and high priority of human rights. The Universal Declaration states that human rights are rooted in the dignity and worth of human beings and in the requirements of domestic and international peace and security.

Fourth, human rights are not dependent for their existence on recognition or enactment by particular governments. They exist as legal norms at the national and international levels, and as norms of justified or enlightened political morality. In promulgating the Universal Declaration as a “common standard of achievement,” the UN did not purport to describe rights already recognized everywhere. Instead, it attempted to set forth an enlightened international political morality that addresses familiar abuses of contemporary political institutions. Subsequently, however, international treaties were used to make human rights norms part of international law. Their proponents would like to see them embedded in all people’s beliefs and actions and effectively recognized and implemented in law, government, and international organizations.

Fifth, human rights are international standards of evaluation and criticism unrestricted by political boundaries. They provide standards for criticism by “outsiders” such as international organizations, people and groups in other countries, and foreign governments.

Sixth, human rights are primarily political norms rather than interpersonal standards. They are standards of decent governmental conduct and mainly speak to social and political leaders and institutions. Governments are their primary addressees. We must be careful here, however, since rights against racial and gender discrimination, for example, are concerned to regulate behavior that is more often private than governmental (Cook 1994; Okin 1998). Still, governmental action is directed in two ways by rights against discrimination. First, the rights forbid governments to discriminate in their actions and policies. Second, they impose duties on governments to prohibit both private and public forms of discrimination.

Seventh, human rights are numerous and specific rather than few and general. Like other bills of rights, the Universal Declaration is a list of specific rights that addresses severe but familiar problems of governments. Accordingly, the Universal Declaration is not a restatement of Locke’s rights to life, liberty, and property (Locke 1986, originally published 1689), although some abstract values are identified in the preamble. Instead, it is a list of roughly two dozen specific rights (see Table 1.1).

Finally, human rights set minimum standards; they do not attempt to describe an ideal social and political world. They leave most political decisions in the hands of national leaders and electorates. Still, they are demanding standards that impose significant constraints on legislation, policy-making, and official behavior.

Table 1.1 The Universal Declaration’s Rights

Security Rights

- Life, liberty, and security of person (article 3)
- No torture or cruel punishments (article 5)

Due Process Rights

- Right to an effective remedy for violations of rights (article 8) and to a social and international order in which human rights can be enjoyed (article 28)
- No arbitrary arrest, detention, or exile (article 9)
- Right to a trial in criminal cases (article 10)
- Presumption of innocence in criminal cases (article 11)
- No retroactive criminal laws or penalties (article 11)
- No arbitrary deprivation of nationality (article 15)
- No arbitrary deprivation of property (article 17.2)
- Protection of moral and material interests resulting from any scientific, literary, or artistic production of which one is the author (article 27.2)

Basic Liberties

- No slavery or servitude (article 4)
- No arbitrary interference with one’s privacy, family, home, or correspondence (article 12)
- Freedom of movement and residence (article 13)
- Freedom to leave and return to one’s country (article 13)
- Freedom to seek and enjoy in other countries asylum from persecution (article 14)
- No marriage without full and free consent of the intending spouses (article 16.2)
- Freedom to own property individually and collectively (article 17.1)
- Freedom of thought, conscience, and religion (article 18)
- Freedom of opinion and expression (article 19)
- Freedom of peaceful assembly and association (article 20)
- Freedom to form and join trade unions (article 23.4)
- Freedom of parents to choose the kind of education that shall be given to their children (article 26)
- Freedom to participate in cultural life (article 27)

Rights of Political Participation

- Freedom to participate in government, directly or through freely chosen representatives (article 21.1)
- Equal access to public service (article 21.2)
- Opportunities to vote in periodic and genuine elections (article 21.3)

Equality Rights

- Equality of fundamental rights and freedoms (article 2)
- Legal personality (article 6) and equality before the law (article 7)
- Freedom from discrimination (articles 2, 7)
- Equal rights in marriage and family (article 16)
- Equal pay for equal work (article 22)
- Equal social protection for children born out of wedlock (article 25.2)

Economic and Social Rights

- Social security (article 22)
- Just and favorable remuneration for workers (article 23.3)
- Rest and leisure (article 24)
- Adequate standard of living for health and well-being (article 25)
- Health care (article 25)
- Special care during motherhood and childhood (article 25.1)

Old and New Rights

The authors of today's conception of human rights used familiar ideas about freedom, justice, and individual rights. It is not a distortion to view human rights as the recycling and updating of old ideas within a new, transnational context. The notion of a natural or divine law requiring decent treatment of everyone is ancient. It was wedded to the idea of rights by theorists such as Locke and Jefferson as well as in declarations of rights such as the French Declaration of the Rights of Man and the Citizen (1789, in Ishay 1997) and the US Bill of Rights (1783, in Urofsky and Finkelman 2002). The idea of normative protections of people against their governments is far from new.

The contemporary view of human rights, embodied in the Universal Declaration and the subsequent human rights treaties, differs from earlier – particularly eighteenth-century – conceptions in three ways. Human rights today are more egalitarian, less individualistic, and more internationally oriented. The egalitarianism of recent human rights documents is evident, first, in the great emphasis they place on equality before the law and protections against discrimination. Although eighteenth-century rights manifestos sometimes declared equality before the law, the reality in that era was that basic rights were denied to whole classes of people based on their race, nationality, and gender. Legal protections against discrimination are nineteenth- and twentieth-century developments. Victory over chattel slavery in the Americas came in the nineteenth century, but racist attitudes and practices remain a central problem of our time. The demand for equality for women in all areas of life has also become part of the human rights agenda. The Convention on the Elimination of All Forms of Discrimination against Women (United Nations 1979) condemns discrimination against women and advocates equal rights. Article 11, for example, commits the participating countries to taking "all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights."

The egalitarianism of contemporary human rights documents can also be seen in the inclusion of social rights. Earlier lists of political rights were mainly concerned with governments doing things they should not, rather than failing to do things they should. The duties generated by these rights were mainly negative – duties of restraint. Positive duties were found mainly in the duty of governments to protect people's rights against internal and external invasions. Due process rights such as rights to a fair trial, and freedoms from arbitrary arrest, torture, and cruel punishments, were

seen as remedies for abuses of the legal system. These abuses included manipulating the legal system to favor the friends and disadvantage the enemies of those in power, jailing political opponents, and ruling through terror. Rights of privacy and autonomy such as rights to freedom from warrantless invasion of home and correspondence, freedom of movement, free choice of residence and occupation, and freedom of association were seen as remedies for invasions of the private sphere, which included governmental prying into the most intimate areas of life and attempts to control people by limiting where they are able to live, work, and travel.

Rights of political participation such as rights to freedom of expression, to petition government, to vote, and to run for public office were seen as remedies for such abuses as refusing to consider complaints by citizens, suppressing dissent and opposition, crippling the development of an informed electorate, and manipulating the electoral system to stay in power.

Even if governments were restrained from the various abuses just listed, however, social and economic problems such as poverty, disproportionate illiteracy among women and girls, disease, and lack of economic opportunities would be undisturbed. Many contemporary political movements have mainly focused on these social and economic problems. One result has been to broaden the scope of the rights vocabulary to include these problems within the human rights agenda. The vehicle for delivering the services demanded by rights to social security, education, and basic health care is the modern welfare state, a political system that uses its taxation powers to collect the resources required to supply essential welfare services. Contemporary notions of human rights are not only more egalitarian than earlier conceptions in the sense that they extend the guarantee to freedom from discrimination to more classes of people, but also in the sense that they actually provide positive rights serving to mitigate economic and social inequalities.

The second difference between today's concept of human rights and eighteenth-century natural rights is that today's human rights are less individualistic. Recent rights manifestos have tempered the individualism of classical theories of natural rights. They continue to protect individual rights and liberties, but they often conceive of people as members of families and communities, not as isolated individuals (Glendon 2001: 93). And the human rights movement has produced treaties and declarations that forbid genocide and protect the rights of women, minorities, and indigenous peoples.

Thirdly, today's human rights differ from eighteenth-century natural rights in being internationally oriented and promoted. Not only are they prescribed internationally – which is nothing new – but they are also seen

as appropriate objects of international action and concern. Although eighteenth-century natural rights were viewed as rights of all people, they served mainly as criteria for justifying rebellion against existing governments. International organizations with power to investigate, expose, and adjudicate human rights problems were not yet on the horizon. While states remain jealous of their sovereignty and anxious to prevent outsiders from interfering in their affairs, the principle that international inquiries and interventions are justifiable in cases of large-scale violations of human rights is now well established.

The International Protection of Human Rights

This section offers a description of how human rights are promoted and protected by governmental and nongovernmental institutions in 2006. An annually updated version of this section is available in the “human rights” entry in the online Stanford Encyclopedia of Philosophy (<<http://plato.stanford.edu/entries/rights-human/>>).

The agencies involved in the effort to bring about international respect for human rights today include the United Nations, various regional governmental organizations such as the Council of Europe and the Organization of African Unity, nongovernmental organizations, and individual nations acting alone or in concert with others. This section offers brief descriptions of each of these mechanisms for promoting and enforcing human rights as well as some of the most important treaties that have been enacted. Readers with limited interest in international organizations and human rights treaties are invited to skim this section and move on to Chapter 2. Treaties and declarations dealing with the rights of minorities are discussed in Chapter 10.

The United Nations

United Nations human rights treaties

After the approval of the Universal Declaration in 1948, efforts to create international human rights treaties were handicapped by the Cold War but went ahead anyway. The Genocide Convention was approved in 1948, and as of 2003 has more than 130 participating countries (United Nations 1948a). It defines genocide and makes it a crime under international law.

It also calls for action by UN bodies to prevent and suppress acts of genocide and requires states to enact national legislation prohibiting genocide, to try and punish persons or officials who commit genocide, and to allow extradition of persons accused of genocide. The International Criminal Court, which was created by the Rome Treaty of 1998, is authorized to prosecute genocide, along with crimes against humanity and war crimes, at the international level (see Schabas 2001).

The plan to follow the Universal Declaration with analogous treaties also went ahead, but at a glacial pace. Drafts of the International Covenants were submitted to the General Assembly for approval in 1953. To accommodate those who believed that social rights were not genuine human rights or that they were not enforceable in the same way as civil and political rights, two treaties were prepared, the Civil and Political Covenant and the Social Covenant.

Between the Universal Declaration of 1948 and the General Assembly's approval of the two Covenants in 1966, many African and Asian nations, recently freed from colonial rule, entered the United Nations. These countries were generally willing to go along with the human rights enterprise, but they modified it to reflect their own interests and concerns, such as ending colonialism, apartheid in South Africa, and racial discrimination around the world. The two Covenants reflect these concerns. They assert the rights of peoples to self-determination and to control their own natural resources, give rights against discrimination a prominent place, and omit the Universal Declaration's rights to property and to remuneration for property taken by the state.

A country ratifying a UN human rights treaty agrees to respect and implement the rights the treaty covers. It also agrees to accept and respond to international scrutiny and criticism of its record. The Civil and Political Covenant, which has been ratified by 152 countries, illustrates the standard UN system for implementing an international bill of rights. It created an agency, the Human Rights Committee, to promote compliance with its norms. The 18 members of the Committee serve in their personal capacity as experts rather than as state representatives. The Committee can express its views as to whether a particular practice is a human rights violation, but it is not authorized to issue legally binding judgments (Alston and Crawford 2002).

Participating states are required to prepare and present periodic reports on their compliance with the treaty, and the Human Rights Committee has the job of receiving, studying, and commenting critically on these reports (Boerefijn 1999; McGoldrick 1994). While doing so, the Committee holds meetings in which it hears from nongovernmental organizations such as Amnesty International and meets with representatives of

Chapter 2

Human Rights as Rights

Historic documents limiting governmental abuses were often formulated in the language of rights. Examples include the English Bill of Rights (1689, in Ishay 1997), the French Declaration of the Rights of Man and the Citizen (1789, in Ishay 1997), and the US Bill of Rights (1789, in Urofsky and Finkelman 2002). Because of these influential precedents, it is not surprising that the authors of the Universal Declaration chose the concept of rights to express international standards of government conduct. This chapter explains what it means to say that human rights are rights.

Before turning to that, however, a qualification is in order. The political project of creating international standards regulating how governments should treat their citizens and residents does not stand or fall with the concept of rights. That project can be pursued using other normative concepts. Indeed, human rights documents do not use the language of rights exclusively. They often issue prohibitions such as “No one shall be subjected to torture or to inhuman or degrading treatment or punishment” (European Convention, article 3). They sometimes issue requirements such as “Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him” (American Convention on Human Rights, article 7.4). And they occasionally declare general normative principles such as “All human beings are born free and equal in dignity and rights” (Universal Declaration, article 1). These alternative vocabularies offer both normative and philosophical flexibility. The importance of the concept of rights to the human rights movement can be recognized while avoiding a fetishism of rights.

Elements of Rights

One way to analyze a concept is to look at its elements or parts and the relations between them. For example, if we analyze “biological mother”

in this way the elements would include female, parent, and offspring. Because rights often involve complex relationships concerning who has the right and when it can be applied, it is helpful to have a detailed analysis of the parts of a fully specified right.

First, rights have rightholders, parties that possess and exercise the right. For example, I am the holder of the rights conferred by my retirement plan. And the human right to freedom of religion has all persons as its rightholders.

Second, a right is to some freedom, power, immunity, or benefit, which is its scope or object. “Fair trial” roughly identifies the object of the right to a fair trial. This right prescribes that a person charged with a crime must have available a full and genuine opportunity to have a fair trial. It does not require, however, that each accused person actually be given a trial. The accused can waive his or her right to a trial by pleading guilty or accepting a plea bargain. The scope of a right often contains exceptions excluding items that might otherwise be expected to be included. If, for example, the constitutional right to freedom of speech in the United States does not include protection for speeches made from the visitors’ gallery during sessions of Congress, this exception could be specified in, or be a consequence of, a full statement of the right’s scope.

Third, almost all human rights are or include claim-rights, and such rights identify a party or parties (the addressees or dutybearers) who must act to make available the freedom or benefit identified by the right’s scope. (Besides claim-rights there are immunity-rights, power-rights, and privileges (see Hohfeld 1964 and Wenar 2005).) Rights are commonly classified as negative or positive, according to whether the right requires the addressees merely to refrain from doing something or instead to take some positive action they might not otherwise take. Many rights impose on their addressees both negative and positive duties.

Finally, the weight of a right specifies its rank or importance in relation to other norms. Weight pertains to whether a right can be overridden by other considerations in cases of conflict. A *prima facie* right is a nonabsolute right whose weight is not fully specified. Describing a right as *prima facie* does not imply that it is only an apparent right but rather asserts that it a genuine right that can sometimes be outweighed by other considerations.

* Rights range from abstract to specific (or from general to precise) according to how fully their parts are specified. Indeterminacy can occur in any of the elements of a right. There may be lack of clarity about the identity of the rightholders and addressees. The scope of the right, what it offers its holder(s) and requires of its addressee(s), may be

imprecisely defined. And we may lack a clear view of the right's weight in competition with other considerations. One of the confusing things about rights is that they have differing degrees of abstractness. A right under a business contract is likely to be quite specific while constitutional and human rights are usually abstract (and therefore somewhat vague). Abstract rights are just as important as specific rights, so we should not repudiate them simply to achieve some philosophical ideal of precision.

Rights and Goals

Suppose that instead of formulating a bill of rights the human rights movement had formulated high priority goals in areas such as civil liberties, security of the person, due process, and social justice, and had recommended that these goals be pursued by all nations. This vocabulary would have lent itself to formulating a long list of things that it was desirable for governments to do and not do. The resulting "Universal Declaration of High Priority Goals" could have been even more expansive than the Universal Declaration.

A declaration of high priority goals might have had much the same effect, and many of the same problems, as the Universal Declaration. These goals might have served as international standards for governments and led to familiar sorts of disputes about the phrasing, relative priorities, and ambitiousness of the goals. Defenders of these high priority goals might have justified them by appeal to considerations of human welfare, dignity, and equality. Their critics might have charged that high priority goals for such things as civil liberties and due process are Western ideas with few roots in non-Western cultures.

This comparison of goals and rights should help us to recognize some of the distinctive features of rights. I have spoken of high priority goals in order to match an apparent feature of rights, namely, that they are typically very important or high priority considerations. In Ronald Dworkin's phrase, rights are "trumps" (Dworkin 1977). What Dworkin means to suggest with this metaphor is not that rights always prevail over all other considerations but rather that rights – or at least constitutional rights – are strong considerations that generally prevail in competition with other concerns such as national prosperity or administrative convenience. Dworkin proposes "not to call any political aim a right unless it has a certain threshold weight against collective goals; unless, for example, it

cannot be defeated by appeal to any of the routine goals of political administration" (Dworkin 1977). Part of the rhetorical appeal of the concept of a right is that having a right to something usually means having a strong claim that can outweigh competing claims.

The assertion that rights are powerful normative considerations does not imply that their weight is absolute or that exceptions cannot be built into their scope. And the weight of a particular right is relative to other considerations at work in a given context. Some rights involve matters that are not of earthshaking importance (for example, the repayment of a small loan). Such rights are powerful in comparison with other considerations normally at work (for example, in the context of a small loan, the debtor's convenience).

The vocabulary of goals, if it had been chosen for the Universal Declaration, would have yielded more flexible standards of government behavior. Even high priority goals can be pursued in various ways and can be deferred when prospects for progress seem dim or when other opportunities are present. Rights, however, are more definite than goals; they specify who is entitled to receive a certain mode of treatment (the rightholders) and who must act on specific occasions to make that treatment available (the addressees).

Rights are more suitable for enforcement than goals because they have identifiable holders, scopes, and addressees. But a theorist who wished to equate rights with some subset of goals might respond that rights are just those goals that are both high priority and definite in the sense of having specific beneficiaries and addressees.

It is not clear, however, that having these two characteristics will make a goal into a right. Suppose that a family chooses as a high priority goal making available to its only child the resources needed to fund a university education. It is clear that such a high priority goal is a lesser commitment than giving the young person a right to the resources needed to attend university. The mandatory character of a right is still missing. As long as providing the resources is merely a high priority goal, the parents would do no wrong if they decided to use their resources to pursue some other project such as providing for their retirement by taking advantage of a very attractive investment opportunity. But if they had given their child a moral right to the resources for a university education through an explicit promise, such a decision would be morally wrong. The mandatory character of a right provides a basis for complaint that a high priority goal may not.

Rights are distinctive not only in their high priority and definiteness but also in their mandatory character. It is these three features – high

priority, definiteness, and bindingness – that make the rights vocabulary attractive in formulating minimal standards of decent governmental conduct. This character would be lost if we were to deconstruct rights into mere goals or ideals.

To avoid exaggeration here, however, two qualifications need to be stated. First, rights are never perfect guarantees. To return to our example, a young person who has been given a right to university expenses may face not only deliberate noncompliance with that right but also the parents' inability to pay when the time arrives or even a conflicting, higher priority claim on those resources such as expensive medical treatments for a sibling.

The second qualification concerns the fact discussed above that rights vary greatly in degree of specificity, ranging from very specific, such as a right to reside in a particular apartment under a rental contract, to grand constitutional rights such as due process of law. Abstract rights are much less definite in their requirements than specific rights; indeed, very abstract rights may function in a way not too different from high priority goals. Rights do not always imply clearly who must do what, and hence actions to comply with and implement them are subject to considerable discretion. But when abstract rights can be made concrete in particular cases, they differ from priority goals by conferring on the guidance they provide a binding character that high priority goals lack and cannot confer.

Claiming One's Rights

Some theorists have emphasized the usefulness of rights in claiming things as one's due. By facilitating claiming things as one's due, rights provide especially firm support for dignity and self-respect. Joel Feinberg states this as follows:

Even if there are conceivable circumstances in which one would admit rights diffidently, there is no doubt that their characteristic use and that for which they are distinctively well suited, is to be claimed, demanded, affirmed, insisted upon . . . Having rights, of course, makes claiming possible, but it is claiming that gives rights their special moral significance . . . Having rights enables us to "stand up like men," to look others in the eye, and to feel in some fundamental way the equal of anyone. (Feinberg 1973; see also Hart 1955; Gewirth 1981; and Pogge 2002)

Moral and legal guarantees of important freedoms, benefits, and powers do seem to support people's self-respect. And we can readily concede that the identification of rightholders to whom the addressees have duties (or other normative burdens) gives rights a more definite meaning than goals. It is less clear, however, that the activity of claiming is somehow central to the meaning of the rights vocabulary or the maintenance of self-respect.

One problem with this assertion is that the notion of claiming a right is very ambiguous; it can involve (1) insisting that one has a right to something (as when civil rights protesters claimed that they had a right to use segregated public libraries); (2) triggering an already recognized right (as when one invokes or triggers one's right to a fair trial in a criminal case by entering a not guilty plea and demanding a trial); (3) demanding compliance with a recognized right in the face of a threatened violation (as when a member of a minority group insists on nondiscrimination from a realtor who is giving him or her the runaround). The assertion that all rights can be claimed in the first and third senses is not very interesting because any norm can be asserted and compliance with it demanded. The second sense is the more interesting one, but not all rights require triggering to be engaged. A person's right not to be tortured can be engaged even if the person is too weak to invoke it.

Another problem concerns the claimant. Must it be the rightholder? Or can claiming by an interested party other than the rightholder serve as well? This difference is important since a self-effacing society might rely almost entirely on an interested party claiming.

These questions show how imprecise it is to say that the distinctive feature of rights is found in the activity of claiming one's due. A further problem with this thesis is that we can easily imagine the concept of a right functioning in cultures where actions such as demanding, claiming, and protesting are frowned on as discourteous. If we generalize from the close connection between rights and claiming in many Western societies, we risk giving an ethnocentric account of the functions of rights – one which overemphasizes social and legal procedures for bringing about the recognition of rights and which suggests that other cultures cannot have or adopt the concept of rights unless they are or become pushy and litigious.

Finally, it is not necessary to identify some particular speech act – claiming or anything else – as the single act which it is the special role of the rights vocabulary to perform. Most words can be utilized in a great many speech acts. Just as the word "good" can be used to perform many speech acts besides commanding, the statement that someone has a right can be used to perform many speech acts besides claiming a right to something.

Besides claiming rights, we can recognize them, question them, take them into account, disregard them, respect them, and use them as a basis for decision. Since these other activities give the rights vocabulary a functional role, perhaps all we should say about the connection between rights and claiming is that claiming things as someone's due is one of the characteristic things done by rights talk.

Rights and Duties in Morality and Law

Rights are found in various normative systems, such as moralities; the regulations of organizations; and local, state, national, and international legal systems. It is common to classify rights by the kind of normative system in which they are rooted. A positive legal right is one that is recognized and implemented within some legal system. A moral right is one that exists within a morality.

Moral rights can be divided into those that exist in actual moralities and those that exist as constructs in critical or justified moralities. An accepted moral right is one that exists within the actual morality of some group or groups. For example, a group's moral code may give people a right not to have their clothes forcibly removed by other persons. Such a right may exist prior to the group's having a formal legal system, and it may be recognized and enforced by the formal legal system once such a system comes into being. Rights often exist both as accepted moral rights and as positive legal rights.

When a right is part of a group's actual morality, it is used as a standard of argument and as a guide to the evaluation of conduct and social policy. Those who refuse to comply may be scolded, shamed, ostracized, exiled, beaten, or even killed. For some rights such recognition and implementation at the moral and social level may be all that is possible or desirable. Legal or governmental implementation may be impossible (as with, say, a right to revolt against repressive governments), or it may be inappropriate because it would be too costly or because its enforcement would require unacceptable violations of other norms.

Many people believe that their moral rights include not only those accepted within their society but also some unrecognized rights they believe to be justifiable. This belief suggests that some rights exist as justified moral rights. A justified morality may be a philosophical reconstruction of morality, of the sort one finds in Kant and Mill, or it may simply be an actual morality that has had some deficient norms replaced with ones believed to be better.

Legal positivists and skeptics hold that we should take legal rights as our exclusive paradigms of rights and thus treat moral rights as degenerate or spurious. Closely connected issues here are whether it should be definitional that rights are constituted by the duties or other normative burdens of the addressees, and whether legal and moral rights are rights in the same sense of the word.

Three broad positions can be taken in response to these questions, corresponding to three stages in the evolution of a legal right. The first stage is the recognition that it is very important for people to have some good available to them – that people are somehow entitled to that good. The second stage involves identifying moral duties, disabilities, and liabilities of some parties that, if they are complied with, will result in the availability of that good. The third stage involves constructing parallel legal duties, disabilities, and liabilities and providing measures for their enforcement; at this stage a legal right emerges.

Each stage corresponds to a position on when it is appropriate to speak of a right. The first, which I call the entitlement theory, endorses a liberal use of the language of rights and holds that it is proper to speak of rights whenever one can justify on moral or legal grounds the proposition that people are entitled to enjoy specific goods – even if we cannot say who should bear the burden of making these goods available or how these entitlements should be implemented and enforced. A more restrictive view, which I call the entitlement-plus theory, holds that entitlements alone cannot constitute full-fledged rights and must be supplemented by the identification of addressees who have appropriate moral duties, disabilities, or liabilities. These burdens on the addressees are the “plus” added to the entitlement to yield a full-fledged right. The third and narrowest position, which I call the legally implemented entitlement theory, agrees with the previous theory in holding that genuine rights are more than mere entitlements, but it holds that this “something more” must include legal implementation. In this view, it is not proper to speak of rights at the earlier stages; the real thing does not emerge until one has effective legal implementation.

The entitlement theory

Broadly, this theory holds that a right is a very strong moral reason why people should have a certain freedom, power, protection, or benefit. H. J. McCloskey puts forward a theory of this kind; he believes that rights are best “explained positively as entitlements to do, have, enjoy, or have done, and not negatively as something against others . . .” (McCloskey

1976). McCloskey's view implies that a full-fledged right need not specify who bears the burden of making available what the right is to; a right is not to be equated with claims against other parties. Of course, rights do often give rise to duties, but McCloskey wishes to emphasize the logical priority of entitlements to the duties they generate. An entitlement might be a strong set of reasons, rooted in the nature of human beings, for ensuring that a certain good is available to people. Since McCloskey believes that entitlements – and thus rights – can exist even when it is not feasible to implement them, he finds no difficulty in saying that a right to medical care, for example, is a universal human right.

The entitlement theory has the advantage of accounting for the wide range of actual uses of the rights vocabulary. McCloskey emphasizes that people often speak of rights when it is unclear who must bear the burdens of these alleged rights. Thus McCloskey would have no objection on linguistic grounds to reformers who declared a new right even though they were unable to specify who would bear the burdens of this right, what exactly these burdens would be, or whether resources were available to meet such burdens. Such rhetorical uses of the rights vocabulary are very common, but a key issue here is whether we should endorse them.

A second advantage of the entitlement theory is that its notion of rights is readily exportable. Talk of entitlements is tied neither to possibly parochial activities such as claiming things as one's due or seeking remedies for wrongs nor to legal implementation. Thus the vocabulary of rights can easily be put to use in diverse cultures.

Viewing rights as mere entitlements, however, is likely to have inflationary results. A moral right will exist whenever there are strong moral reasons for ensuring the availability of a certain good. Hence there is danger that the list of entitlements will be nearly as long as the list of morally valuable goods. To extend the economic metaphor, this conception has no built-in assurance that the demand side of rights will not outrun the supply side.

The entitlement theory is insufficiently penetrating because it is unable to distinguish between rights and high priority goals. It dilutes the mandatory character of rights by cutting out essential reference to their addressees.

The entitlement-plus theory

These problems can be remedied, it seems, by adding essential reference to specific addressees and burdens to our conception of a full-fledged

right. This is what the entitlement-plus theory does. It holds that a right cannot be constituted by an entitlement alone, that moral or legal norms directing the behavior of the addressees are essential to the existence of moral or legal rights and must be added to an entitlement to constitute a right.

A version of the entitlement-plus theory of rights is put forward by Joel Feinberg, who makes a useful distinction between "claims-to" benefits and "claims-against" parties to supply those benefits (Feinberg 1973). A claim-to is what I call an entitlement, and a claim-against is the "plus" that can be added to an entitlement. Feinberg's position is that a full-fledged claim-right is a union of a valid claim-to and a valid claim-against. He allows, however, that rights in a weaker, "manifesto," sense can be constituted by a claim-to or entitlement alone. Feinberg's approach makes clear that justifying a right requires one to justify not only an entitlement (or claim-to) but also a claim-against, that is, the burdens that the right will impose on at least one other party.

The entitlement-plus theory fits well with the traditional view that claim-rights are simply duties seen from the perspective of one to whom a duty is owed. In this view the difference between A's right against B and B's duty to A is mainly the difference between the active and the passive voice. From B's perspective the normative relation is a duty and from A's perspective it is a right, but the relation is really the same.

The entitlement-plus theory need not require all full-fledged rights to have precisely specified scopes, weights, and addressees. The vocabulary of rights is used in abstract as well as in specific normative discourse, and one cannot expect abstract rights to be fully specified. The description of an abstract right often identifies only key ideas and leaves specific elements to be worked out at the implementation stage. But even when rights are stated abstractly, as they typically are in human rights documents, there must at least be some general idea of what normative burdens are imposed by the right and who the dutybearers are.

The entitlement-plus theory has important advantages over the entitlement theory. First, it is a more accurate and penetrating analysis in recognizing an essential feature of rights, the burdens they impose on their addressees, which the entitlement theory leaves out. Its penetration comes from its ability to distinguish rights from high priority goals and to explain how both moral and legal rights are rights. Because the entitlement-plus theory holds that even justified moral claim-rights must generate norms that place burdens on addressees, it sees similar normative structures in all kinds of claim-rights, which makes it easier to see that they are all rights in the same sense. Second, the entitlement-plus theory

is noninflationary in that it denies that mere entitlements are full-fledged rights.

Still, some will say that the entitlement-plus theory is insufficiently accurate and penetrating because it ignores practices of legal recognition and enforcement and thus fails to emphasize what is practically most important about rights and also fails to mark the very significant difference between legal rights and moral demands. I now turn to this charge, which is central to the third theory of rights.

The legally implemented entitlement theory

It is often claimed that a “right” is mainly a legal notion, that practices of legal enforcement are central to the existence of rights, and that non-legal rights are phony rights. To the nineteenth-century philosopher Jeremy Bentham, the idea of rights not created by positive law was nonsense. Bentham might have been willing to allow that entitlements, in the sense defined above, can exist as conclusions to utilitarian arguments and can serve as grounds for wanting corresponding legal rights. But he held that such entitlements are not rights just as “hunger is not bread” (Waldron 1987).

Bentham held that talk of moral and natural rights is politically dangerous and ultimately unintelligible. An advocate of Bentham’s view might point out that when, for example, the right to leave one’s country is not legally recognized, respected, or enforced, we sometimes say that people in that country do not have the right to leave or that this right does not exist there. But this mode of speaking proves nothing. One may mean by these statements that the right to leave is not a legal or effectively implemented right in that country without at all wanting to deny that it exists as an accepted or justified moral right. Indeed, it is precisely to demand reform in cases like these that we may wish to appeal to independently existing moral or human rights.

Bentham viewed appeals to nonlegal rights as mere rhetorical ploys, and held that without a court of law to determine who has the right and what it means, talk of rights is merely “a sound to dispute about,” allowing argument from undefended premises. But an appeal to rights is no bar to further argument. Underlying assumptions are always open to challenge. Bentham was eager to settle political questions by appeal to what would maximize utility, but there is no system of courts and judges to answer the question of whether a particular policy maximizes utility. Thus, if we accept Bentham’s premise that a normative concept without an adjudication procedure merely gives us a sound to dispute

about, we must conclude that nothing more is given by the principle of utility that he favored. Subtract Bentham’s exaggerated claims about the determinacy of his preferred standard, and it becomes clear that Bentham’s attack on the vocabulary of his opponents undermines his own appeals to utility.

A third argument against nonlegal rights is that recognition and enforcement are such important features of our paradigm that unenforced rights cannot be said to be rights in the same sense as enforced rights. According to this view, only by saying that nonlegal rights are rights in a different or phony sense can we adequately reflect the importance of recognition and enforcement to what rights are all about. But important differences often exist within a single generic category. There are huge differences between small economy cars and giant long-distance trucks, but this does not require us to say that they are vehicles in a different sense of “vehicle.”

Although noninflationary, the equation of all rights with enforced legal rights excludes talk of important moral rights and severely limits the exportability of the concept of rights. Another disadvantage is that restricting full-fledged rights to legal ones gives important argumentative advantages to defenders of existing social, political, and legal arrangements.

Overview

Rights are high priority mandatory norms that typically have rightholders, addressees, scopes, and weight. They focus on the rightholder and thereby emphasize the freedom or benefit to be obtained or enjoyed. Unlike goals, claim-rights impose moral or legal duties on the addressees. Rights can exist in actual and justified moralities and in national and international legal systems. Legal enforcement is generally important to making rights effective, but is not essential to the existence of rights.

Further Reading

- Feinberg, J. 1970. “The Nature and Value of Rights.” *Journal of Value Inquiry* 4: 243–51.

Human Rights as Minimal Standards for Governments

When a widespread human problem is recognized the question arises of whether its remedy should be conceived as a human right. This is not just a political question; it includes the foundational question of whether the problem is serious enough to be a matter of human rights. To answer this question we need to appeal to fundamental values and norms. Discomfort due to hot weather is a widespread human problem, and a right to air conditioning might be proposed as its remedy. But this problem is not serious enough (discomfort does not generally get one into the realm of human rights), and its universal remedy is not feasible enough, to support a universal human right. We can think of the emergence of a human right as the coming together of the recognition of a problem; the belief that the problem is very severe; and optimism about the possibility of addressing it through social and political action at national and international levels. Judgments about the severity of a problem are hard to make because different people are impacted differently by problems and because of the vagueness of the boundary between problems that are severe enough to be matters of human rights and ones that are not. Still, we have strong reasons for limiting international human rights to minimal standards.

Human rights aim at avoiding the terrible rather than achieving the best. Their modality is “must do” rather than “would be good to do.” Henry Shue suggests that human rights specify the “lower limits on tolerable human conduct” rather than “great aspirations and exalted ideals” (Shue 1996). As minimal standards they leave most legal and policy matters open to democratic decision-making at the national and local levels. Minimal standards can accommodate a great deal of cultural and institutional variation. Human rights block common threats to a decent or minimally good life for human beings. There are many such threats, however, and we need several dozen specific rights to address them.

As a political morality of the depths, human rights do not attempt to prescribe a general theory of distributive justice or give an account of optimal democratic institutions. Instead they prescribe equality in areas where inequality would be entirely unacceptable, and demand that countries allow political participation and have regular elections.

There are four strong reasons why international human rights should be minimal standards. First, it is by insisting that human rights address very severe problems that we ensure their high priority and universality. If human rights are created to deal with problems such as smoking and

the unavailability of holidays with pay, this may undermine the claim of human rights to have great importance.

Another reason is to leave ample room for democratic decision-making at the national level. It is appropriate for a country’s citizens and legislators to have the power to shape laws, institutions, and practices to fit popular desires, the country’s cultures and traditions, and physical and economic circumstances. Globalization is already producing excessive uniformity around the world. Human rights should not contribute to such uniformity except in a few important areas where only one way is the acceptable way.

The third reason why human rights should be minimal standards is that this helps make them acceptable to countries who prize their independence and self-determination. The requirements of widespread and ongoing participation by sovereign states in human rights institutions need to be taken seriously (see the discussion of national self-determination in Chapter 6). Limiting the scope of international human rights is such a requirement.

The final reason is that by limiting human rights to minimal standards we make them more likely to be feasible in the vast majority of the world’s countries. Human rights will do little work if they are so expansive that many countries can see them only as distant ideals to be realized some time in the future.

Who Has Human Rights?

A simple answer to this question is “Humans!” – all human beings everywhere and at all times. That human rights apply to all people without distinction has been a major theme of the human rights movement. Nevertheless, reflection on the idea that the holders of human rights are simply all people reveals that this answer is too broad.

First, some rights are held only by adult citizens, not by all persons. The clause of the Civil and Political Covenant dealing with political participation begins not with “Everyone” but with “Every citizen” (article 25). Further, the rights of people who are very young, severely retarded, comatose, or senile are justifiably limited. Although these people have important rights such as life, due process, and freedom from torture, it would be implausible to argue that they have rights to vote, run for political office, or travel freely on their own. These latter rights presuppose a greater degree of rationality and agency than some human beings possess.

Furthermore, some human rights cannot be universal in the strong sense of applying to all humans at all times, because they assert that people are entitled to services tied to relatively recent social and political institutions. Specific human rights are only as timeless as the specific problems they address. Some human rights problems have been with us for millennia, such as violence related to getting or retaining political power. Others have emerged in the last few centuries with the arrival all over the globe of the modern state, with its associated legal, penal, bureaucratic, educational, and economic branches (on the spread of modern political institutions see Morris 1998; see also Donnelly 2003: 92, 117). Human rights deal with security, liberties, fair trials, political participation, equality, basic welfare, and perhaps even the natural environment.

Due process rights, for example, presuppose modern legal systems and the institutional safeguards they can offer. Social and economic rights presuppose modern relations of production and the institutions of the redistributive state. My point here is not merely that people living 10,000 years ago would not have thought to demand these rights but rather that the scope of these rights can be defined only by reference to institutions that did not then exist (on “embracing temporal relativity” see Tasioulas 2002b: 87). Human rights could be formulated in much broader terms to avoid this objection, but the result would be very abstract rights, subject to a variety of interpretations and hence less useful in political criticism and less suitable for legal implementation.

Assigning Responsibilities for Human Rights

Rights have identifiable addressees – people or agencies who have responsibilities related to the realization of the right. This connection between rights and the assignment of responsibilities is a basis for a frequently voiced question: who bears duties in regard to human rights? On hearing, for example, that people have rights to food and education, one may wonder whether individuals have duties to try to provide these things out of their own resources.

The primary addressees of human rights are the world’s governments. Human rights are not ordinary moral norms applying mainly to interpersonal conduct. Rather they are political norms dealing mainly with how people should be treated by their governments and institutions. The political focus of human rights is very clear in the human rights treaties. The European Convention, for example, requires participating govern-

ments to “secure to everyone within their jurisdiction the rights and freedoms defined [in] this convention” (article 1). It also requires that “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity” (article 13). This requirement presupposes that governments are often both addressees and violators. The struggle to gain respect for a human right must often attempt to get the government both to restrain its own agencies and officials and to use its legal powers to restrain others.

If Almeida is a citizen or permanent resident of Brazil, the government of Brazil has the heaviest duties to respect and uphold Almeida’s human rights. Brazil has duties not just to refrain from violating Almeida’s human rights; it also has duties to uphold them through actions such as implementing them legislatively, protecting them with police work, providing legal remedies in the courts, and providing services such as food assistance. But we should not conclude from this that all of Almeida’s rights are against the government of Brazil, or that all of the human rights duties of the Brazilian government are duties to its citizens.

Some of Almeida’s human rights are against people and governments in other countries who at least have duties not to kill or imprison him without trial. When Almeida is standing peacefully on the Brazilian side of the Brazil/Bolivia border, a Bolivian police officer standing nearby on the other side of the border has the same human rights duty not to shoot Almeida as he has not to shoot a peaceable Bolivian citizen as she walks along the Bolivian side of the border.

Further, people and governments in other countries, along with international organizations, may have back-up responsibilities for Almeida’s human rights when the government of Brazil is unwilling or unable to respect or uphold them. The United Nations and the World Bank, for example, may have duties to monitor human rights conditions in Brazil and to promote compliance with human rights. International corporations operating there may also have responsibilities (Weissbrodt 2005).

Because of the failures of many states to respect and uphold the rights of their residents, it is tempting to assign these tasks to international organizations such as the United Nations or to hope that a world federation or government will soon emerge to assume them. International organizations, however, have limited authority and power to enforce rights around the world. And a world federation or government currently seems at best a distant possibility. At present no alternative exists to assigning sovereign states the main responsibility for upholding the rights of their residents. This is a hard saying since many governments are corrupt and

weak, and reform and development have proven hard to bring about through outside pressure and assistance.

Saying that the primary addressees of human rights are governments is not the end of the story, however. Individuals also have responsibilities generated by human rights. This view is suggested by the Universal Declaration. Its preamble suggests that human rights have implications for the conduct of individuals when it says that “every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures national and international to secure their universal and effective recognition and observance.” Clearly, the authors of the Universal Declaration believed that both states and individuals have obligations in regard to human rights. A rationale for this view is that if the justifying reasons for human rights are substantial enough to override domestic law and justify risks of international conflict, those grounding reasons are also likely to generate obligations for individuals in matters subject to their control.

Further, people participate as individuals in human rights abuses such as racial discrimination, slavery, domestic violence, and political killings (Cook 1994). When article 4 of the Universal Declaration asserts, “No one shall be held in slavery or servitude, slavery and the slave trade shall be prohibited in all their forms,” the main violators of this right are not governments. Slaveholders have generally been individuals, although governments have often supported and institutionalized slavery. The right to freedom from slavery obligates individuals and governments not to hold slaves and further requires governments to pass legislation making slavery illegal. When article 11 of the Convention on the Elimination of All Forms of Discrimination against Women (United Nations 1979) commits ratifying countries to “take all appropriate measures to eliminate discrimination against women in the field of employment,” it is clear that this requires governments to pass legislation prohibiting discrimination by private businesses, firms, and corporations.

One approach to explaining how and why citizens share in the duties generated by human rights views the citizens of a country as having ultimate responsibility for the human rights duties of their government. If their government has a duty to respect or implement the right to a fair trial, or a duty to aid poor countries, its citizens share in that duty. They are required as voters, political agents, and taxpayers to try to promote and support their government’s compliance with its human rights duties. This principle of shared responsibility is particularly attractive in democratic societies where the citizens are the ultimate source of political authority. This view makes individuals back-up addressees for the duties of their

governments. Thomas Pogge has taken a related but slightly different approach to generating individual duties from human rights that have governments as their primary addressees (Pogge 2002: 67). Pogge emphasizes Universal Declaration article 28 which says that “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.” Pogge sees in this article a plausible norm, namely that both countries and individuals have duties not to be complicit in an international order that unfairly disadvantages poor countries and the people in them.

The complex view of the addressees of human rights sketched above can be illustrated using the right against torture (Nickel 1993a). Duties to refrain from engaging in torture can feasibly be borne and fulfilled by all persons and agencies, so this duty can be addressed to all. An adequate response to people’s entitlement not to be tortured also requires finding individuals or institutions that can protect people against torture. The right to protection against torture can be universal without all of the corresponding duties being against everyone, or against some single worldwide agency. What is required is that there be for every rightholder at least one agency with duties to protect that person from torture. This agency will typically be the government of one’s country of citizenship or residence. The duty not to torture falls on everyone; the duty to protect against torture falls primarily on governments.

There may also be secondary addressees who bear back-up or monitoring responsibilities connected with the right against torture. The people of a country are secondary addressees with respect to fundamental rights. They bear the responsibility of creating and maintaining a social and political order that respects and protects the right to freedom from torture. International institutions are also secondary addressees. They bear the responsibility of assisting, encouraging, and pressuring governments to refrain from torture and to provide effective protections against torture. If national or international institutions are unable to fulfill this responsibility there is the possibility of reforming them or creating new ones (Shue 1996: 166).

Scope, Weight, and Trade-Offs

Human rights are both mandatory and high priority. As mandatory norms, they are not mere goals. Meeting their demands is obligatory, not merely a good thing. As high priority norms, they generally prevail in competition with other considerations – including advancing utility,

prosperity, national security, and good relations with other countries. To have high priority they must be supported by strong moral and practical reasons.

It is not plausible, however, to suggest that all human rights are absolute, that they can never be suspended or sacrificed for other goods. As James Griffin says, “The best account of human rights will make them resistant to trade-offs, but not too resistant” (Griffin 2001: 314). At least some civil and political rights can be restricted by public and private property rights, by restraining orders related to domestic violence, and by legal punishments. Further, after a disaster such as a hurricane or earthquake, freedom of movement in the area is often appropriately suspended to keep out the curious, to permit free movement of emergency vehicles and equipment, and to prevent looting. The Civil and Political Covenant permits rights to be suspended during times “of public emergency which threatens the life of the nation” (article 4). Yet it excludes some rights from suspension including the right to life, the prohibition of torture, the prohibition of slavery, the prohibition of ex post facto criminal laws, and freedom of thought and religion.

Human rights and their exercise are generally subject to regulation by law. For example, rights to freedom of speech, religious practice, assembly, movement, and political participation require substantial qualification and regulation so that they harmonize with each other and with other important considerations. A system of human rights must adjust the scopes and weights of its rights so that they can coexist with each other and form a coherent system (Rawls 1971, 1993). The right to privacy, for example, must be adjusted to coexist with the right to a fair trial. And the right to security against crimes has to be accommodated to rights to due process of law.

The scope of a right is the benefit, freedom, power, or immunity that it confers upon its holders. For example, specifying the scope of the right to freedom of religion involves describing a set of freedoms in the area of religious belief and practice that the holders of the right enjoy. Weight concerns the ranking or priority of a right when it conflicts with other considerations. To be exceptionless is a matter of scope, and to be absolute is a matter of weight. Nevertheless, it is often difficult to know whether the failure of a right to outweigh competing considerations and to dictate the result that should be followed, all things considered, in a particular case is best described as an instance of its containing an implicit qualification (scope) or as an instance of its being overridden (weight).

Suppose that Kim wants to exercise her right of free speech by marching into the courtroom in which Lee is on trial and telling the jury some fact that is barred from them by the rules of evidence (for example, about

Lee's criminal record). Here Kim's right to speak would conflict with Lee's right to a fair trial. Suppose further that we agree that Kim should not be allowed to speak to the jury and that the relevant rights do not, all things considered, require that she be allowed to do this. There are two possible ways of describing the failure of Kim's right to freedom of speech to prevail here. One approach says that the right to free speech, properly understood, does not include within its boundaries a right to enter a courtroom and tell the jury things about the defendant they are precluded from knowing. Here the matter is treated as one of scope. The other description says that Kim's right of free speech applied in this situation would normally have required that she be allowed to speak, but it was outweighed in this unusual case by Lee's right to a fair trial, which is of higher priority. Here the matter is treated as one of weight.

In this instance it is probably best to see the matter as one of scope. One might hope that all conflicts between norms could be dealt with as they arose by redrawing boundaries and inserting exceptions. Boundaries would eventually be adjusted to minimize or eliminate conflicts, and the relative priority of different norms would be reflected in the expansion or retraction of their boundaries when they covered contiguous areas.

All the same, at least three barriers stand in the way of this program. One is that we cannot anticipate all conflicts between rights and with other norms, and we are often uncertain about what we should do in the cases we can imagine. A second barrier is that a right containing sufficient qualifications and exceptions to avoid all possible conflicts would probably be too complex to be generally understood. Third, relieving a conflict by building in an exception will sometimes incorrectly imply that the overridden right did not really apply and that we need feel no regret about our treatment of the person whose right was overridden. The most awful moral dilemmas are conflicts not at the edges of rights or duties but at their very centers. Adding exceptions to cover such cases may lead us to see what is happening as nontragic, rather than as calling for regret, apology, and – if possible – compensation. Retaining the vocabulary of weight and overriding may help us to remember that not all moral dilemmas can be anticipated or resolved in advance and that in hard cases even our best efforts may result in serious harm or unfairness (Ignatieff 2004).

When we describe human rights as *prima facie* rights because we cannot provide in advance adequate accounts of how to deal with conflicts between human rights and other important considerations, we render irrelevant the sorts of objections that could be made if we claimed that human rights are absolute or near absolute. *Prima facie* rights are far easier to defend, but their implications for practice are often unclear. If no substantial competing values are present, a *prima facie* right will tell us what

to do. But when substantial competing considerations are present, as they often are, *prima facie* rights are silent. The danger is that *prima facie* rights will provide no guidance in the cases where guidance is needed most.

Two responses can be made to this objection. First, there is no reason why the scopes of *prima facie* rights cannot be defined in considerable detail or principles for ranking them in relation to competing considerations worked out. Classifying a right as *prima facie* implies not that this sort of work cannot be done, but that we recognize that the work will always remain partially unfinished. Second, appeals to human rights should be seen as part of moral and political argument, not as the whole of it. The presence of claims about human rights does not mean that less specialized forms of moral and political argument cannot be invoked.

Are Human Rights Inalienable?

We say that human rights are universal to avoid leaving the oppressed noncitizen, minority group member, or social outcast without rights to stand on. We claim that human rights are inalienable so that oppressive governments cannot say their subjects have forfeited or voluntarily given up their rights. Further, the idea that human rights are inalienable fits nicely with the idea that governments are not the ultimate source of human rights. What governments do not give they also cannot take away.

Inalienability means that a right cannot be permanently forfeited or given up entirely. The inalienability of a right implies that the rightholder's attempts to repudiate that right permanently, or attempts by others to take that right away, will be without normative effect. If people and government agencies lack the moral power to eliminate permanently a right of their own or others, that disability makes the right inalienable. And since the right cannot be eliminated, those who act as if it had been eliminated will violate it.

One problem with the claim that human rights are inalienable is that some of the rights in the Universal Declaration are forfeitable in many legal systems upon conviction of serious crimes. Most systems of criminal punishment use incarceration as a penalty, and thereby suppose that criminals forfeit at least temporarily their right to liberty. In spite of such examples, advocates of human rights often worry that the idea of forfeiture, if admitted, could consume too many rights. Admitting the possibility of forfeiture seems to invite oppressors to say that unpopular groups have forfeited their rights to life, liberty, or decent treatment. Nevertheless, this possibility is not sufficient to show that all human rights are

immune to forfeiture. Most normative concepts are susceptible to rhetorical abuse.

The claim that human rights cannot voluntarily be repudiated wholesale is also problematic. Some eighteenth-century rights theorists asserted the inalienability of natural rights because they wanted to counter the Hobbesian claim that people had agreed to give up all their rights when they left the state of nature and entered civil society (Hobbes 1981). And perhaps we can agree that some minimal rights to security and liberty are inalienable and hence that individuals lack the power to permanently waive those rights.

I doubt, however, that we can plausibly say that every human right is immune to repudiation. People choose to give up many basic liberties when they voluntarily enter monasteries or military service, yet we would not forbid these actions. Likewise, people may accept permanent limits on what they can say and publish about certain topics in order to receive a security clearance for government intelligence work. As a general conclusion about the inalienability of specific human rights I suggest that they are hard to lose but that few are strictly inalienable (for a stronger view of inalienability see Donnelly 2003: 10).

The Existence of Human Rights

Human rights are often held to exist independently of acceptance or enactment as law. The attraction of this position is that it permits critics of repressive regimes to appeal to human rights whether or not those regimes accept human rights or recognize them in their legal systems. Yet the contention that human rights exist independently of acceptance or enactment has always provoked skepticism. If human rights were mere wishes or aspirations, we could say that they exist in people's minds. In order to be norms that are binding on all people, however, human rights must be far more than wishes or aspirations.

It is possible to sidestep skeptical doubts about the independent existence of human rights by pointing to their place in international law. For example, the right to leave a country is found in article 12 of the Civil and Political Covenant, a treaty that is now part of international law. Under this treaty a person who wishes to leave her country (and who is not fleeing debts or criminal prosecution) has in this right a strong justification, and her government has a corresponding obligation to allow her to go. As this example suggests, human rights can exist as legal rights within international law.

When human rights are implemented in international law, we continue to speak of them as human rights; but when they are implemented in domestic law we tend to describe them as civil or constitutional rights. It is possible, however, for a right to be instantiated within more than one normative system at the same time. For example, a right to freedom from torture could be a right within a justified morality, a right within the domestic legal system, and a right within international law. This kind of congruence is an ideal of the human rights movement, which seeks broad conformity between various levels of law, existing moral codes, and the standards of enlightened moralities.

Because human rights are now enacted within many national and international legal systems, the worries of legal positivists about unenforced moral rights are no longer fatal to taking human rights seriously. As Louis Henkin observes, “Political forces have mooted the principal philosophical objections, bridging the chasm between natural and positive law by converting natural human rights into positive legal rights” (Henkin 1978: 19). This view is much more plausible today than when Henkin wrote it because nearly all countries have by now committed themselves to human rights treaties and because mechanisms for protecting human rights at the international level have become more powerful and better accepted.

Still, it would be better for the general applicability and stability of human rights if their availability as standards of criticism were not dependent on enactment or acceptance. Many have followed this line of thought, and thus human rights are commonly characterized as *moral rights*. A right is a moral right if it exists as a norm within an actual or justified morality.

Accepted moral rights are rights that are recognized and mostly respected in actual human moralities today. These rights can exist before a formal legal system is established and may later become legal rights. Perhaps most actual moralities confer some rights on individuals, but it is not clear that accepted norms are adequate to support rights of international applicability. If human rights are to be generated by the various accepted moralities that exist around the world, these moralities must share a commitment to principles of the sort found in the Universal Declaration. It is not clear that enough moral agreement exists worldwide to support anything like the full range of rights declared in contemporary manifestos (but see Chapter 11 below), and ordinary interpersonal moralities usually have little to say about matters such as fair trials and equality before the law.

A human rights advocate who asserts that human rights are binding on governments independently of acceptance and international law will probably construe human rights as existing within *justified moralities* rather

than within all accepted moralities. A justified morality is one that is well supported by appropriate reasons. John Stuart Mill, a nineteenth-century advocate of what we now call human rights, would have allowed that there is little agreement worldwide in accepted moralities about basic rights (Mill 2002b). But he would have claimed nonetheless that human rights exist within justified moralities – which in his view would all give a prominent place to the principle of utility.

Viewing justified moralities as the ultimate home of human rights requires strong epistemological and metaphysical and moral commitments. It requires believing that moral and political reasons of worldwide applicability exist and that most humans have the epistemological capacities required to recognize and apply them. It requires believing that the grounds of human rights are in some sense objective. I find these propositions believable, and think that plausible metaethical grounds can be found for them. But I do not attempt a defense of them here. I should say, however, that viewing the human moral capacity as competent, in principle, to permit the recognition of universal human rights does not warrant moral arrogance. Human moral capacities, like other cognitive and emotional capacities, are extremely fallible. Further, shared moral capacities need not yield uniform principles if circumstances in different societies are substantially different. The universality of norms must be defended by showing that problems and circumstances in different cultures are sufficiently similar as to permit broad underlying principles to yield similar specific principles.

The analysis of rights offered in Chapter 2 held that a full-fledged right is an entitlement-plus, which implies that for a justified moral right to exist, two things must obtain. First, there must be a justifiable entitlement to a freedom or benefit. Second, it must be possible to justify the duties or other burdens that require making this freedom or benefit available to all. A justified moral right, in this view, is an entitlement with holders, scope, weight, and addressees that is supported by strong moral reasons. At the level of theory, the identification of these elements may be fairly abstract, with many details left unspecified. Nonetheless, at least a vague conception of the content of these elements must be present for one to have a full-fledged right.

A justified morality does not need to be accepted or practiced by anyone, nor does it necessarily have a social or institutional dimension. Thus the question arises: are the principles and rights that constitute such a justified morality sufficiently robust and determinate to be binding in actual situations here and now? What the knowledge of human rights comes to in this view is – at a minimum – knowledge of strong reasons for adopting and following a certain set of norms. The Universal

Declaration can accordingly be seen as an international attempt to specify the content of such a justified morality in the area of relations between people and their governments.

Legal positivists doubt that the principles of justified moralities are sufficiently knowable to be worth talking about or whether it is worthwhile, in our contemporary Babel with its many competing voices and views, to talk about principles everyone would be justified in adopting. They prefer the cold steel of legally implemented rights to the hot air of justified human rights. One who sees human rights as existing most fundamentally as justified moral rights may have the same preference but believe that, in those areas where we lack international agreement on norms that can be implemented everywhere through domestic and international law, we should continue discussing, and trying to identify, define, and promote justifiable norms. Human rights declarations and treaties are usefully seen as an attempt to formulate some fixed points in this discussion, to identify some rights that are widely accepted and strongly supported by good reasons. The belief that it is possible to formulate such a list rests on the belief that human beings have a substantial capacity for moral understanding and progress, but the need for such a list presupposes that the unaided consciences of government officials will not reliably provide fully adequate beliefs about how people ought to behave and how society ought to be organized.

How Human Rights Guide Behavior

Some of the ways in which human rights can guide behavior are obvious; in other areas the guidance they provide is complicated or problematic. In the obvious cases, full-fledged rights direct the behavior of their addressees through negative and positive duties. For example, a right to freedom from torture guides behavior by defining torture (see Levinson 2004), forbidding everyone to engage in it, and imposing a duty on governments to protect people against it. Still, the prohibition of torture is likely to be vague, and adjudication may be needed to refine its meaning.

Many issues about dealing with torture are not directly covered by a right against torture. Formulations of the right against torture are likely to provide little guidance about (1) what actual and potential victims of torture may do to defend themselves; (2) how ordinary citizens should relate to those they suspect of being engaged in torture (for example, do

they have a duty to try to interrupt torture sessions, or a duty not to sell groceries to torturers?); (3) how citizens and officials should respond when the right to be free from torture is not legally recognized; and (4) how people and governments from other countries should respond to known cases of torture. Determinate answers to these questions cannot usually be found by appeal to human rights alone. Other moral and political principles must play an ongoing role. It is often necessary to look back to the abstract moral principles that underlie specific human rights, sideways to moral considerations other than rights, and forward to likely consequences. A list of human rights is only a partial guide to, and not a substitute for, moral and political deliberation.

Guidance from rights that are not accepted or implemented

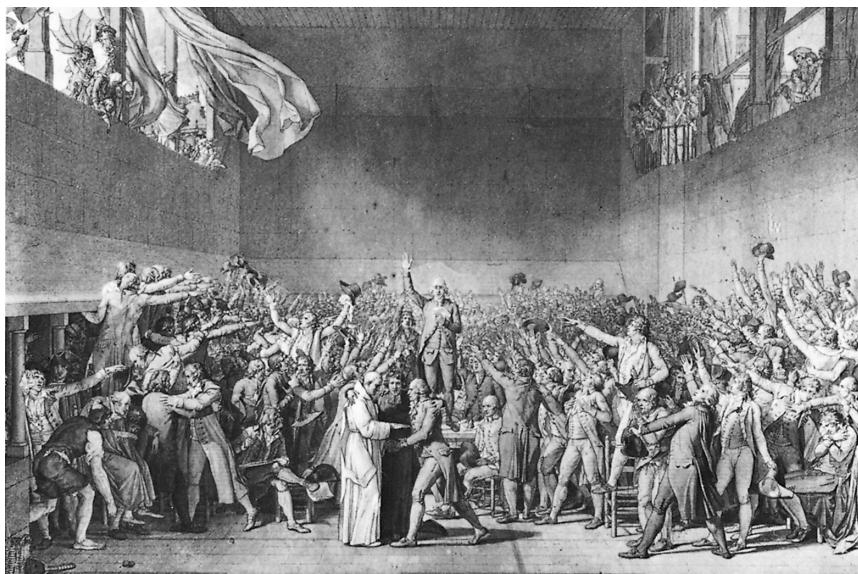
Even when a human right is not generally recognized or legally implemented in a country, it can guide the behavior of those who believe it is morally justified. Suppose that Fariz is an adherent of the Baha'i faith – which is unpopular in some countries – and that she sincerely believes in the right to freedom of religion for herself and others. The validity of this norm is confirmed, she thinks, by its international recognition in the Universal Declaration and human rights treaties. As a holder of this justified moral right, Fariz has the moral liberty to hold Baha'i beliefs, to engage in Baha'i religious practices, and to instruct her children in the Baha'i faith. It is clear that Fariz's recognition of these norms – whether or not they are socially or legally recognized – can guide her behavior. This right can also guide the behavior of its addressees. As one of these addressees, Fariz will have a moral duty not to interfere with the religious beliefs and practices of others. Fariz would do wrong to disrupt a religious meeting by Jehovah's Witnesses, and if she were a public official, she would do wrong to sponsor legislation to outlaw the Jehovah's Witnesses from proselytizing or to force the children of its members to undergo instruction in the Baha'i faith.

Rights can guide behavior not only by directing it with duties and other normative elements (the stronger and more usual case) but also by providing reasons or justification for it (the weaker case). For example, a violation of one's right to freedom of religion, or the likelihood of such a violation, may provide a reason or justification for such actions as refusing to obey a law, engaging in public protest, or seeking to emigrate. Not all the guidance obtainable from a human right is found in its scope.

Chapter Two

Human Rights and the Enlightenment

THE DEVELOPMENT OF A LIBERAL
AND SECULAR PERSPECTIVE ON HUMAN RIGHTS



The Oath of the Tennis Court by Jacques-Louis David, 1791. Courtesy of the Musée National du Château de Versailles at Versailles.

IF A CIVILIZED NATION “lacks in its eyes and in the eyes of others, a universal and universally valid embodiment in laws,” observed the German philosopher Friedrich Hegel (1770–1831), “it fails to secure recognition from others.”¹ India, China, Roman Christendom, and the Arab Islamic world met these standards and were recognized as the great civilizations of the fifteenth and sixteenth centuries. In addition to its economic achievements, each showed the capacity for transcending the horizon of local and parochial thinking, and each exhibited a set of encompassing moral criteria that commanded the respect of others. The next three centuries, however, were to witness a revolutionary change in human thought as for the first time a secular and relatively more egalitarian approach to universal morality emerged in Europe and spread throughout the world under the revolutionary banner of the Enlightenment.

The birth of secular universalism took the form of an assault on the intellectual and political edifice of Roman Catholicism. That structure, seemingly impregnable during the Middle Ages, now collapsed under the blows struck by the Renaissance and the Protestant Reformation, opening up room for the emergence of humanist thought. Christian ethics thus shifted from a docile dependence on revealed knowledge toward an embrace of religious freedom and freedom of opinion in general. Simultaneously, feudal authoritarianism grounded on divine inspiration yielded to the modern concept of the nation-state, justified by its protection of natural and individual rights. The monopolistic feudal economy gave way to mercantilism and later to free markets based on the individual’s right to private property. Finally, a religious tradition that had often sanctioned merciless and arbitrary killings was now confronted with laws premised on the individual’s right to life, and with an insistence that even warfare must conform to universal standards of justice.

With these transformations, a secularized version of Judeo-Christian ethics lent itself to the development of a broad liberal discourse on human rights, a discourse that has shaped contemporary thinking. This chapter will illustrate why current human rights debates can be best un-



derstood as an extension of Enlightenment arguments that date back to the seventeenth and eighteenth centuries. Now as then, we find ourselves wondering whether the state is the best mechanism with which to defend basic rights, or a formidable Leviathan against which one's rights need to be defended. As in the eighteenth century, we are still questioning whether free markets are the best way to promote democratic institutions and global peace, and under which conditions one may justly wage war. This chapter also alerts the reader to the sufferings of those who remained excluded from initial Enlightenment conceptions of (purportedly) universal rights. As subsequent chapters will show, the victims of one era can become either the avenging aggressors or the human rights crusaders of the next age.

Because our modern conceptions of human rights originated in Europe and America, the story of their inception is embedded in the political, economic, and technological changes associated with the rise of the West and the relative decline of rival civilizations. Thus, before turning to the Western origins of particular rights, this chapter begins with a brief overview of the changes that contributed to the rise of the West over other civilizations. Chief among those changes were the development of modern science, the rise of mercantilism (which led to the consolidation of the nation-state), the great voyages of discovery that would bring the world's wealth within Europe's grasp, and the emergence of a middle class as a powerful source of revolutionary change. These developments laid the foundations for four great historical events in the Western world: the Reformation and the English, American, and French Revolutions. Much of this chapter will look at how each of these events animated key dimensions of the emerging liberal vision of human rights. That vision today reigns triumphant, though not uncontested, throughout the West, and has passionate, often embattled adherents throughout the rest of the world.

The liberal worldview first emerged out of the struggle for freedom of religion and opinion that began with the Reformation, laying the groundwork for subsequent claims for a universal right to life (including calls for the abolition of torture and the death penalty) and the right to property—along with counterclaims on behalf of an equitable distribution of wealth. As each of these components of the liberal tradition emerged, adherents began the political struggle—still under way—to develop effective means to promote the rights they championed. The final section of this chapter addresses the inconsistencies and limitations that beset early liberal thought (including the exclusion of women, the prop-

ertyless, blacks, colonized peoples, homosexuals, Jews, and other nationalities), inconsistencies that helped provoke the development of the nineteenth-century challenge to the liberal human rights agenda. Let us first consider how the West emerged as the leading power, outpacing other civilizations, notably in India, China, and the Islamic world, and attaining the capacity to dominate the world and, consequently, to shape an increasingly global debate over human rights.

FROM ANCIENT CIVILIZATIONS TO THE RISE OF THE WEST

India, China, and Islamic Civilizations

At the close of the fifteenth century, as Vasco da Gama's expedition found its way around the Cape of Good Hope to Indian waters, it was far from apparent that the West was on the verge of ascendancy to global predominance. Indeed, three rivals, India, China, and the Islamic world, could not only claim to match or exceed Western accomplishments, but could not then be ruled out as formidable contenders for global power. India, under Muslim Moghul rule, had reached a level of civilization marked by respect for learning and growing religious tolerance whose achievements in architecture and painting surpassed those of medieval Europe. Under the leadership of Akabar (1542–1605), religious minorities were granted legal status. The "Great Moghul" not only condemned Indian practices such as the immolation of widows and enslavement, his tolerance for all religions was exemplary. For half a century, his successors continued his efforts to wed Hindu and Muslim cultures. The mingling of these traditions found sublime expressions in naturalist painting, refined ceramics, textiles, and monumental architecture.² An empire built on a regularized tax system supported all these cultural endeavors and also provided the central treasury with funds for rulers to secure the loyalty of military and bureaucratic officers.

Chinese civilization was at least equally impressive, not least in inventiveness, as its production of paper, printing (around 700), gunpowder, the mariner's compass, the sternpost rudder, and the wheelbarrow all predated their appearance in Europe. China's silks, ceramics, jades, and bronze castings (accomplished fifteen hundred years before Europeans mastered that metal) found a market in far-flung parts of Asia and Europe. Moreover, the Chinese, under the influence of Confucianism, possessed an advanced ethical and political system presided over by a scholarly bureaucracy, which not only maintained great administrative

continuity but made possible the centralized management of a vast state. If rebellions took place, provinces broke away, or rulers changed, the politico-religious system persisted. It was later emulated in Korea and Vietnam. Experimentation with newly available crops made possible the rapid growth of the Chinese population, which had reached perhaps 160 million by 1600.³ Despite many famines, the food situation in China was typically better than that in Europe in the previous millennium.⁴

The Arab-Islamic Mediterranean and the Middle East region also enjoyed a brilliant civilization that predated the emergence of Italian commercial cities.⁵ As Islam spread, Arabia, Persia, and the Ottoman Empire surfaced as major centers of religious, intellectual, cultural, artistic, and architectural influence whose reach extended to North Africa, China, and northern and Southeast Asia, threatening Europe as a result of its penetration of southern Spain. The Abbasid civilization (750–1258), second of the two great dynasties of the Muslim empire, had already marked its greatness by undertaking the translation of the Greek classics into Arabic, and the works of Plato, Aristotle, Euclid, and Galen were integrated into a flourishing Arab culture.⁶ Subsequent translations of Arabic works in the late European Middle Ages testify to the great reputation that Arab thinkers such as Al-Kindi enjoyed in Europe. Persian contributions to medical studies penetrated the Arab world and became the standard texts for Western training. In contrast to China, trade and maritime expeditions were more central to the Islamic world. The prominence of Muslim trade in the early Middle Ages was prompted by flexible commercial instruments and practices adopted as early as the eighth century and picked up only centuries later in Europe.⁷ Cultural and commercial traffic with the European world was almost one-way, attesting to the superior quality of Arab civilization.⁸

Given the strength of Indian, Chinese, and Islamic civilizations relative to the West, one may wonder why none of them successfully propagated a universal ethics of rights. Inevitably, the unexpected speed of the West's ascendancy drew the interest and speculation of many historians. Writings on this question have been controversial, as various scholars emphasize different economic, cultural, and institutional variables. Some stress the uniqueness of Western capitalism and scientific development, while others counter that a similar form of capitalism existed in Islam, or that science flourished in China before the modern West.⁹ At times, such disagreements have fueled heated academic debates between “Eurocentric” defenders and “anti-Eurocentric” critics. While the fundamental sources of strength and weaknesses of civilizations will re-

main contentious, we can nevertheless point to particular reasons for the relative decline of India, China, and the Islamic cultures, and corresponding factors that help account for the rise of Europe, as well as for the influence of its human rights legacy.

Indian agriculture, based on the caste system, was less productive than that of other areas of Asia, and small manufacturing (mainly handicraft production) in towns was organized around hereditary guilds.¹⁰ Not only did heavy taxation leave the peasantry destitute, but the cost of trading also hindered the prospects for artisans who might have wished to become merchants. These obstacles, coupled with Hindu reliance on the caste system, may have frozen occupational mobility to a larger extent than it did in feudal Europe. Moreover, despite the partial unity achieved during the Moghul Empire, limited communications and inadequate military technology made it difficult for rulers to retain loyalty in various critical areas.¹¹ This fragmentation of loyalty, reminiscent of that in late medieval Europe, was exacerbated by the religious intolerance and relentless wars of the last Moghul leader, Aurungzebe, whose regime was countered by many popular revolts that ultimately led to the decline of the Moghul Empire.¹² That decline coincided with the emergence of European predominance. European traders had acquired only a few coastal stations in India since the Portuguese appropriation of Goa in 1510, but opportunities for trade increased after the decline of the Moghul Empire. Despite rivalries and unlike earlier conquerors, Europeans would stay in India for centuries and would extract substantial economic gains.

Despite the strength of Chinese civilization, the Ming dynasty gradually shifted its energy inward, focusing on agrarianism and away from technology, industry, and its earlier naval exploration of Asia and the Indian Ocean, leaving Europeans freer to secure their dominance over the seas and expand their colonial control over the globe.¹³ China's power, its centralized unity, and its isolationism might have ultimately worked against the expansion of its civilization and possibly against the spread of a Confucian sense of universal justice. It was precisely the European states' fragmentation and competition, Jared Diamond argues, that enabled the Genovese Christopher Columbus to bargain with several monarchs and finally earn the financial support of the Spanish king for his naval expedition. By contrast, in unified China, there was no alternative site with which to challenge the shortsighted decision to forgo maritime exploration. European scientific discoveries, Diamond speculates, might also have benefited from that disunity.¹⁴

In comparison, Maxime Rodinson has maintained that there seemed

to be nothing inherent in Islamic civilizations that would have precluded further economic development,¹⁵ unless we consider the fact that the lands the Muslim Mediterranean world acquired were not as rich as the regions colonized by the Europeans in the Americas. Islamic overseas trade emphasized luxury goods and did not compensate for the general shortage in important sectors such as agriculture.¹⁶ Another potential source of economic weakness was that the population of the Islamic Near East comprised only 28 million people, which was relatively low compared to that of China, India, and Europe in the 1600s.¹⁷ Behind the Ottoman frontiers, a multiracial policy was organized to integrate different religions into the growing empire. Yet the expansion of the empire engendered heavy military expenses, which created great stresses for the state. Further back in Islamic history, in Cordoba, private property had been protected against the caliph, and in general, medieval Islamic governments were not known for seizing commercial property. Later, “[T]he Ottoman empire as heir to all this came to operate an economic system that rested on confiscation, despoilment, and a total, calculated, insecurity of life and property.”¹⁸ Whereas Europeans took advantage of feudal fragmentation to develop a mercantile society, the Ottoman Empire’s structural fragility gradually weakened its economy, contributing to its diminishing cultural, legal, and ethical influence and its final disintegration.

The Rise of the West and the Legacy of the Enlightenment

In contrast to these sources of weakness within India, China, and the Islamic world, an amalgamation of simultaneously favorable circumstances stimulated the rise of the West and its capacity to develop and diffuse a modern discourse of human rights. They included the Reformation, the inception of science, the rise of mercantilism, the consolidation of the nation-state, maritime expeditions, and the emergence of a revolutionary middle class, developments that served to hone human rights demands throughout such major social upheavals as the English, American, and French Revolutions.¹⁹ A new universal discourse of rights took hold, committed to reason and individual free choice, to scientific planning and the rules of law, to contractual agreement and economic interdependence. **The emerging commercial nation-state was then entrusted to diffuse these ideals worldwide in the spirit of peace and cooperation.**

With the advance of the Reformation, from 1546 to the Treaty of Westphalia in 1648, the universalist message of the church had been severely compromised. While the separation of the Greek Orthodox churches from

Rome had provoked the **first rupture in Christian unity**, the Protestant Reformation of the sixteenth and seventeenth centuries contributed decisively to its decline. Erupting in Germany, religious conflict soon spread through Europe to France, Holland, and Spain, and to England. Yet if a series of long-lasting religious wars eroded the initial aspirations of Christendom, the international nature of the wars incited the development of a new vision of world unity based on rational thinking rather than on revealed truth—principles that had shown their divisive nature during the wars of religion. By asserting individual responsibility in matters of salvation and in seeking happiness on earth, the Protestant influence helped advance a new credo relying on individual choice and rights. The belief in the value of individuals and their capacity to reason was further strengthened by a burst of scientific breakthroughs.

Despite the long phase of religious crisis, scientific discoveries abounded. Striving to free themselves from the universities, which remained a stronghold of Catholicism, British, French, Italian, and German scientists joined a growing number of independent societies, such as the Royal Society in London, the Academy of Science in Paris, the Accademia della Scienza in Naples, and the Collegium Carolinum in Brunswick, Germany. Their collaboration over distances was facilitated by the invention of the printing press, and common standards of measurement were promoted by the development of such precision instruments as the telescope, the microscope, the barometer, and the pendulum clock. The drive behind the scientific revolution might have been of divine inspiration, but it was Galileo, Descartes, and Newton, rather than God, who were stirring the imaginations of their contemporaries. By painting a **picture of the enrichment of human life through new discoveries, each presented an accessible world open to human consciousness and built upon universal and secular laws—laws that would later help shape secular visions of human rights.**

As both scientific progress and the wars of the Reformation were undermining the Catholic Church, changes in economic life were also reshaping the social landscape of Europe. While feudalism decayed, mercantilism emerged as an economic system that unified, strengthened, and financially enriched the nation. It did so by means of strict governmental regulation of the entire national economy, usually through policies designed to secure an accumulation of bullion, the expansion of a favorable trade balance, and the development of agriculture and manufacturing. Proponents of mercantilist theories maintained that global wealth was relatively fixed. The best way to acquire new resources and

to preserve as large a share as possible of this limited wealth, they believed, was through a rationally and scientifically planned state, aspiring to sufficient size and strength to sustain national development. By relying upon the mercantilist and later the commercial state as a way to promote economic interdependence and possibly peaceful conditions, **mercantilists would also inspire the vision of many human rights champions of the Enlightenment.**

Circumstances, of course, would not equally favor all who aspired to apply the mercantilist approach. In the sixteenth and seventeenth centuries, German and Italian cities—notwithstanding the call of Niccolò Machiavelli (1469–1527), in *Il principe*, for the unification of his country—lacked the necessary political strength to appropriate resources on a large national scale. In eastern Europe, states such as Austria, Poland, and Russia, although large in size, were overwhelmingly dominated by agrarian production and could not achieve the benefits of a mercantile economy. However, the conditions necessary for the progress of mercantilism were present in the Low Countries (especially in the period from the Treaty of Westphalia until the early 1700s), as well as in England and France.²⁰

Critical to the rise of the West over other civilizations was the discovery, colonization, and mercantilist exploitation of the new world. The developing global economy, initiated by the Portuguese and Spanish in the sixteenth and seventeenth centuries, moved during the eighteenth century into the hands of the British, the French, and the Dutch. While India and China still commanded admiration, these Western powers were ascending as the new leaders of the international economy. The conquest of America was particularly valuable for the Europeans because of its vast natural resources, whose exploitation required masses of human labor that were supplied by Africa. Many Europeans regarded the indigenous populations of their colonies as barbarians, justifying the enslavement of Africans, the killing or subjugation of American Indians, and similar abuses of other native peoples.

As overseas empires spread, the expansion of money markets dissolved old social bonds, transformed the guild character of the Middle Ages, and strengthened the town economy, leaving the surrounding countryside subservient to the interests of the town. The shift from the village to the town changed the landscape of social relationships that had been prevalent in feudal societies.²¹ With the emergence of towns as the heart of human society, autonomous spheres of social activity proliferated amid the ruins of the Catholic commonwealth. In addition, labor was in-

creasingly divided according to specialization. With the subsequent atomization of society, mercantilism reached new levels of speed and efficiency. This fragmentation into various spheres of specialization undermined the self-sufficient character of feudal society, exacerbating the need for a new form of social interdependence surrounding the exchange of commodities and the necessity of a contractual discourse premised on rights.

This parceling of sixteenth- and seventeenth-century political and economic life created space for the development of a relatively autonomous class, the bourgeoisie, which was concentrated in urban sites. Economically speaking, the bourgeoisie stood between the nobility and the clergy on the one hand and the peasantry on the other hand. Its members earned their living by manufacturing, shopkeeping, banking, trading—in general, by the various activities that had been stimulated by the expansion of commerce. In countries like England and France or regions like Flanders—where governments helped create a national market and an industrious nationwide labor supply for their great merchants—the bourgeoisie became even more prominent, and succeeded in gaining a degree of economic strength independent of the political and religious control of their provinces. Needless to say, a merchant backed by a national monarchy was in a much stronger position than one supported by a city, such as Augsburg or Venice. National governments could endorse local merchants, subsidize exports, and pay bounties for goods whose production they wished to encourage, or erect tariff barriers against imports to protect their own producers from competition. A national tariff system was thus gradually superimposed on the old network of provincial and municipal tariffs.²²

From the mid-seventeenth century to the eighteenth century, the European bourgeoisie, however, felt trapped within a tale of two economies, that is, between a prosperous international economy and the still backward, traditionalist, and autarkic national market. The nobility still dominated the government, public administration, the church, and most social institutions. It resisted any change in the status quo that might undermine its political privileges. These conflicts of interests were exemplified in Molière's play *Le bourgeois gentilhomme*, which portrayed a ruined nobleman begging for more loans from an enriched bourgeois. Art was imitating life, reproducing the economic wealth and political frustration of the burgeoning middle class. The needs of the bourgeoisie, in the end, collided with monarchical interests, fueling the English, American, and French Revolutions. Facing resistance, the political demands

of this new class in formation grew more revolutionary and universalist in orientation; as it gained power, it also revealed its particularist tendency.²³

During the English Puritan revolution (1642–1648), universal claims of rights were first advanced against Charles I's effort to restore his centralized power at the expense of Parliament. Seeking funds to crush a Scottish rebellion in 1637, the king convoked the English Parliament for the first time in eleven years. Neither that Short Parliament (1640) nor the subsequent Long Parliament (1640–1660) supported that goal. Instead, new members of the Long Parliament, led by Oliver Cromwell (1599–1658), John Hampden (1594–1643), and John Pym (ca. 1583–1643), challenged royal authority, culminating in the execution of Charles I and the establishment of the republic. After using the support of radicals like the Levellers (whose influence had spread among the rank and file of the army fighting the king) to press popular demands, such as the rights to life, property, and religious freedom, Cromwell turned against those democratic supporters and purged them from the army.

Despite these dramatic turns of events, the revolution ultimately empowered the propertied class by granting sovereignty to Parliament and dissolving prerogative courts. It overlooked the demands of starving peasants, led by the communist Diggers, who tried but failed to radicalize the revolution by calling for broader political representation and a more egalitarian redistribution of wealth. With the monarchical restoration, human rights hopes that had been unleashed by the English Revolution were thwarted. Yet the revolutionary spirit remained alive amidst peasants' grief and despair. It was to reemerge in a brief explosion during the 1688 Glorious Revolution, as the bourgeois fought for parliamentary and civil rights—later embraced by the English Bill of Rights.

In the late eighteenth century, England became overburdened by the cost of its colonial possessions and resorted to imposing inequitable taxes on the American colonies. The colonists rebelled. The English revolution of the 1640s provided a worthwhile example of resistance for them to emulate. Fighting for independence from England, they recalled the British Levellers' struggle for the rights to life, to property, to manhood suffrage, and the rights to rebel against tyrannical authorities and to establish republican institutions. **With the ratification of the Declaration of Independence in 1776, they were soon able to celebrate their new human rights achievements.**

As in the English Revolution, the new American republic was initially divided. Competing economic interests separated merchants, farmers, and

plantation owners. There were also differences between the new and old states of the confederation, and already some tensions between Southern slave-owning states and Northern states. While these tensions would ultimately result in a civil war (1860–1865), in the 1770s, supporters of independence in both North and South were drawn together in opposition to the British crown and its American loyalists. After their fight for independence from England, Americans inscribed in the 1788 constitution rights that favored wealthy property owners. However restricted the human rights claimed by the American republic, the success of the revolution drew international admiration.

French soldiers who had fought on the side of the American revolutionaries returned to France to extol the accomplishments of the American revolutionaries. With the country on the verge of national bankruptcy and confronting a nobility unwilling to share its power, many of these returning soldiers would follow the horde of hungry peasants and angry bourgeois from the streets of Paris to the Tennis Court, where the Third Estate General rallied and affirmed that it now constituted the National Assembly. The mixture of solemnity and optimism of that first revolutionary moment was admirably captured by the neoclassical painter Jacques-Louis David (1748–1825) in his *Oath of the Tennis Court* (1791). A month later, on July 14, 1789, the movement took the streets as a crowd stormed the Bastille. Soon after, the revolutionary leaders drafted the Declaration of the Rights of Man and of the Citizen, one of the most important human rights documents of the eighteenth century, affirming the principles of the new state based on the rule of universal law, equal individual citizenship, and collective sovereignty of the people. With it, Jacobins and defenders of the French *patrie* proclaimed a new world in which “liberty, equality, and fraternity” would become, they hoped, universal norms.

Yet social divisions in France, initially eclipsed by the Third Estate in its fight against the *ancien régime*, now reemerged as voting rights were restricted to owners of property, along the lines of the British and American example. Struggling to repel invading armies, the Third Estate was further divided by domestic social tensions. If the influence of property owners during the early phase of the revolutionary wars soon yielded to the ascent of a popular force, the sansculottes (1792–1794), the execution of their leader, Maximilien de Robespierre (1758–1794), marked the end of the revolutionary process and the empowerment of a new regime of notables whose ranks were drawn from monarchists and moderate republicans. As in England and America, the revolutionary universalism

of the French middle class gave way to an era of conservatism. Those seventeenth- and eighteenth-century struggles represented, however, the first important affirmations of liberal ideas, and they were crucial for establishing the secular foundation of human rights. These important events also serve as a guide to the first part of our journey, which begins with the historical struggle for freedom of religion and opinion and leads to assertions of rights to life and to property.



FREEDOM OF RELIGION AND OPINION

The fight for freedom of religion and opinion repeatedly jolted medieval Christendom. Religious intolerance had long since superseded the charitable and universalist promise of the Gospels. The pervasive Christian fear of the Turks, a result of the Crusades (1096–1099, 1147–1149, 1189–1192, and 1202–1204), contributed to sharpening Catholic intolerance toward other religious groups. In addition to Muslims, European Jews were considered foreigners and often personae non gratae in Western Christendom, and as such were subjected to various levels of discrimination. The Fourth Lateran Council (1215), for instance, banned Jews from government employment. In 1290, Jews were expelled from England, in 1306, from France. In Spain, initial tolerance gave way to persecution during the Inquisition (1492), and Jews were forced to choose between conversion and eviction. In addition, Jews were often accused of performing acts of sacrilege and murdering children, charges that intensified during the Crusades and the Black Plague (1347–1351), and as a result were often targeted as scapegoats and massacred.

Challengers from within the Catholic faith endured similar persecutions in the medieval age. The church, jealously guarding its wealth, was unwilling to accommodate sprouting heretic groups whose demands for a new spirituality called for a genuine solidarity with and renewed interest in the plight of the poor. The Cathari, the Humiliati, and the Waldenses were among the early heretic groups whose members defied the monopoly of the Catholic Church only to be subjected to many forms of discrimination and even public immolation. For those dissenters and sinners who evaded earthly punishment, Dante's *Inferno* (1306–1308 and 1321) and Michelangelo's *Last Judgment* (1534–1541) served as reminders of their fate in hell. Similar Catholic intransigence existed in the Spanish colonies, where, despite protests by the Dominican priest Bartolomé de las Casas, Indians were persecuted without mercy in the name of Catholicism.²⁴ Catholic efforts to crush all opposition finally encoun-

tered a force that could not be suppressed, as the rise of Protestantism reshaped prospects for religious freedom and helped ultimately to launch the broader Enlightenment struggle for human rights.

Against the indisputable authority of a highly hierarchical Catholic Church, its spectacular and mundane authority, its claim to each person's body and soul, its control of the individual's destiny and the promise of eternal felicity in heaven—all demanding unconditional obedience to the feudal church—Protestantism proposed radical reforms. Martin Luther (1483–1546), the first to formulate Protestant principles, called for the centrality of the Bible as primary authority on issues of faith; the return to simple liturgies; separation between church and state; and individual responsibility in matters of salvation and in finding happiness on earth. Luther's notion that “a Christian man is the most entirely free lord of all, subject to none,” while at the same time he was the “dutiful servant

BARTOLOMÉ DE LAS CASAS, *IN DEFENSE OF THE INDIANS*, 1548

[Y]ou seek Indians so that gently, mildly, quietly, humanely and in a Christian manner you may instruct them in the word of God and by your labor bring them to Christ's flock, imprinting the gentle Christ on their minds, you perform the work of an apostle and will receive an imperishable crown of glory from our sacrificed lamb. But if it be in order that by sword, fire, massacre, trickery, violence, tyranny, cruelty, and in inhumanity that is worse than barbaric you may destroy and plunder utterly harmless peoples who are ready to renounce evil and receive the word of God, you are children of the devil and the most horrible plunderers of all. . . . Now if we shall have shown that among our Indians of the western and southern shores (granting that we call them barbarians and that they are barbarians) there are important kingdoms, large numbers of people who live settled lives in a society, great cities, kings, contracts of the law of nations, will it not stand proved that the Reverend Doctor Sepúlveda has spoken wrongly and viciously against peoples like these, either out of malice or ignorance of Aristotle's teaching, and therefore, has falsely and perhaps irreparably slandered them before the entire world. From the fact that the Indians are barbarians it does not necessarily follow that they are incapable of government and have to be ruled by others, except to be taught about the Catholic faith and to be admitted to the holy sacraments. They are not ignorant, inhuman, or bestial. Rather, long before they heard the word Spaniard they had properly organized states, wisely ordered by excellent laws, religion, and custom. They cultivated friendship and, bound together in common fellowship, lived in populous cities in which they wisely administered the affairs of both peace and war justly and equitably, truly governed by laws that at very many points surpass ours.

From *In Defense of the Indians*, 40, 42.

of all, subject to everybody,” restated Paul’s injunction: “[O]we no man anything, but to love one another.”²⁵ This became a rallying cry against the abuses of the Catholic Church.

Luther’s views, as espoused, or revised, by supporters like Jean Calvin (1509–1564), had far-reaching political repercussions: they not only undercut the power structure cemented by the feudal church, but also the system of privileges granted by divine grace. The progress of the Protestant reformation alarmed the Catholic custodians of the status quo, and eventually also Luther himself, who feared social chaos and ended up condemning in 1524 the German peasant rebellion against manorial lords. Even as Luther reverted to a more conservative view of Protestantism, hostility between Protestants and Catholics escalated, culminating in a religious conflict that plagued late-sixteenth- and seventeenth-century Europe.

The 1555 Augsburg Peace seemed to resolve the conflict by officially recognizing Lutheranism in the Holy Roman Empire. According to the principle of *cujus regio, ejus religio*, each prince was to decide for himself whether he or his state should be Catholic or Lutheran. Yet the continuous spread of Protestantism was now becoming more threatening for Catholics, who ended up mobilizing armed forces against Lutheran advances. This religious clash led to a series of wars that spread throughout Europe: the French civil wars of 1562–1598; the Dutch revolution against Philip II of Spain in 1567–1579; the Spanish Armada Católica against England in 1588; the Scottish rebellion against Mary Stuart in 1565–1568; the Thirty Years’ War of 1618–1648; and the Puritan revolution of 1642–1648 in England.

Revolted by the appalling atrocities committed in the name of God during these religious conflicts, the Dutch legal scholar Hugo Grotius (1583–1645) urged warring parties to maintain a spirit of religious tolerance. “It seems unjust,” he said, “to persecute with punishments those who receive the laws of Christ as true, but entertain doubts or errors on some external points.”²⁶ During the English civil war, the spokesman of the Levellers, John Lilburne (1614–1657), proclaimed that “all men by nature are the children of Adam, and regardless of religious differences, they are all equal and alike in power, dignity, authority and majesty.”²⁷

In the end, the struggle for religious freedom during the wars of the Reformation won some enduring success. The Treaty of Westphalia, ratified in October 1648, put an end to the wars of religion. It granted, for instance, “the privilege of emigration to the subjects of such states if they dissented from the religion of their territorial lord; and whereas later,

for the better preserving of greater concord among the states, it was agreed that no one should seduce another's subjects to his religion.”²⁸ It stopped short of providing individuals with freedom of religion, but the treaty nevertheless asserted the right to religious asylum and states’ prerogative to select their own religion. The treaty also divided Europe according to religious spheres of influence. A balance of power between Catholics and Protestants was achieved in Germany; England asserted its Anglican colors; Calvinism maintained a strong foothold in the Netherlands; France and the Italian states (despite intermittent occupations by the Austrian Empire) remained loyal to the papacy.

With his famous *Letter concerning Toleration* (1690), the English philosopher John Locke (1632–1704) moved beyond the conservative concessions of Westphalia, demanding the individual’s, rather than the state’s, right to select a religion. Such a right, he argued, comes from “an inward persuasion of the mind, without which nothing can be acceptable to God.”²⁹ Yet the battle for religious freedom was far from over. In France, an important advance in that struggle had been the Edict of Nantes (1598), in which Henry IV had sought to end the French wars of religion by guaranteeing religious freedom to French Protestants (or Huguenots). In 1658, however, Louis XIV revoked the edict, depriving the Huguenots of all civil and religious liberties. In England, the Parliament passed the Tolerant Act in 1689, which, though allowing some dissenters to practice their religion, continued to exclude Jewish and Catholic worship. Alarmed by these violations, Locke called for a clearer separation between the church and the state. “Political society,” he maintained, “is instituted for no other end, but only to secure every man’s possession of the things of this life. The care of each man’s soul, and of the things of heaven, which neither does belong to the commonwealth nor can be subjected to it, is left entirely to man’s self.”³⁰ With these statements, Locke opened a new chapter in the struggle for religious freedom and freedom of opinion.

The context for reviving that struggle was propitious. Throughout Europe, the most dramatic effort to silence opinions (of religious or secular nature) was the *Index librorum proibitorum*—a list of proscribed books developed by the Roman Catholic Church that included the work of the well-known scientist Galileo. Licensing (or control over publication) came to be regarded by many in England as an excess of Roman Catholic influence. So, when the Puritans disestablished the Anglican successor to the Roman church and the English Parliament reinstated licensing in 1643, the political pamphleteer John Milton (1608–1674) rose

in protest: “He who kills a good book kills reason itself, kills the image of God . . . in the eye,” he exclaimed in *Areopagética*, a book that remains a classic plea for the freedom of the press.³¹ While conceding the need for criminal prosecutions in response to some types of publications, Milton proclaimed the importance of freedom of opinion: “[G]ive me the liberty to know, to utter, and to argue freely, above all liberties. . . . If truth is let free, it will overcome and win over all possible errors.”³² Milton’s beliefs ultimately prevailed, leading in 1695 to the abandonment of prepublication censorship in England. This victory became an important milestone in the fight for freedom of opinion and the press, and was repeatedly invoked throughout the American and French Revolutions.

Given the strong communal theocratic beliefs held by the early English Pilgrims in America, one may have wondered whether American soil would prove fertile for the development of Milton’s and Locke’s perspectives. The Pilgrims, after all, represented the radical fringe of the English Reformation. For them, the Reformation had not gone far enough, having ended by merely supplanting one ruler (the pope) with another (the British crown). They believed that nowhere in England could they find a true church, and concluded that their ultimate salvation required their migration to the New World. In the first Puritan colonies of Plymouth and Boston, as in Calvin’s Geneva, the church was an integral part of the state. The fundamental laws were drawn from the Bible, and only where the Bible was silent could men create laws.³³ By the second half of the seventeenth century, Calvinism in America had grown to such an extent that the French and the Dutch were unable to limit its expansion.³⁴ Its growing influence in America, however, would ultimately clash with that of the established English church.

The major cleavage among the churches in colonial America divided Anglicans from Puritan dissenters. With growing political tensions between England and the American colonists, this split might well have been a necessary condition for ensuring pluralism and religious tolerance. The rapid spread of religious sects during the prerevolutionary period, called the “Great Awakening,” further secured this prospect.³⁵ The Methodist movement seized upon the elements of feelings and conscience that Protestant orthodoxy had tended to neglect and gave a renewed and devotional impetus to the doctrine of grace and to the tradition of moral earnestness. In the middle years of the eighteenth century, waves of revivals and conversions led by Congregationalists and Presbyterians spread through the colonies. Many small, independent, Bible-centered groups, which

often professed allegiance to Baptist teachings, also came into being during this period.

Undoubtedly, the spread of divergent churches, combined with the increasing influence of the press, helped to influence the prerevolutionary spirit. There were initial efforts to hinder the freedom of the press, which paralleled similar attempts in England. The 1735 trial of the German immigrant printer John Peter Zenger, indicted for his attacks on Governor Cosby of New York, and the 1765 British Stamp Act, which placed a severe tax on newspapers, were among the many efforts to control the press.³⁶ The Stamp Act, in particular, intensified colonial resentment of the British, which was already growing in response to other taxes, and unleashed a radical form of journalism against the crown. Anti-British printers and activists such as Isaiah Thomas (1749–1831) and Samuel Adams (1722–1803) were among the inciters of the rebellious spirit of the 1770s. Nothing, however, could surpass the agitational journalism of Thomas Paine (1737–1809), whose work was actually read out loud to the revolutionary troops before battle. The “last Cord between England and America” was now broken, Paine announced in 1776, while urging his American compatriots to stand against England. “O ye that love mankind! Ye that dare oppose not only the tyranny but the tyrant, stand forth! . . . Let none other be heard among us than those of *a good citizen, an open and resolute friend, and a virtuous supporter of the rights of mankind and of the free and independent states of America.*”³⁷

Such combative pleas on behalf of freedom influenced the founding fathers. Thomas Jefferson (1743–1826) championed the right of the individual to religious opinion and freedom of conscience based on the reasoning of Locke, Paine, and the French *philosophes*. “Religion,” Jefferson asserted, “is a matter which lies solely between man and his God,” and therefore it was necessary that “a wall of separation [be] erected between the Church and the State.”³⁸ This position was restated in the Virginia Act for Establishing Religious Freedom (1786), a statute that entrusted people with the right to follow the dictates of their conscience and called on the state to tolerate all religions without favoring one in particular.³⁹ Three years later, the concept of the separation of church and state took its place as the first article of the Bill of Rights, part of the new Constitution of the United States of America. The struggle to separate church and state was not completed on the day the Bill of Rights (1791) was adopted, however. Instead, “The wall was slowly erected stone by stone, in some states earlier than in others, in some states more completely than in others.”⁴⁰ Even today, this partition is fragile and un-

der challenge, as some Christian groups seek to institute religious curricula (e.g., prayers, the teaching of Creationism, etc.) in American public schools.

After American independence, limits on state control over the press needed to be secured. In anticipation of a war with France, a law restricting criticism by the press was passed in 1798. The Sedition Act, defined in national security terms, made criminal the publication of “any false, scandalous and malicious writing . . . against the government of the United States, or either House of Congress . . . or the President . . . with the intent to defame [them], to bring them into contempt or disrepute.”⁴¹ Thomas Jefferson’s first inaugural address, however, provided the moral grounding for jurists to repudiate that act: “If there be among us those who wish to dissolve the Union or to change its republican form,” he claimed, “let them stand undisturbed as monuments of safety with which error of opinion may be tolerated where reason is left free to combat it.”⁴² When the threat of war passed, the Sedition Act was repealed and freedom of the press restored.

On the other side of the Atlantic, French intellectuals welcomed the winds of freedom coming from revolutionary America. Baron de Montesquieu (1689–1755), Jean-Jacques Rousseau (1712–1778), Voltaire (1694–1778), Baron Paul-Henri d’Holbach (1723–1789), and Denis Diderot (1713–1784), among many other French thinkers, had proclaimed the importance of freedom of expression and other civil rights long before the American Revolution.⁴³ They saw in revolutionary America the realization of such ideals. Voltaire, more than any other deist philosopher of his time, has been identified as the archenemy of revealed knowledge and intolerance.⁴⁴ “What is toleration?” he asked in 1764. “It is the natural attribute of humanity. We are all formed of weakness and error: let us pardon reciprocally each other’s folly. That is the first law of nature.”⁴⁵

Such a law of nature, advancing “freedom of communication of ideas and opinion,” was later singled out as “one of the most precious of the rights of man” in the French Declaration of the Rights of Man and of the Citizen (1789).⁴⁶ In its fight against religious intolerance, the French revolutionary *patrie* became the first country in the world ever to grant Jews civic emancipation and to allow them to hold public office—and this well before the hard-won legislative passage of the 1826 Maryland “Jewish Bill of Emancipation” in America. If the American Revolution left the church free from state supervision, with complete freedom in moral and educational tasks, the French revolutionary government im-

**THE FRENCH DECLARATION OF THE RIGHTS
OF MAN AND OF THE CITIZEN, 1789**

. . . The National Assembly recognizes and proclaims, in the presence and under the auspices of the Supreme Being, the following rights of man and citizen.

1. Men are born and remain free and equal in rights; social distinctions may be based only upon general usefulness.

2. The aim of every political association is the preservation of the natural and inalienable rights of man; these rights are liberty, property, security, and resistance to oppression.

3. The source of all sovereignty resides essentially in the nation; no group, no individual may exercise authority not emanating expressly therefrom.

4. Liberty consists of the power to do whatever is not injurious to others; thus the enjoyment of the natural rights of every man has for its limits only those that assure other members of society the enjoyment of those same rights; such limits may be determined only by law.

5. The law has the right to forbid only actions which are injurious to society. Whatever is not forbidden by law may not be prevented, and no one may be constrained to do what it does not prescribe.

6. Law is the expression of the general will; all citizens have the right to concur personally, or through their representatives, in its formation; it must be the same for all, whether it protects or punishes. All citizens, being equal before it, are equally admissible to all public offices, positions, and employments, according to their capacity, and without other distinction than that of virtues and talents.

7. No man may be accused, arrested, or detained except in the cases determined by law, and according to the forms prescribed thereby. All who solicit, expedite, or execute arbitrary orders, or have them executed, must be punished; but every citizen summoned or apprehended in pursuance of the law must obey immediately; he renders himself culpable by resistance.

8. The law is to establish only penalties that are absolutely and obviously necessary; and no one may be punished except by virtue of a law established and promulgated prior to the offence and legally applied.

9. Since every man is presumed innocent until declared guilty, if arrest be deemed indispensable, all unnecessary severity for securing the person of the accused must be severely repressed by law.

10. No one is to be disquieted because of his opinions, even religious, provided their manifestation does not disturb the public order established by law.

11. Free communication of ideas and opinions is one of the most precious of the rights of man. Consequently, every citizen may speak, write, and print freely, subject to responsibility for the abuse of such liberty in the cases determined by law.

12. The guarantee of the rights of man and citizen necessitates a public force; such a force, therefore, is instituted for the advantage of all and not for the particular benefit of those to whom it is entrusted.

13. For the maintenance of the public force and for the expenses of adminis-

tration a common tax is indispensable; it must be assessed equally on all citizens in proportion to their means.

14. Citizens have the right to ascertain, by themselves or through their representatives, the necessity of the public tax, to consent to it freely, to supervise its use, and to determine its quota, assessment, payment, and duration.

15. Society has the right to require of every public agent an accounting of his administration.

16. Every society in which the guarantee of rights is not assured or separation of powers not determined has no constitution at all . . .

17. Since property is a sacred and inviolable right, no one may be deprived thereof unless a legally established public necessity obviously requires it, and upon condition of a just and previous indemnity.

plemented a more restricted and regulated policy toward the church. Its lands were placed at the disposal of the *patrie*, the clergy was provided with an honorable stipend, and bishops and clergymen were elected like any other public officials.⁴⁷ Such a policy was designed to control the power of the clergy, which was closely allied with the feudal nobility. Not surprisingly, as the conflict between the supporters of the ancient regime and the defenders of the French Revolution deepened, anticlerical measures assumed proportions not known in the New World. Indeed, after refractory French priests rose in revolt on the side of the aristocracy and allied with the royalists in the Vendéean counterrevolution, the young Jacobin government was marked by attacks on priests, including the wholesale closure of churches and the enthronement of the Goddess of Reason in Notre-Dame Cathedral. The de-Christianization process, further inflamed by an ultra-atheist group called the Enragés, might have alienated believers among the French peasantry and could have led to domestic chaos at a time when France was fighting a war with external enemies. At least this was what Robespierre believed. He thus called for a patriotic compromise, based on Rousseau's view of civic religion, that he identified as the cult of the Supreme Being (or the cult of reason). Religious feasts were celebrated under the banner of universal reason and were organized in order to raise popular feelings of solidarity against the old regime.

The triumph of reason associated with the Enlightenment reached its pinnacle during the French Revolution. Despite many setbacks over the succeeding centuries, the fight for freedom of religion and opinion was not in vain. **Those rights would be recognized in the twentieth century as fundamental human rights** proclaimed in the first clause of the UN

Universal Declaration of Human Rights (1948), in article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), article 13 of the American Convention on Human Rights (1969), article 18 of the International Covenant on Civil and Political Rights (1966), and in article 8 of the African Charter on Human and Peoples' Rights (1986).

THE RIGHT TO LIFE

Appeals to trust the human capacity to reason and think freely long preceded the Enlightenment, as chapter 1 showed. Such efforts were rooted in the writings of ancient Greek and Roman political thinkers, who ultimately provided European Enlightenment thinkers and leaders with new moral tools in their struggle against tyranny. Because of these struggles surrounding the human capacity for rational thought, the Enlightenment was aptly described by the German philosopher Immanuel Kant (1724–1804) as the “Age of Reason.” Reflecting on the wisdom of nature and its laws, which some characterized as God’s imprint on earth, European visionaries of the new age employed reason not merely as a new way to combat religious oppression and arbitrary ruling, but also as a starting point to further individual rights, starting with the right to life. With the injunction “thou shall not kill,” Judaism had already instructed people to honor individuals’ right to life, an entitlement not only respected by other monotheistic religions, such as Christianity and Islam, but also by Buddhism, Hinduism, and Confucianism. The difference was that reason rather than revelation or mystical devotion was now advanced as the basis for such a belief.

Unfolding historical events had already shown that many who acted in God’s name could easily dismiss religious formulations of the sanctity of life. The record of human carnage created by waves of religious fanaticism during the Reformation evidenced the futility of bartering human lives for religious power. If life could be so casually disposed of by rulers, whose “revealed” wisdom could not be questioned, then new criteria other than revelation needed to be developed to constrain their arbitrary actions. Where else could humanists of the Reformation appeal, but to human reason, to its universalist attributes, to its deist and peaceful intent? If religion could not unite everyone, then reason would provide more concrete guidelines for transcending religious and parochial differences.

Brandishing a torch of optimism amidst the graveyards of the English civil war, the English philosopher Thomas Hobbes (1588–1679) argued

for a fundamental right of nature, namely that “each man has to use his own power, as he will himself for the preservation of his own nature—that is to say of his own life.”⁴⁸ From this natural right derived “a precept or general rule of reason *that every man ought to endeavor peace, as far as he has hope of obtaining it.*”⁴⁹ To secure that inalienable right to life, an individual could consider entering a social contract to join the commonwealth. For no reason other than the security of one’s life and peace, maintained Hobbes, should one surrender other forms of liberty enjoyed in the precivilized state of nature.

With other Enlightenment social contract theorists, Hobbes understood the state of nature as a hypothetical place in which no government existed. By speculating on how humans would fare under those conditions, one could identify why one would consider entering into a social contract that would secure minimal rights. For Hobbes, the right to life was essential, and a social contract would be void if it did not defend this right. The human rights discourse was emerging as a worldview wedded to realpolitik concerns. Ironically, one of the first realists in international politics was also a human rights advocate. His assertion of a right to life would ultimately be echoed in many international bills of rights (article 3 of the UN Universal Declaration, article 6 of the International Covenant on Civil and Political Rights, article 2 of the European Convention, article 4 of the American Convention, and article 4 of the African Charter).

If indicted by the state, Hobbes further argued, one should not be forced to incriminate oneself. In short, for Hobbes, self-defense in all circumstances was a paramount human right.⁵⁰ No matter how much the protection of one’s body and life was trumpeted as inalienable during the Enlightenment and thereafter, what such protection meant in practice would become the subject of many controversies. When applied to those accused of crimes, for example, it was unclear where to place limits concerning imprisonment, torture, and the death penalty. In the same year as Hobbes’s death, the Habeas Corpus Act of 1679 was promulgated in England as an ancient common law writ intended to correct violations of personal liberty by the state. In the spirit of the Magna Carta, granted in 1215 by King John to his barons, the Habeas Corpus established appropriate processes for checking the illegal imprisonment of people by inferior courts.⁵¹ Ten years later, the English Bill of Rights restated similar rights and liberties of subjects by condemning abuses of those accused or convicted of crimes: “[E]xcessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.”⁵² Although

there had been no explicit legalization of “cruel punishments” or torture in England, torture was hardly forbidden. The threat of “pressing to death” under weights, for instance, was used to compel the accused to testify in court, while the rack and other instruments of torture were employed to elicit legally admissible confessions.⁵³

THE ENGLISH BILL OF RIGHTS, 1689

. . . Thereupon the said lords spiritual and temporal, and commons, pursuant to their respective letters and elections, being now assembled in a full and free representative of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid; do in the first place (as their ancestors in like case have usually done) the vindicating and asserting their ancient rights and liberties, declare:

1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.
 2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of later, without consent of parliament, is illegal.
 3. That the commission for erecting the later court of commissioner for ecclesiastical causes, and all other commissions and courts of like nature are illegal and pernicious.
 4. That levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament, for longer time, or in other manner than the same is or shall be granted, is illegal.
 5. That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning, are illegal.
 6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against the law.
 7. That the subjects which are protestants, may have arms for their defence suitable to their condition, and as allowed by law.
 8. That the election of members of parliament ought to be free.
 9. That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.
 10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.
 11. That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders.
 12. That all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void.
 13. And that for redress of all grievances, and for the amending, strengthening, and preserving of the laws, parliament ought to be held frequently. . . .
-

Whether in Europe, China, Japan, India, the Middle East, or elsewhere, the most intricate and horrible tortures were used as common forms of interrogation and punishment.⁵⁴ Some, like Sir Francis Bacon (1561–1626), defended the efficiency of torture; others, like Hobbes, qualified its usage. If torture was used, Hobbes suggested, it should be under very specific circumstances and only to promote the search for truth, and this with the understanding that “accusations upon torture are not to be reputed as testimonies.”⁵⁵ Yet the eighteenth century also witnessed vociferous condemnations of torture. Indebted to Montesquieu, the Italian criminologist and economist Cesare Beccaria (1738–1794) claimed that punishments should be relative to the severity of the offense, and imposed only when a defendant’s guilt was proven. With compelling logic, he argued that

[t]he dilemma is not a novelty: either the crime is certain or it is not; if it is certain, then no punishment is called for other than what is established by law and other torments are superfluous because the criminal’s confession is superfluous; . . . if it is not certain, then an innocent man should not be made to suffer, because in law, such a man’s crimes have not been yet proven. . . . [Further, a] sensitive but guiltless man will tend to admit guilt if he believes that, in that way, he can make the pain stop.⁵⁶

In France, where the use of *supplice* (referring specifically to the public torture and execution of criminals) was one of the great evils of judicial procedure up to the time of the French Revolution, Beccaria found in Voltaire a kindred spirit who would condemn torture repeatedly in his writings: “It is as absurd to inflict torture to seek out truth as it is to order a duel to assess who is the culprit,” Voltaire wrote. “[O]ften the robust and guilty one resists the ordeal, whereas the debilitated innocent succumbs to it.”⁵⁷ If Voltaire and Beccaria’s outcries against torture often fell on deaf ears in the eighteenth century, they were very much in the minds of the drafters of the major twentieth-century international legal documents on human rights.⁵⁸

The right to life and to the integrity of one’s body, including the condemnation of illegal imprisonment, was invoked with each unfolding war and period of political turmoil during the eighteenth century. During the Seven Years’ War (1756–1763), Rousseau defended life “as an essential gift of nature”;⁵⁹ during the American revolutionary war, Jefferson echoed that view in the 1776 Virginia Declaration of Rights; and in pre-revolutionary France, Kant admonished rulers, in *The Metaphysics of Morals* (1785), for treating individuals as a means rather than an end.

This stipulation of an essential law of nature, along with related personal guarantees mentioned in the Habeas Corpus and the English Bill of Rights, would have lasting effects on the promulgation of the American Bill of Rights and the 1789 French Declaration of the Rights of Man and of the Citizen—the two documents most responsible for modern legal formulations of human rights.⁶⁰ By the end of the eighteenth century, torture was widely denounced as a relic of the barbarism of another age, as the mark of a savagery decried as “Gothic.”⁶¹

The question of the death penalty for criminals (or the limitations of the “inalienable” right to life), however, created a deeper divide among intellectuals.⁶² The death penalty was taken for granted throughout the history of medieval criminal law. John Locke, among others, reiterated in modern terms the argument that life could be forfeited if anyone attempted to violate another’s natural rights.⁶³ Should a criminal be punished with death, he asked? “Each transgression,” he answered, “may be punished to that degree and with so much severity, as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like. Every offense that can be committed in the state of nature may be also punished equally, and as far forth as it may in commonwealth.”⁶⁴ More than half a century later, Rousseau echoed Locke’s view, observing that “it is in order that we may not fall victims to an assassin that we consent to die if we ourselves turn assassins.”⁶⁵

Rousseau’s influence on the German philosopher Kant was considerable. Like Rousseau, Kant did not see any contradiction between his support for the right to life (defined as a categorical imperative) and his defense of capital punishment. Referring to the idea of retributive punishment (the talion law), he maintained that “if [an individual] has committed a murder, he must die. In this case, no possible substitute can satisfy justice.”⁶⁶ Aside from murder cases, Kant identified other crimes punishable by death, including crimes against the state. Invoking the Scottish rebellion of 1745, he believed that conspirators against the state deserved the death penalty, yet he warned that if a great part of the population was accomplice to such a plot, a sovereign should not get rid of all his subjects and reduce the country to chaos.⁶⁷ He thus urged sovereigns, perhaps with a favorable eye toward the early achievements of the French revolutionaries, to consider other punishments, including granting mercy, so that the community of people might be preserved. Clearly, he suggested, “[T]he state will not wish to blunt the people’s feelings by a spectacle of mass slaughter.”⁶⁸

Yet the spectacle of death as a form of punishment was not about to

end with Kant's warnings. How many deaths by torture would be deemed necessary to revive the collapsing *ancien régime*? How many times would the guillotine dull its blade on the necks of enemies of the French Revolution? Executions were then public events and belonged to a series of rituals in which power was either "eclipsed" or "restored." "The public execution of the seventeenth and early eighteenth century," Michel Foucault has insightfully stated, "was not . . . with all its theater of horror, a lingering hang-over from an earlier age. Its ruthlessness, its spectacle, its physical violence, its unbalanced play of forces, its meticulous ceremonial, its entire apparatus were inscribed in the political functioning of the penal system."⁶⁹

The horrible displays of public execution, often preceded by torture, stirred the minds of many Enlightenment humanists, who decried the savagery of their contemporaries. "For most people," Beccaria complained, "the death penalty becomes a spectacle and for a few an object of compassion mixed with scorn."⁷⁰ Beccaria's thesis was that the severity of the death penalty was inferior to the prospect of life imprisonment as a deterrent to murder. "With the death penalty," he explained, "every lesson which is given to the nation requires a new crime; with permanent penal servitude, a single crime gives many lasting lessons." He argued further, "*Murder which we have preached to us as a terrible crime, we see instituted without disgust and without anger.*"⁷¹ Only in extreme circumstances was Beccaria willing to consider the death of a citizen: if the life of that citizen truly jeopardized the survival of the social contract, and when "the nation stands to gain or lose its freedom, or in periods of anarchy, when disorder replaces the law."⁷²

Beccaria's powerful arguments against the death penalty had wide influence. First published in 1767, his work was soon well known in British colonial circles and was reflected in calls from American political leaders such as Benjamin Franklin (1706–1790) and Benjamin Rush (1746–1813) to abolish the death penalty. For Rush, death penalty laws were "as unchristian as those which tolerate or justify revenge."⁷³ In France, Voltaire drew on Beccaria to criticize the French penal system: "[A] Roman citizen could be condemned to death only for crimes that threatened the security of the state. Our masters, our first legislators, respected the blood of their compatriots, while we lavishly waste that of ours."⁷⁴

Influenced by Beccaria, whose ideas were popularized in France by Voltaire, Robespierre called in 1791 for the repeal of the death penalty, on the grounds that it was an unjust and ineffective way to deter crime.

When the state becomes an executioner, he maintained, it does not act like an individual who has been attacked and is using force in self-defense, but like a cold-blooded barbarian: “In the eyes of truth and justice, the scenes of death that society commands with so much ceremony are nothing but cowardly murders, solemn crimes committed according to legal procedures, but by the nation at large.”⁷⁵ Just a year later, when Beccaria made his exception allowing the death penalty in cases where national security was at risk, Robespierre called for the death of Louis XVI after the king’s intercepted flight to the foreign enemies of France:

Yes the death penalty in general is a crime and for that one reason: that according to the indestructible laws of nature, it can be justified only in cases where it is necessary for the security of the person or the state. . . . Society can prevent [common-law offenses] by other means and render the culprit harmless to injure her further. But when a king is dethroned in the midst of a revolution whose laws are still in the making, a king whose very name draws the scourge of war onto a nation in tumult, neither prison nor exile can destroy the influence that his existence continues to exert on the public welfare. . . . Louis must die in order that our country must live.⁷⁶

Robespierre’s seemingly dichotomous view on capital punishment reflected the Enlightenment’s divide over this issue. Today’s controversy on this matter dramatizes the Enlightenment’s legacy as supporters and opponents of the death penalty echo and expand upon positions defined two centuries ago. Thus modern abolitionists argue about the futility of capital punishment as a deterrent against crimes; that judicial errors have condemned the innocent to death; that perpetrators are often social victims who should be provided with the possibility to redeem themselves; and that society’s deliberate violence can only generate more violence.⁷⁷ These views are opposed by defenders of the death penalty who, in reply, assert that killing murderers indeed provides a deterrent, that only death ensures that a convicted murderer will not kill again, and that the families of murder victims deserve nothing less than the killer’s death and may require it as the psychological closure necessary for resuming their lives.

The liberal camp remains split over the idea of capital punishment (particularly in the United States), and tensions over this issue are evidenced by the careful wording of some current human rights documents. For example, the 1966 United Nations International Covenant on Civil and Political Rights states in article 2 that “in countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with law in force at the time of the

commission of the crime.” Article 4 states that “anyone sentenced to death shall have the right to seek pardon or commutation of the sentence.” This prudent language may well underline the divisiveness generated by a more general question, namely, under what conditions may the state deprive an individual of inalienable rights? Liberals’ answers to this question diverge, not just with regard to the question of the death penalty, but also with regard to another central tenet of liberal rights: the right to private property.

THE RIGHT TO PRIVATE PROPERTY

New forms of mercantilist activities that emerged during the Renaissance rekindled efforts to define the individual’s right to private property. Strengthened by trade overseas, the call for such a right by merchants and the rising bourgeoisie could no longer be dismissed. With the advance of Lutheranism and the Reformation, the fight for property rights was initially couched in the terminology of revelation. The English Levellers, for instance, identified property earned as the fruits of one’s labor as sacred under the biblical injunction “thou shall not steal.”⁷⁸ The work ethic of the emerging capitalist age was consistent with the Protestant vision of man’s providential destiny on earth, Max Weber later explained in his *Protestant Ethics and the Spirit of Capitalism*. Indeed, Protestants maintained that only through relentless work on the land, God’s imprint on earth, could individuals reach an intimate communion with the Almighty. Regarded as a radical human rights affirmation in the seventeenth century, the right to property would become a major source of contention in nineteenth- and twentieth-century human rights discourse.

If Hobbes could apply the importance of an inalienable natural right to the property of one’s own body and life, the Levellers would extrapolate from that the equally sacrosanct right to acquire property from one’s work. Yet not everyone among the English rebels agreed with this formulation. Parliamentary Independents like Cromwell and Henry Ireton (1611–1651) argued at the 1647 General Council of the Army in Putney that equating the right to life with the right to property was tantamount to claiming a right to take anything that one may want, irrespective of the rights of others. If the right to property is a natural right, proposed Ireton, “then show me what step or difference there is why I may not by the same right take your property.”⁷⁹ A Leveller spokesman, Thomas Rainborough (?–1648), replied that this was merely a mischaracterization of the Levellers’ position, which was consistent with respect for oth-

ers' natural rights.⁸⁰ This view had been developed a year earlier by the English pamphleteer and Leveller Richard Overton (1631–1664). In his tract entitled "An Arrow against all Tyrants," he stated:

To every individual in nature is given an individual property by nature not to be invaded or usurped by any. For everyone, as he is himself, so he has a self propriety, else he could not be himself; and of this no second may presume to deprive of without manifest violation and affront to the very principles of nature and of the rules of equity and justice between man and man. Mine and thine cannot be, except this. No man has power over my rights and liberties, and I over no man.⁸¹

Debating the legitimacy of property rights as a natural right was not a mere semantic exercise but had additional civil rights implications, including implications for the question of universal manhood suffrage. For Independents like Cromwell and Ireton, only property in freehold land or chartered trading rights entitled men to voting rights. Levellers, on the other hand, argued for a less restrictive property franchise than the one stipulated by the Independents. They believed that all men except servants, alms recipients, and beggars should be granted voting rights. This was consistent with their belief that political freedom was best ensured when individuals (e.g., soldiers and craftsmen) were engaged in independent activity.⁸²

Despite these differences over what constituted reasonable qualifications for political freedom and manhood suffrage, Independents and Levellers alike equated political freedom with some sort of individual property ownership and independence. Thus they introduced the liberal notion that freedom is first earned through independent economic activity. Although the right to vote remained limited, the right to property was eventually won, albeit at a high human cost, and feudal land tenures and arbitrary taxation were abolished in England. Whereas the first phase of the revolution (1642–1648) empowered the propertied by granting sovereignty to Parliament,⁸³ the second phase galvanized more radical concerns, voiced by peasants like the Diggers, who were animated by the vision of an agricultural communist society.

The Diggers' beliefs were more radical than those of the Levellers, who had the support of independent men of small property. Under the leadership of Gerrard Winstanley (1609–1669) and William Everard (1575–1650), the Diggers, who conceived of the English civil wars as a struggle against the king and the great landowners, asked for the establishment of communal property. Now that Charles had been executed, they argued, land should be available for the very poor to cultivate. They also

called for further legal and political democracy and the rejection of the state church. Their increasing activities, however, alarmed the commonwealth government and triggered the hostility of local landowners. Harassed by legal actions and mob violence, they had dispersed by the end of March 1650.

With the restoration of Charles II in 1660, the disbanding of the New Model Army, which had won the English civil war for Parliament, and the return of confiscated estates to the crown and to bishops, the liberal as well as the radical hopes of the civil wars seemed vanquished. Yet the debates that unfolded throughout the two periods of the English civil war were to inform subsequent debates over property and political rights. Not only did these early English civil war debates on property and voting rights anticipate future liberal tensions, they also heralded some of the radical dimensions of the nineteenth-century socialist critique of liberalism. Starting with Locke, forty years after the English civil wars, the Levellers' position was once again echoed during the relatively more conservative settlement of the 1688 Glorious Revolution.

Like the Levellers, Locke argued in 1689 that "everyman has a property in his person; this nobody has a right to but himself. The labor of his body and the work of his hand, we may say, are properly his."⁸⁴ In

**GERRARD WINSTANLEY, "A DECLARATION
FROM THE POOR OPPRESSED PEOPLE OF ENGLAND," 1649**

We whose names are subscribed, do in the name of all the poor oppressed people in England declare unto you, that call yourselves lords of manors, and lords of the land, that in regard the King of Righteousness, our Maker, hath enlightened our hearts so far as to see that the earth was so made purposely for you to be lords of it, and we to be your slaves, servants, and beggars; but it was made to be a common livelihood to all, without respect of persons; and that your buying and selling of land, and the fruits of it, one to another is the cursed thing, and was brought in by war; which hath and still does establish murder and theft in the hands of some branches of mankind over others, which is the greatest outward burden and unrighteous power that the Creation groans under. . . .

And while we are made to labour the earth together, with one consent willing mind; and while we are made free, that every one, friend and foe, shall enjoy the benefit of their creation, that is, to have food and raiment from the earth, their mother; and every one subject to give account of their thought, words and actions to none but to the one only Righteous Judge and Prince of Peace, the Spirit of Righteousness that dwells and that is now rising up to the rule in every creature, and in the whole globe.

From *Selections from His Works*, 44–45.

urging individuals not to spoil or waste God's creation and to leave enough for everyone's subsistence, Locke also voiced some of the more collectivist concerns expressed in the English civil wars. Further, he maintained that the rights to life and property were inalienable rights of nature that the state, to gain moral legitimacy, had to secure. Without spelling out how people's political voice would be heard in civil society—other than suggesting people's right to rebel if a government failed to respect its mandate—Locke offered innovative proposals to curb political abuses. By proposing a separation of powers (legislative, executive, and federative) based on a system of checks and balances, he developed a unique institutional model for safeguarding natural rights principles, principles that would inspire eighteenth-century European revolutionaries.

American revolutionaries enthusiastically modeled their new government according to ideas advanced by Locke, the Levellers, and Montesquieu, who owed his popularity to his lucid philosophizing about English institutions. What the American founding fathers took from the British, following Locke's *Second Treatise* (1690) and Montesquieu's *Spirit of Laws* (1748), was the idea of the division and the balancing of power. Indeed, the constitution clearly reflected the view that unless the three classes of governmental power—the legislative, the executive and the judicial—were separated, political freedom and the certainty of basic human rights would not be secured. In an atmosphere of protests against a centralized sovereign power, American revolutionaries developed a unique federal system by allocating power between central and local governments and drafting all constitutions so as to limit each level of government by means of a separation of powers.

Following Paine's impassioned condemnation of the British monarchy in *Common Sense*, they also rejected the English system of constitutional monarchy, which was identified with George III. Along with Paine, many expressed their dislike for special hereditary privileges, a position exemplified by the constitution of Massachusetts (and many other state constitutions), which affirmed that no government should be instituted "for the profit, honor or private interest of any one man, family or class of men."⁸⁵ Not only did the Declaration of Independence reject monarchy, it also called for the protection of inalienable rights, famously referring to the rights to life, liberty, and the pursuit of happiness. The same year it was signed, George Mason placed property rights in the first clause of the Virginia Declaration of Rights. In the spirit of Locke, the Virginia Declaration granted people the right "to institute a new government" should the state fail in its mandate to secure individual rights.

THE UNITED STATES DECLARATION OF INDEPENDENCE, 1776

When in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and, accordingly, all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government and to provide new guards for their future security. Such has been the patient sufferance of these colonies, and such is now the necessity which constrains them to alter their former systems of government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having, in direct object, the establishment of an absolute tyranny over these States. . . .

We, therefore, the representatives of the United States of America, in general Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by the authority of the good people of these colonies, solemnly publish and declare, that these united colonies are, and of right ought to be, free and independent states: that they are absolved from all allegiance to the British crown, and that all political connection between them and the state of Great Britain is, and ought to be, totally dissolved; and that, as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do. And, for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor.

This should not suggest that all state constitutions were fully egalitarian, as even the most liberal ended up providing advantages to the owners of property. That principle was expressed in some of the state constitutions that supported manhood suffrage for those who showed “sufficient evidence of attachment to the community.”⁸⁶ Even the most radical proponents of the revolution accepted that premise. Benjamin Franklin, presumably a staunch believer in the equality of all men, insisted that to allow those who had no land to vote in legislative elections was “an impropriety.”⁸⁷ Thomas Jefferson contended that suffrage should be extended to “everyman who fights or pays.”⁸⁸ James Madison voiced concern about the following dilemma: “[A]llow the right to vote exclusively to those with property, and the rights of persons may be oppressed. . . . Extend it equally to all, and the rights of property or the claims of justice may be overruled by a majority without property.”⁸⁹

The Constitutional Convention initially called for universal male suffrage but soon adopted, following Samuel Adams’s draft, a restriction on the franchise. Under the restriction, a white man was allowed to vote if he owned real estate worth £3 a year or real and personal property with a value of £60.⁹⁰ As a result, the voting constituency was far less than half of the adult male population.⁹¹ The property franchise was justified along the same lines as those advanced by advocates of the Parliamentary cause during the English civil war, namely that political freedom and public office holding would be best served by white independent men who were either free of material concerns or had property at stake. In some instances, the property franchise was fixed at a very considerable figure; in Massachusetts, for example, it was established at £1,000, in Maryland at £5,000, and in South Carolina at £10,000.⁹² These requirements were consistent with the political ascendancy of a propertied ruling elite that included rich governors and senators—all elected by the wealthy sector of the electorate.

Despite these conservative features of its outcome, the American Revolution inspired people to fight tyrannical regimes and to spread the human rights credo of an emerging liberal age. Constitutionalism, federalism, limited government, property and civic rights were not new ideas in Europe. John Adams (1735–1826), a great figure of the Continental Congress (1774–1777) and the second president of the United States (1797–1801), would later report that the American Revolution was “Locke, Sidney, Rousseau, and de Mably,” that is, the ideas of European philosophers put into practice. The American struggle for independence turned the human rights aspirations of the French into a tangible possi-

bility. As the news of the revolution spread in French salons, clubs, and the press, it began to stir members of the Third Estate, who felt increasingly frustrated by the political corruption and economic abuses of the *ancien régime*.

The fall of the Bastille opened the gates for the arrival of new civic rights, and the Declaration of the Rights of Man and of the Citizen hailed universal rights previously acclaimed by the Americans. Its article 7, for instance, stated that no one “may be deprived of property rights unless a legally established public necessity requires it and upon condition of a just and previous indemnity.” In reference to political freedom, it declared that “sovereignty resides essentially in the nation. . . . The law is the expression of the general will; all citizens have the right to contribute personally or through their representatives. . . . All citizens being equal before it, are equally admissible to all public offices, positions and employment according to their capacity, and without other distinction than that of virtues and talents” (articles 3 and 6).⁹³

These words initially suggested that in contrast to the American system, no property qualification would be required for political participation and manhood suffrage. Yet after having fought strenuously for the elimination of privileges granted to the nobility, Abbé de Sieyès (1748–1836) and other like-minded deputies found no inconsistency in favoring male taxpayers or property owners as the only eligible “active” voting citizens capable of holding public office. “All the inhabitants of a country should enjoy the right of a passive citizen . . . but those alone who contribute to the public establishment are like the true shareholders in the great social enterprise. They alone are the true active citizens, the true members of the association.”⁹⁴ With revolutionaries like Jacques Guillaume Thouret and Rabaut Saint Etienne, Sieyès presented a report that formed the basis for subsequent legislation on suffrage qualifications and office holding. Only three months after the French declaration of rights was issued, voting rights and public office holding were denied to passive citizens—including domestic servants, women, and all those who did not pay taxes equivalent to three days of labor. Invoking the principles of the declaration, Robespierre was among the few who protested the decree:

What sort of system is it in which an honest man, despoiled by an unjust oppressor, sinks into the class of the *helots* while his despoiler is raised by this very crime to the ranks of the citizens . . . in short, what is the worth of my much vaunted right to belong to the sovereign body if the assessor of taxes has the power to deprive me of it by reducing my contribution by

a cent if it is subject at once to the caprice of man and the inconsistency of fortune?⁹⁵

Although the property-based franchise was set at a lower threshold than the one adopted in the United States, it reflected the liberal and bourgeois character of the initial phase of the French Revolution. Revolutionaries such as Abbé de Sieyès, Marquis de Lafayette (1757–1834), Georges Danton (1759–1794), Pierre-Joseph Cambon (1756–1820), and François-Antoine Boissy d'Anglas (1756–1826) were all proponents of a rapid expansion of commerce and the unrestricted accumulation of property. They opposed supporters of the popular class, like Robespierre and Louis de Saint-Just (1767–1794), who were associated with the more radical phase of the French Revolution. Robespierre had warned the Jacobins to limit the free accumulation of wealth. The right to property, he insisted, should not be permitted to infringe upon the rights of others, in particular those of the poorer citizens: the sansculottes (the urban popular class) and the peasantry. He also proposed a progressive tax on incomes and the drawing of a clear distinction between property rights justly and unjustly exercised; only the former type, he believed, should be protected by the state. His views, however, were defeated and omitted from the constitution of 1793, and the property qualification was maintained.⁹⁶

This decision reflected the eighteenth century's endorsement of property as a right and voting as a male privilege to be earned. It also illustrated the tension of a bourgeois consciousness torn between self-interest and a humanistic opposition to feudalism and self-interest. J. A. Pocock aptly remarks that the social thought of the eighteenth century can be envisaged as a single momentous quarrel oscillating between the worldwide compassion of Roman patriotism and the particularism of private investors. The Enlightenment's inability to reconcile economic and political rights sharpened domestic social divisions that would later be further intensified by the rise of the nineteenth-century labor movement.

The notion of property, recognized as an inalienable right by the UN Universal Declaration of Human Rights, the American Convention on Human Rights (article 2), and the African Charter on Human and Peoples' Rights (article 14), would remain a point of contention among the participating members of the UN. For instance, soon after the establishment of the UN, the Soviet Union rejected article 17 of the Universal Declaration, insisting that large units of property should be in the hands of the state (see chapters 3 and 4). Meanwhile, the question of

how to implement liberal rights internationally added another source of division to the human rights debate as conflicting views on that question further shaped the developing liberal character of human rights.

THE STATE AND JUST-WAR THEORY

The Enlightenment's vision of human rights stipulated that rights to property, religious freedom, and life needed to be protected by the state not only against aggressive individuals, but also against predatory states. Today, as during the Enlightenment, the state is both admired as an efficient vehicle for promoting human rights and feared for its potential to abuse those rights, especially during wartime. Italian interstate conflicts in the fourteenth century had already prompted lawyers like Bartolo de Sassoferrato (1314–1357) and Baldo degli Ubaldi (1327–1400) to address the proper wartime conduct of states. Their doctrines became influential in Spain, Portugal, and Germany. Machiavelli, in the fifteenth century, further elaborated guidelines aimed at tempering conflicts over the unification of Italy. The Dominican friar Francisco de Vitorio (1485–1546) joined the critical chorus, condemning in the sixteenth century the conquests and colonial policies of the Spanish empire and defending the rights of non-Christians and American natives, thereby becoming the founder of the Spanish school of international law.⁹⁷

Throughout Europe, the wars of the Reformation intensified debates over the international application of natural law and highlighted the role and responsibility of states as central actors in the world community. Mercantilists looked to the state as the best vehicle to promote their interests and pursue their economic ventures. At the same time, the state, rather than the supranational authority of the Catholic Commonwealth, was also envisioned as the most efficient vehicle for the advancement of human rights norms—norms consistent with religious tolerance and mercantilist pursuits. “Just wars” were thus rationalized accordingly.

The German publicist and jurist Samuel Pufendorf (1632–1694), the English scholar and jurist Richard Zouche (1590–1661), the Swiss jurist Emmerich de Vattel (1714–1767), and the Dutch legal scholar Hugo Grotius were major participants in the debates over just war.⁹⁸ Each offered advice to state leaders, finding in Islam and medieval Catholic scholasticism important contributions to this question.⁹⁹ Because of the growing importance of the nation-state, they also pledged loyalty to the mercantilist state, which they viewed as an important mechanism for waging just wars and promoting peace and human rights. Their views, above

all, captured a period in transition between the medieval system of international law and the birth of the modern international system, between a system established under the control of the Roman papacy and the emperor and one based on state sovereignties as sanctioned by the Treaty of Westphalia.

No one was better able than Hugo Grotius, one of the most influential legal thinkers of his time, to imagine the changes of the time and new possibilities for international cooperation. To mitigate the occurrence and the effects of the wars that plagued his epoch, he called on heads of states to restrain violence for reasons of humanity and freedom of religion. State leaders, he argued, along with others, needed first to avail themselves of negotiations and diplomacy. If military action was inevitable, he insisted that it needed to be both tempered and used only for the right reasons. Natural law instructed leaders on whether and how to initiate a just war and provided guidelines consistent with the prevailing spirit of mercantilism and free enterprise. With Pufendorf and other legal theorists, Grotius defined just wars as wars waged for defense, recovery of property, and punishment of the unjust.¹⁰⁰ Preventive war undertaken because of fear of an imminent attack, he added, was also legitimate. Which types of war were then forbidden according to natural law? Those infringing upon natural law principles, namely, wars for the appropriation of others' property, wars that subjugated "any people by force on the grounds that they deserved to be slaves," wars aimed at repressing religious differences, and wars driven by expediency rather than necessity.¹⁰¹

Retaining many of Grotius's teachings, Pufendorf partly disagreed with his Dutch counterpart, asserting, "[F]ear alone does not suffice as a just reason for war, unless we determine with a morally evident certitude that there is an intention to hurt us."¹⁰² Customary laws, Pufendorf further elaborated, needed to be adopted by states intervening on behalf of a third party:

It is obvious that people wage war not only on their own behalf, but often on the behalf of others. But for this to be done rightly, a just cause for warring is required, at least in the one who is being assisted. In the one who is going to render aid to the other, however, there should be some special bond by which he is connected to the chief belligerent, one that makes it appropriate for him, in order to meet his obligation to one man, to treat another who is equally a man in a hostile fashion.¹⁰³

At first glance, Pufendorf's notion of a "special bond" is evasive and seems to contrast with his initial insistence on the need for clear criteria

before waging preventive war. Indeed, an unqualified notion of a “special bond” could indulge a third party’s whimsical preferences by encouraging that party to act only when its perceived national self-interest was at stake and exempting it from acting on humanitarian grounds. Reflecting his epoch’s preoccupation with curtailing the strong authority of the Catholic commonwealth, Pufendorf’s views also illustrate growing sentiments favoring the sovereignty of nation-states in intervention and other matters.

That concern was deemed so important that neither Grotius, Vattel, Pufendorf, Christian von Wolff (1679–1754), nor any other Enlightenment humanist thinker advanced the idea of a supranational state reminiscent of papal or imperial dominion. If anything, the natural law among nations was characterized by its advisory nature: it informed nations of their mutual advantages and the range of actions that were “permissible” if they were to abide by the rule of nature and reason. “The law of nations,” Grotius commented, “derive[s] its authority from the consent of all, or at least of many nations. It was proper to add MANY, because scarce any right can be found common to all nations, except the law of nature, which itself too is generally called the law of nations. Nay, frequently in one part of the world, that is held for the law of the nations, which is not so in another.”¹⁰⁴ The law of nature encouraged cooperative behavior among nations but rejected the idea that the state ought to be subjugated to a supranational power. Referring to the example of the Roman province, Grotius asserted, “For those nations are not sovereign states of themselves, in the present acceptation of the word; but are subordinate members of a great state, as slaves are members of a household.”¹⁰⁵

Such a statement resulted in the commonly held belief that natural law could be secured by strong states without any need for authoritative supranational political structures. This view also grew out of the concomitant historical development of human rights norms and mercantilism. Mercantilism required a strong state to launch trade expeditions overseas, yet it also needed new international norms of cooperation to prevent wars and other possible obstructions to the free flow of goods. If the seventeenth century united the interest of the mercantile nobility and that of merchants, by the eighteenth century such an alliance was questioned. For members of the rising middle class, state mercantilism would prove to be too restrictive both domestically, where they were excluded from the political process, and internationally, where the weak political leverage of property owners undercut opportunities for trade.

The towering Scottish economist Adam Smith (1723–1790) formulated best the principles of this new economic challenge. Against the monopolistic nature of both feudalism and mercantilism, Smith saw in the pursuit of individual self-interest the possibility of an unimpeded development of the common good. In a concept he introduced in *The Theory of Moral Sentiments* (1759) and developed in the *Wealth of Nations* (1776), Smith depicted self-seeking individuals as being led by “an invisible hand . . . [that] without knowing it, without intending it, [serves to] advance the interest of the society.”¹⁰⁶ The system of perfect liberty, he asserted in his 1776 masterpiece, must operate according to the drives and constraints of human nature as channeled by intelligently tailored institutions.¹⁰⁷ Should such institutions ensure free economic competition, the individual’s constant drive for self-improvement, pitted against others driven by the same competitive urge, would maximize the prosperity of the entire society.

Reviewing four main historical stages of political organization—the age of hunters, nomadic agriculture, feudal or manorial farming, and commercial interdependence—Smith concluded that the final stage represented the highest form of individual liberty. Insightfully, he observed that a civil government established for the purpose of protecting property rights “is in reality instituted for the defense of the rich against the poor, or of those who have property against those who have none at all.”¹⁰⁸ Yet the forces of the market, he explained, constituted a mechanism that would drive the prices of commodities down to their “natural” and most affordable level, despite short-term aberrations and inequality. Praising a guild-free wage and private ownership rather than government-constrained enterprises, he introduced the case for what would become known as laissez-faire capitalism.¹⁰⁹

Left largely unexplored by Smith, however, was the question of which form of government was best suited to ensuring free markets. In the second half of the seventeenth century and throughout the eighteenth century, many visionaries viewed a republican regime as the best way to promote laissez-faire policies and peace between nations and to ensure liberal rights domestically. Cromwell and Lilburne had justified the pursuit of an English revolutionary war on behalf of a British republic, but it was with Jean-Jacques Rousseau that the concept of the nation-state, justified by his theory of the social contract, was substantially broadened. Rousseau went beyond Hobbes’s notion that the state should be protective yet authoritarian, and further than Locke’s view of a minimal liberal state ratified by a social contract of atomistic individuals. The state

had a different task, insisted Rousseau. It needed to be identified with people's will, or the *volonté générale* (the general will), an organic entity that transcended the sum total of the individuals who comprised it. In the state, individuals were not merely securing the rights they acquired in the state of nature but were creating a new entity, one committed to the common welfare. Later joined by revolutionaries and illuminati like Jefferson, Paine, Robespierre, and Kant, Rousseau advanced the idea that inequitable and unrepresentative states were by nature the basis of global disorder. It was only by means of just political institutions that the rights of a citizen could blossom and war would disappear.

What would promote the development of such political institutions? The spread of commerce would encourage republicanism, argued Paine. By rendering individuals as well as nations useful to one another, the necessity for war would be eclipsed. "If commerce were permitted to act to the universal extent it is capable," Paine explained, "it would extirpate the system of war, and produce a revolution in the uncivilized state of Governments. The invention of commerce has arisen since those Governments began, and it is the greatest approach towards universal civilization that has been made by any means not immediately flowing from moral principles."¹¹⁰ The principle of republicanism, now linked with the spirit of laissez-faire, was widely viewed as a panacea against the outbreak of wars. Echoing Paine, Kant remarked that "civil freedom could no longer be infringed without disadvantage to all trades and industries, and especially to commerce," and vice versa.¹¹¹ That view, essentially unchanged since its eighteenth-century origins, would find expression in the post–cold war foreign policy doctrine of the world's only superpower, which linked world peace to the synergetic expansion of markets and democracy.

Yet not everyone was so optimistic about the widely accepted affinity between commerce and human rights. Rousseau had warned the Polish and Corsican governments that commerce bred inequity and war. In the tradition of the French Physiocrats, Rousseau, like François Quesnay (1694–1774), instead favored representative states based on self-sufficient agrarian economies.¹¹² "Leave all the money to others," . . . [f]arm well your fields without worrying about the rest . . . financial systems produce venal souls," wrote Rousseau, pointing to the possible flaws of a human rights vision predicated solely on commercial transactions, a view later shared by Jefferson and Robespierre.¹¹³ Whether capitalism should be applied solely to agriculture, as the Physiocrats suggested, or to commerce, as Smith argued in repudiating the Physiocrats' belief system, all

of the sympathizers of the revolutions agreed on a central point: republican institutions were the only way to promote peace and human rights.

Should a republican supranational entity be instituted to force aggressive states to enter the civilized world community? With the exception of Kant, no supporters of the French Revolution were willing to endorse such an option. In *Abridgement of the Project for Perpetual Peace* (1713), the French publicist and reformist Abbé Charles de Saint-Pierre (1658–1743), following Henry IV's idea of a “grand design plan,” proposed the establishment of a European confederation that would name a permanent, indissoluble arbitration council to solve disputes between states and even stipulated that the council's arbitration would be binding.¹¹⁴ Yet as Rousseau argued in his *Judgement on Perpetual Peace* (1756), the development of international harmony and rights could never be achieved by self-serving princes and monarchical regimes. Sympathetic to the objectives of the world federation proposed by Saint-Pierre, he nevertheless remained skeptical about its viability and deplored the repressive tendencies of big governmental institutions that were sure to be manifest in such a supranational behemoth.¹¹⁵

Addressing part of Rousseau's concerns, and loyal to the spirit of the categorical imperative that invited individuals “to act according to principles which can be adopted at the same time as universal law,” Kant further explored the idea of a cosmopolitan confederation premised on republican states.¹¹⁶ He suggested that since individuals had relinquished their “lawless freedom” for their own good upon entering the republican state, the state now needed to surrender some of its “lawless freedom” for the sake of global welfare. The “general will,” he insisted, could only exist peacefully as long as each state recognized an authority above itself. In an effort to develop accountable domestic and international institutions for securing human rights, he envisioned that

[t]here shall be no war, either between individual human beings in the state of nature, or between separate states, which, although internally law-governed, still live in a lawless condition in their external relationships with one another. . . . [W]e must simply act as if it could really come about (which is perhaps impossible), and turn our efforts towards realising it and towards establishing that constitution which seems most suitable for this purpose (perhaps that of republicanism in all states, individually and collectively).¹¹⁷

Whereas most intellectuals and politicians remained unconvinced, at the end of the eighteenth century, that such a confederation of states was feasible, many agreed with Kant and Paine that republicanism and some

version of laissez-faire would favor peace. If, while constructing this republican and laissez-faire order, war had become a necessity to eradicate the vestige of the old regimes, then the eighteenth century needed to redefine the seventeenth century's contribution to just-war theory. Indeed, though condemned in principle, revolutionary wars were now deemed just so long as they promoted property rights for all, laissez-faire economic policies, and republicanism.

In the 1770s, there was seldom disagreement among supporters of republicanism over the justice of a revolutionary war to redress American rights usurped by the British. At one end of the spectrum, revolutionaries like John Dickenson (1732–1808) continued to praise the king while calling for some form of resistance. At the other end of the spectrum were defenses of the people's right to change the government at any time. As one speaker at the annual orations in colonial Boston expressed it, civil liberty is “a power existing in the people at large, at any time, for any cause, . . . to alter or annihilate both the mode and essence of any government and adopt a new one in its stead.”¹¹⁸ The Declaration of Independence ultimately advanced a relatively more moderate position on the justifications of revolutionary change: “Whenever any form of government becomes destructive of these ends [life, liberty, and property], it is the right of the people to alter or to abolish it, and to institute new government, laying its foundations on such principles and organizing its power in such form, as shall seem most likely to affect their safety and happiness.”¹¹⁹ Although America did not use the sword to spread its revolutionary message beyond its natural frontiers, its example inspired others to take up arms against tyranny.

Soon after the fall of the Bastille, French revolutionaries found themselves facing troops sent by foreign dynasties that feared the diffusion of human rights ideas beyond the newly established French *patrie*. Drafted in a *levée en masse*, French soldiers of the new patriotic army saw themselves as the liberators of Europe. “O! Ye Austrians, ye Prussians!” wrote Paine in his address to the people of France, “ye who turn your bayonets against us, it is for you, it is for all Europe, it is for all mankind, and not for France alone that she raises the standard of liberty and equality.”¹²⁰ Robespierre defined the objectives of the French revolutionary wars in similar terms:

We wish an order of things . . . where distinctions arise only from equality itself; . . . where industry is an adornment to the liberty that ennobles it, and commerce the source of public wealth, not simply of monstrous riches for a few families. . . . May France stand for the glory of all people, fight

the terror of oppressors, console the oppressed, become the ornament of the universe; and in sealing our work with our blood may we see at last the dawn of universal felicity gleam before us. This is our ambition, this is our aim.¹²¹

The credo of the Declaration of the Rights of Man and of the Citizen, invoking the vision of universal felicity, justified the wars against the enemies of the French revolutionaries. With counterrevolutionary forces on the rise at home and abroad, Robespierre even called for the institution of a strong centralized government: “The object of constitutional government,” he explained, “is to preserve the Republic; the object of the revolutionary government is to establish it.”¹²² If centralism could be depicted as essential for warding off the enemies of the revolution, it would be less easy to rationalize the creation of an expedient judiciary machine during the last phase (1793–1794) of the French Revolution, a vehicle for killing many less radical revolutionaries like Danton or the feminist Olympe de Gouge (1748–1793).

Was Saturn now eating his own children? asked Danton before his execution. It might have been the similar use of violence on behalf of a revolutionary cause in the early nineteenth century that prompted the Spanish painter Goya to paint with disturbing sensationalism a fear-crazed old man, Saturn, driven by the blind instinct of self-preservation, eating one of his children (1821). The revolutionary excesses carried out during the Red Terror and its aftermath begged crucial questions: Which means are justified to promote human rights? Do all means justify their human rights goals? These questions would be widely debated within the socialist movement in the nineteenth and twentieth centuries. In the late eighteenth century, however, violence and war were generally accepted as means of last resort for implementing republican ideals—with the assumption that once republics were established worldwide, wars would vanish. Would revolutionary wars, however, in fact lead to a world federation that would secure the rights upheld domestically by new republican regimes? Even Kant, the only defender of a confederation of republican states, remained conflicted on that question. On the one hand, he saluted the French Revolution “as a moral predisposition within the human race.”¹²³ On the other hand, consistent with his central belief in the supremacy of individual life, he denounced “any uprising that bursts into rebellion . . . [as] the worst punishable crime in a community.”¹²⁴ It is left unclear from Kant’s statements how France could have fought against despotism except through resistance to authority, rebellion, the

breach of agreements, killings, or interference with the internal affairs of the enemy's country—recourses that were all condemned by Kant.¹²⁵

Nevertheless, if Kant was unique in trying to grapple with the problem of ends and means, his inconsistency on how to promote human rights was in fact symptomatic of his era. Many revolutionaries were unclear about how to proceed with a just-war strategy. For instance, no one asked at what point in the revolutionary war process republicanism and commerce would triumph, or what the acceptable extent was to which violence could be used to save the revolution. These incongruities and omissions were born in the tumult of an uncertain age that lacked historical precedents for a democratic revolutionary struggle. Yet the eighteenth century's standards nevertheless offered an important contribution to the human rights debates over means of implementation. The eighteenth century revisited the seventeenth century's criteria for just wars—that is, those waged for self-defense, the recovery of property, and freedom of religion—by considering legitimate the right to wage wars to establish a more inclusive republican sovereignty and to promote republican ideals.

The late Enlightenment's preference for laissez-faire economics over a supranational authority as central to the spread of republican ideals and peace is still shared by many Western politicians. Despite increased international recognition of human rights today, nothing contained in the UN charter authorizes “the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state” (article 2). Nevertheless, recent inconsistent humanitarian justifications for military interventions reflect continued liberal ambivalence about loyalty to the national interest versus solidarity with an international authority predicated on human rights. Both during the Enlightenment and today, this dual allegiance has contributed to the perpetuation of a double standard of moral behavior in which various appeals to human rights obligations remain subordinated to “the national interest.”

HUMAN RIGHTS FOR WHOM?

In addition to being characterized by such conflicts over means and ends, the eighteenth century universal liberal agenda was undermined by another set of concerns over who would be the primary beneficiaries of human rights. Unquestionably, the social conditions of many improved during the Enlightenment. The struggle for the right to life, freedom of religion and opinion, and property rights broke the back of feudal regimes

and transformed humankind's prospects for realizing human rights. Despite the Enlightenment's critical contribution to the development of the modern human rights agenda, the revolutions of the mid-seventeenth and eighteenth centuries remained incomplete. Many individuals were still considered ineligible to be entrusted with all the freedoms invoked by the English, American, and French declarations of rights. Propertyless male citizens and all women were considered secondary or passive citizens and denied voting rights and political participation; women's legal status continued to be subjugated to the authority of their husbands; with rare exceptions, slavery persisted; the rights of indigenous populations within European colonies were violated; in many places, homosexuality was still regarded as a criminal act; the civil rights of Jews continued to be denied even in revolutionary countries; and finally, despite the pledge of the French revolutionary army to liberate all European nationalities, their lack of political freedom remained unchanged under Napoleon's continental system.

As the drama of revolutionary upheavals unfolded, the Enlightenment era gradually revealed the limits of its universal promise of rights. The English civil war might have coincided with the development of fundamental rights (i.e., the right to life, freedom of opinion, and property), but those rights were not extended to everyone. The emergence of radical groups like the British agrarian communists the Diggers, who strove to be recognized as full-fledged citizens under the British sky, attested to the exclusive character of the revolution; their hopes for civil equality were soon thwarted by the political ascendancy of men of property. The Diggers' disillusionment with the revolutionary process was well described by Gerrard Winstanley: "[S]ome of your great offices, . . . told me that we Diggers took away other men's property from them by digging upon the common; yet they have taken mine and other men's property of money (got by honest labour) in taxes and free quarter to advance themselves, and not allowed us what they promised us; for it [is] this beam in their own eyes they cannot see."¹²⁶

Similar sentiments against the inequitable resolution of the American Revolution were expressed by Thomas Jefferson, who complained in 1785 that "the property of this country is absolutely concentrated in a very few hands."¹²⁷ More consequential outrage was expressed by the 1786–1787 Shay's Rebellion in western Massachusetts. Rebuffed after an appeal to the state legislature for relief, debt-ridden farmers organized a rebellion under the leadership of Daniel Shay (1747–1825). The rebels argued that the state legislature was in the hands of the wealthy

and was being used for their benefit. Growing support for the rebellion worried many in the upper classes in other states. Their concerns were ultimately allayed when the federal arsenal crushed the rebellion. As a result of the rebellion, however, the Massachusetts legislature enacted laws easing the economic condition of debtors.¹²⁸

Similar popular disillusionment over the consolidation of power by French propertied men could be observed in revolutionary France. Robespierre's proposal to limit the accumulation of wealth and grant every man the right to vote was rejected by the French National Assembly. Economically disadvantaged and politically disempowered, members of the Fourth Estate—the peasantry and the sansculottes—were not able to bridge the growing economic gap between themselves and the wealthier sector of the population. Though they were briefly in power, their radical agenda did not outlast Robespierre's revolutionary government and was superseded (in 1794) by the Thermidorian reaction. The Thermidorians wanted to guarantee the social preeminence and political authority of the bourgeoisie within the liberal regime. With Thermidor, the progressive forces of the Enlightenment era were in retreat, challenged by the interests of a greedy commercial class.

By casting aside dated customs and old economic structures, the emerging commercial age had initially infused women with new emancipatory hopes. "With every great revolutionary movement," observed Friedrich Engels, "the question of free love came into the foreground."¹²⁹ Coinciding with the advent of Protestantism, sexual revolutionaries argued that a monogamous partnership based on mutual love should replace arranged marriage. Theoretically, a single moral standard would now have to be applied to both sexes.¹³⁰ This prospect unleashed radical speculations by Milton, who, with the clergyman Hugh Peters (1598–1660) and Ms. Attaway, defended the freedom to divorce. The essayist and playwright Francis Osborne (1593–1659) entertained even more daring propositions by celebrating polygamy and annually renewable marriage contracts, and the novelist Henry Neville (1620–1694) depicted a cheerful polygamous utopia in the *Island of the Pines* (1668).¹³¹

In reality, these assaults on conventional thinking were ephemeral, soon supplanted by a conservative backlash that defended the inequality of the sexes and a strict division of labor between men and women. Although the social condition of Englishwomen was better than that of most women in other parts of Europe, their legal position remained inferior to that of men. They were, for instance, subjected to different forms of punishment than were men, for the same offense. They were not al-

lowed to sit on the same bench as their husbands when in church and were often subjected to beatings.¹³² Some contract theorists, such as Pufendorf, Hobbes, and Locke, had recognized some form of women's equality in the hypothetical state of nature, but none entertained such ideas when considering women's status in civil society. Women, they assumed, would consent to their husbands or male political authorities in exchange for protection once they entered a conjugal or a social contract.¹³³ At the turn of the seventeenth century, a British feminist writer, Mary Astell (1666–1731), highlighted her era's double standard, comparing the limits placed on the power of sovereigns with the almost limitless power of husbands over wives. Sarcastically, she asked, "If the authority of the husband, so far as it extends, is sacred and inalienable, why not that of the Prince?"¹³⁴

Her concerns were echoed throughout the eighteenth century. In 1775, Thomas Paine deplored the plight of women in the *Pennsylvania Magazine*: "Society, instead of alleviating [women's] condition, is to them the source of new miseries."¹³⁵ Abigail Adams (1744–1818) suggested in a famous letter to her husband John, "Remember the Ladies" (1776), that he be more generous than his ancestors as he helped orchestrate America's independence from Great Britain. She warned him not to grant husbands unlimited power over their wives: "Remember all men would be tyrants if they could." Despite her warning that women were determined to foment a rebellion if they had no political voice, John Adams scornfully rebuffed her request, asserting that "we know better than to repeal our Masculine systems."¹³⁶ Confirming this position, the constitution avoided mentioning women, that is, one-half of the population under its jurisdiction.

The French Declaration of the Rights of Man and of the Citizen, like the American constitution, excluded women from political participation. With the hope of converting Queen Marie-Antoinette to the women's cause, the French pamphleteer and playwright Olympe de Gouge, echoing the views of the French philosopher the Marquis de Condorcet (1743–1794) and Etta Palm d'Aelders (1743–?), wrote a Declaration of the Rights of Women in 1791. In it, she called for respect for women's natural rights as equal to the rights of male citizens outlined in the 1789 declaration. Writing in a time which still viewed women as passive citizens, dependent socially and economically on the male sex, she added a special proviso to protect women from plights specific to their gender. Her declaration included the right to have one's children recognized by their fathers and various other protections for unmarried women to be

provided by the state.¹³⁷ Invigorated by the militancy of the French-women, the English writer Mary Wollstonecraft (1759–1797), in her *Vindication of the Rights of Woman* (1792), made a similarly passionate and insightful plea for women's education combined with social and political equality.¹³⁸

French law was not changed in response to the important role women had assumed in the revolutionary process. While they were active in popular assemblies, galleries, and clubs, and even risked their lives in the battle to save the revolution, women were nonetheless denied the full rights of citizens. Their dual role was justified by Louis-Marie Prudhomme (1752–1832) who, without scruple, urged Frenchwomen of all ages and all stations to arm themselves with burning torches for the sake of the revolution, but who continued, “[o]nce the country is purged of all these hired brigands, we will see you return to your dwellings to take up once again the accustomed yoke of domestic duties.”¹³⁹ In the final stage of the French Revolution, women's opportunities were further curtailed. French deputies like Philippe Fabre d'Eglantine (1750–1794), Jean-Baptiste Amar (1755–1816), and Pierre Gaspard Chaumette (1763–1794) decided that organized women's activities, including women's involvement in political associations, were threatening, and forbade their existence.¹⁴⁰ With the Thermidor, and later with the establishment of the Napoleonic Code, women's hopes of emancipation were crushed.

While women and propertyless individuals remained at the margin of English, American, and French societies, France advanced considerably the status of homosexuals, slaves, and Jews.¹⁴¹ At the beginning of the revolution, the death penalty was removed for all sexual crimes. With the revision of the criminal codes under Napoleon, homosexuals were granted the same rights as other citizens. To be more specific, the codes now left unpunished any sexual activity occurring in private between consenting adults (whether between women, men, or men and women), as long as their actions were not the subject of public indecency. The French legislated for the first time in favor of sexual privacy, while sexual freedom remained severely restricted in the English and American penal books (although prosecutions of sodomy or “acts against nature” were rare).¹⁴²

On the issue of slavery, Montesquieu's work *L'esprit des lois* was a pivotal contribution to the abolitionist cause. It influenced many other French revolutionaries, like the constitutional monarchist the Comte de Mirabeau (1749–1791) and Lafayette, as well as members of the 1788 Black Friends Association, which supported the emancipation of slaves.

OLYMPIE DE GOUGE, THE DECLARATION OF THE RIGHTS OF WOMAN, 1790

. . . Mothers, daughters, sisters [and] representatives of the nation demand to be constituted into a national assembly. Believing that ignorance, omission, or scorn for the rights of woman are the only cause of public misfortunes and of the corruption of governments, [the women] have resolved to set forth in a solemn declaration the natural inalienable and sacred rights of woman in order that this declaration constantly exposed before all the members of the society, will ceaselessly remind them of their rights and duties; in order that the authoritative acts of women and the authoritative acts of men may be at any moment compared with and respectful of the purpose of all political institutions and in order that citizens' demands, henceforth based on simple and incontestable principles, will always support the constitution, good morals, and the happiness of all. Consequently, the sex that is as superior in beauty as it is in courage during the sufferings of maternity recognizes and declares in the presence and under the auspices of the Supreme Being, the following Rights of Woman and of Female Citizens. . . .

Article I. Woman is born free and lives equal to man in her rights. Social distinctions can be based only on the common utility.

Article II. The purpose of any political association is the conservation of the natural and imprescriptible rights of woman and man; these rights are liberty, property, security, and especially resistance to oppression. . . .

Article VI. The law must be the expression of the general will; all female and male citizens must contribute either personally or through their representatives to its formation; it must be the same for all: male and female citizens, being equal in the eyes of the law, must be equally admitted to all honors, positions, and public employment according to their capacity and without other distinctions besides those of their virtues and talents. . . .

Article XI. The free communication of thoughts and opinions is one of the most precious rights of woman, since that liberty assures the recognition of children by their fathers. Any female citizen thus may say freely, I am the mother of a child which belongs to you, without being forced by a barbarous prejudice to hide the truth; [an exception may be made] to respond to the abuse of this liberty in cases determined by the law. . . .

Article XIII. For the support of the public force and the expenses of administration, the contributions of woman and man are equal; she shares all the duties [*corvées*] and all the painful tasks; therefore, she must have the same share in the distribution of positions, employment, offices, honors, and jobs [*industrie*]. . . .

Article XVII. Property belongs to both sexes whether united or separate; for each it is an inviolable and sacred right; no one can be deprived of it, since it is the true patrimony of nature, unless the legally determined public need obviously dictates it, and then only with a just and prior indemnity. . . .

Nevertheless, the fear that the eradication of the slave system would contribute to the decline of French national wealth silenced many initial sympathizers. Slavery and the slave trade, essential to the maintenance of colonial plantations, thus remained in place for the next five years.¹⁴³ Vincent Ogé, a young representative of the Assembly of the Colonists, went to Paris in 1789 to press mulatto claims for equal civil and political status on the grounds that mulattoes were men of property and slave owners. His plea was rejected.¹⁴⁴ Yet Robespierre, along with the parish priests and revolutionary sympathizers Abbé Grégoire (1750–1831) and Abbé Raynal (1713–1796) went further, decrying the lot of slaves in the colonies. Their efforts were countered by individuals like Antoine Barnave (1761–1793), a lawyer for the city of Grenoble and a central figure in the French National Assembly, who unscrupulously warned his audience against abolition. “Abandon the colonies,” he said on behalf of the Colonial Committee, “and the sources of prosperity will disappear.”¹⁴⁵ With the spread of slave rebellions in the 1790s in Saint Domingue (now the Dominican Republic), Haiti, Guadeloupe, and Martinique, the Committee of Public Safety¹⁴⁶ finally adopted, at the National Convention on February 4, 1794, a decree abolishing slavery. Yet the taste of emancipation enjoyed by former slaves soured eight years later, in 1802, when Napoleon restored colonial slavery.

The British, who abolished the slave trade in their colonies in 1807,

ENTRY FOR NEGRO IN ENCYCLOPAEDIA BRITANNICA, 1798

Negro, *Homo pelli nigra*, a name given to a variety of the human species, who are entirely black, are found in the Torrid Zone, especially in that part of Africa which lies within the tropics. In the complexion of negroes we meet with various shades; but they likewise differ far from other men in all the features of their face. Round cheeks, high cheek-bones, a forehead somewhat elevated, a short, broad, flat nose, thick lips, small ears, ugliness, and irregularity of shape, characterize their external appearance. The negro women have their loins greatly depressed, and very large buttocks, which give the back the shape of a saddle. Vices the most notorious seem to be the portion of this unhappy race: idleness, treachery, revenge, cruelty, impudence, stealing, lying, profanity, debauchery, nastiness and intemperance, are said to have extinguished the principles of natural law, and to have silenced the reproofs of conscience. They are strangers to every sentiment of compassion, and are an awful example of the corruption of man when left to himself.

From *Encyclopaedia Britannica, or a Dictionary of Arts, Sciences and Miscellaneous Literature*, 3d ed. (Edinburgh: A. Bell and C. Macfarquhar, 1798). (Modeled on *La grande encyclopédie*.)

were nonetheless influenced by the early French revolutionary example. In North America, however, abolitionist efforts were less successful as Thomas Paine's passionate denunciation of the African slave trade in 1775 was rejected.¹⁴⁷ Although he kept slaves on his estate, Jefferson shared some of Paine's discomfort, and in 1782 called for the abolition of slavery and for respect for Indians.¹⁴⁸ Nonetheless, the interests of slave owners on the Southern plantations prevailed in the constitution. Indeed, articles 1 and 4 perpetuated slavery and, with a perverse mathematical logic, called for counting each black and mulatto as three-fifths of a person; Article 1 also excluded Native Americans from apportionment for representation.¹⁴⁹

Despite the limitations described above, France carried the torch of freedom further than any other country. It was the first country to free slaves, decriminalize homosexual activity, and emancipate Jews. The Declaration of the Rights of Man and of the Citizen had proclaimed freedom of religion and opinion, yet it was initially unclear whether Jews would qualify as citizens. The Prince de Broglie (1756–1794), an officer from Colmar, spoke against the idea, arguing that the Jews' "present existence can be regarded as a great misfortune for [the Alsace] province." Blaming Jews for lending enormous sums of money, he called for denying them the title and rights of citizen.¹⁵⁰ The Bishop of Nancy, La Fare (1752–1829), joined the anti-Semitic chorus by stating that Jews were foreigners and should not be allowed to enjoy rights held by the French people.¹⁵¹ Yet after tumultuous discussions of the rights of the Jewish communities, a deputy of the National Assembly, Adrien Jean Francois Duport, proposed a daring motion that would finally admit Jews as equal citizens of the republic. The motion passed on September 27, 1791.¹⁵² The French decision was soon emulated in Holland, Germany, Austria, Hungary, and England.¹⁵³

Granting minority rights and freeing all repressed nationalities throughout Europe was part of the French revolutionary agenda.¹⁵⁴ With the decree of November 19, 1792, the Constituent Assembly declared "in the name of the French nation [the decree] will bring fraternity to all people wishing to recover their liberty."¹⁵⁵ Revolutionary principles as celebrated by the French began to spread through all of Europe, not only through "wars of liberation," but also through well-organized local minority groups who had been influenced by French republican ideals. In the most despotically governed countries of eastern Europe, such as Hungary, political unrest took the form of conspiracies. In England and Prus-

sia, Jacobin clubs, such as the London Corresponding Society and the Wednesday Society, proliferated.

By 1807, French armies under Napoleon Bonaparte had swept across Europe. Napoleon now organized a continental system to unite Europe and cripple Britain by cutting off its trade.¹⁵⁶ The system attempted to organize the economy of continental Europe with France as its center. It promulgated an internationalist human rights ideology that presupposed the consent of the European peoples to a new era of republican governance. European Jacobins initially regarded Napoleon as their liberator. He spoke repeatedly of the Enlightenment and urged all people to work with him against the medievalism, feudalism, ignorance, and obscurantism still prevailing in Europe. Hopes were high that France would continue to champion the principles of liberty and equality, and that Napoleon, whose victories spread these principles abroad, was the “man of destiny,” what Hegel called “the world spirit on a white horse.” For the continental bourgeoisie, The Declaration of the Rights of Man and of the Citizen became the charter of a new world, the constitution of a universal society that Europe should exemplify.

The rhetoric of a French crusade to liberate enslaved people, however, was soon swept aside in Napoleon’s policies, as the deeds of the liberator began to resemble the play of old-fashioned power politics. The united European flag, which Napoleon brandished during the “wars of liberation” against absolutist regimes, served mainly to increase France’s economic power and national prestige at the expense of its allies. Indeed, national emancipation was not really granted to Jacobins outside of France. The unification of Italy, for instance, may have been implied by the creation of the Italian kingdom, but the new state was promptly truncated by the French annexation of one-third of the peninsula, including all the territory north of Rome to France. Sections of Croatia, Carnolia, and the Dalmatian coast, annexed as the Illyrian provinces, were given a strictly administrative unity: the name was borrowed from a Roman prefecture, and the language favored there was not Croat, nor Italian, but French. The unfulfilled promises of national emancipation began to be ever more deeply resented by the subjects of the Napoleonic Empire.

It was nevertheless the case that the rational reforms Napoleon introduced in Italy and in the German states helped shatter feudal particularism and clear the way for the development of national institutions. As a champion of liberal reforms in spite of himself, Napoleon taught the Italians and the Germans how to reorganize their national institutions—a

lesson that would later help them build their respective national states. However, he failed to perceive that nationalist sentiment, which he hoped to arouse against absolutist regimes, would instead turn on him and his empire. The first signs of his decline coincided with what was ostensibly his period of greatest power. As the expansion of French reach became increasingly identified with blatant imperialism, the seeds of nationalist revolt began to bear fruit—first in Spain and then in Austria—and finally broke Napoleon's power at the Battle of Waterloo in 1815.

The reestablishment of the old dynasties during the 1815 Congress of Vienna suppressed even the limited liberties instituted by the French emperor. The resulting Concert of Europe was specifically designed to prevent revolutions based on either individual rights or national self-determination. The new European balance of power, however, did not succeed in extinguishing the hope of emancipation brandished by revolutionary France, and rebellious sentiments would now be directed against aristocratic regimes. If advocates of human rights ideals were now, at least temporarily, on the defensive in Europe, the Enlightenment had nevertheless transformed the Western world. Slavery had been temporarily abolished in the French colonies. The United States entered a new century as the first constitutional republic founded on human rights principles. The idea of national liberation, temporarily suppressed, was ready to reemerge with a vengeance in the nineteenth century. Many women had recognized their inferior legal status and were resolved to change it. Finally, the first stirrings of popular demand for economic justice had challenged the classic liberal assumption that free markets and human rights were always compatible.

Janata Party) refers to a Hindu nationalist party; and Komeito (the Clean Life Party) is a Japanese conservative Buddhist party.

CHAPTER 2



1. G. W. F. Hegel, *The Philosophy of Right*, par. 39, 218.
2. J. M. Roberts, *The History of the World*, 441.
3. Ibid.
4. Ibid., 434.
5. Samir Amin, “The Ancient World-Systems versus the Modern Capitalist World System,” 357. Amin defines the categorization of this vast region, whose centers of power shifted over time.
6. Roberts, *The History of the World*, 330.
7. Ibid., 187.
8. Ibid., 331.
9. Stephen K. Sanderson, *Civilizations and World Systems*; Joseph Needham, *Science and Civilization*; Amin, “The Ancient World-Systems versus the Modern Capitalist World System”; and Amin, *Eurocentrism*.
10. E. L. Jones, *The European Miracle*, 200.
11. Ibid., 194.
12. Roberts, *The History of the World*, 420.
13. Ibid., 203.
14. Jared Diamond, *Guns, Germs, and Steel*, 412–413.
15. Maxime Rodinson, *Islam and Capitalism*.
16. Jones, *The European Miracle*, 177.
17. Ibid.
18. Ibid., 187.
19. Parts of the following section are drawn from Ishay, *Internationalism and Its Betrayal*, 5–10.
20. For a discussion of the conditions of the development of mercantilism, see Eli F. Hecksher, *Mercantilism*, vol. 1, chap. 7, 326–456; and also Laurence B. Packard, *The Commercial Revolution*, 7–20.
21. See Karl Marx and Friedrich Engels, *The German Ideology*, 63.
22. Robert Palmer and Joel Colton, *History of the Modern World*, 102–103.
23. Numerous explanations of these revolutions are possible. Class-based analyses have been recently challenged by a variety of alternative historical explanations. Egret and Eisenstein contest the class demarcation of the revolutionary movement; Furet emphasizes the struggle of the political elites; Skocpol focuses on the structural weakness of the state; and Goldstone concentrates on population growth. What is important, however, for the purposes of this book is to identify a trend: the expansion of capitalism and its relationship to the evolving worldview of a class in formation. For more detailed accounts and interpretations of these revolutions, see Albert Mathiez, *The French Revolution*; Albert Soboul, *Histoire de la révolution française*; Georges Lefebvre, *La révolution française*; Simon Schama, *Citizens*; Jean Egret, *The French Pre-Revolution*; Elizabeth Eisenstein, “Who Intervened in 1788?”; François Furet, *Penser la révolution française*.

tion française; Theda Skocpol, *States and Social Revolutions*; Jack Goldstone, *Revolution and Rebellion in the Early Modern World*; and Herbert G. Gutman, *Who Built America?*

24. Bartolomé de las Casas, *In Defense of the Indians*.
25. Martin Luther, “The Liberty of the Christian Man,” in G. R. Elton, *Renaissance and Reformation, 1300–1648*, 148.
26. Hugo Grotius, *The Rights of War and Peace*, bk. 2, chap. 22, sec. 14,
271.
27. C. W. Firth, ed., *The Clarke Papers*, vol. 3, 351.
28. The Treaty of Westphalia, in Elton, *Renaissance and Reformation*, 241.
29. John Locke, *A Letter concerning Toleration*, 44.
30. Ibid.
31. John Milton, *Areopaggetica: A Speech for the Liberty of Unlicensed Printing, to the Parliament of England*, in *Selected Essays of John Milton*, 42.
32. Ibid., 128.
33. William H. Marnell, *The First Amendment*, 57.
34. Ibid., 60.
35. Ibid., 93.
36. Ibid., 144.
37. Thomas Paine, *Common Sense*, 34, 52.
38. Thomas Jefferson, “Address to a Committee of the Danbury Baptist Association, in the State of Connecticut, Washington, January 1, 1802,” in *The Life and Selected Writings of Thomas Jefferson*, 332.
39. “An Act for Establishing Religious Freedom (1779),” passed in the Assembly of Virginia in the beginning of the year 1786, in Jefferson, *The Life and Selected Writings of Thomas Jefferson*, 311–313.
40. Marnell, *The First Amendment*, 144.
41. “The Sedition Act” (July 14, 1798), in *The People Shall Judge*, 435.
42. Jefferson, “First Inaugural Address, 1801,” in *The People Shall Judge*, 427.
43. See Baron de Montesquieu, *Lettres persanes*, letters 83 and 85; Voltaire, “Toleration,” in *Philosophical Dictionary*, 360–361, and *Oeuvres complètes*; Jean-Jacques Rousseau, “Profession du Vicaire Savoyard,” in *Oeuvres complètes*; Denis Diderot, *Oeuvres complètes*.
44. Deism is a belief advocating a natural religion emphasizing human over revealed morality.
45. Voltaire, “Toleration,” in *Philosophical Dictionary*, 360–361.
46. Article 11 of the French Declaration of the Rights of Man and of the Citizen, in Ishay, *The Human Rights Reader*, 139.
47. See also Ishay, *Internationalism and Its Betrayal*, 53–55.
48. Thomas Hobbes, “The Leviathan,” in Ishay, *The Human Rights Reader*, 84.
49. Ibid., 85.
50. Ibid., 88.
51. The Habeas Corpus was directly inspired by clause 39 of the Magna Carta, which states, “No freeman shall be arrested, or detained in prison, or outlawed, or banished, or in any way molested; and we will not set forth against

him nor send against him, unless by the lawful judgment of his peers and by the law of the land.” In George B. Adams, *The Origin of the English Constitution*, chap. 5.

52. English Bill of Rights, in Ishay, *The Human Rights Reader*, 93.
53. Brian Innes, *The History of Torture*, 86–96; see also John H. Langbein, *Torture and the Law of Proof*.
54. Innes, *The History of Torture*, 147–155.
55. Hobbes, “The Leviathan,” in Ishay, *The Human Rights Reader*, 88.
56. Cesare Beccaria, *Treatise on Crimes and Punishments*, chap. 2, in Ishay, *The Human Rights Reader*, 120–122.
57. George R. Havens, *Selections from Voltaire*, 384 (my translation); see also “Torture” in Voltaire, “The Philosophical Dictionary,” in *The Works of Voltaire*, 119.
58. See article 5 of the UN Universal Declaration, article 7 of the Covenant on Civil and Political Rights, article 3 of the European Convention, article 5.2 of the American Convention, and article 5 of the African Charter; see also Nigel S. Rodley, *The Treatment of Prisoners under International Law*.
59. Rousseau, “*The Social Contract*” and “*Discourses*,” 105.
60. More precisely, see articles 3, 5, and 8 of the UN Universal Declaration; articles 2 and 3 of the European Convention; and articles 6 and 7 of the Covenant on Civil and Political Rights (in the documents section in Ishay, *The Human Rights Reader*).
61. Michel Foucault, *Discipline and Punish*, 38.
62. Norberto Bobbio, *The Age of Rights*, 128.
63. See John Simmons, *The Lockean Theory of Rights*, 148–149.
64. Locke, *The Second Treatise*, in Ishay, *The Human Rights Reader*, 96.
65. Rousseau, “The Right of Life and Death,” in “*The Social Contract*” and “*Discourses*,” 209.
66. Immanuel Kant, “The Metaphysics of Morals,” in *Kant’s Political Writings*, 156.
67. Ibid., 157.
68. Ibid.
69. Foucault, *Discipline and Punish*, 48–49.
70. Beccaria, *Treatise on Crimes and Punishments*, chap. 2, in Ishay, *The Human Rights Reader*, 124.
71. Ibid., 126.
72. Ibid., 123.
73. Quoted in James J. Megivern, *The Death Penalty*, 302–303.
74. Voltaire, “Commentaires sur le livre des délits et des peines,” in *Oeuvres de Voltaire*, 58. Voltaire’s work referred to Beccaria’s. Although the German philosopher Hegel repudiated Beccaria’s abolitionist view, he nonetheless recognized in his *Philosophy of Right* that “Beccaria’s effort to abolish the death penalty had some advantageous effects; even if neither Joseph II nor the French have ever managed its total abolition, there has been more awareness of which crimes are punishable and which are not” (par. 100).
75. Maximilien de Robespierre, “On the Abolition of the Death Penalty” (Constituent Assembly, May 30, 1791), in *Robespierre*, 24.

76. Robespierre, “On the Action to be Taken against Louis XVI” (December 3, 1792), in *Robespierre*, 31.
77. See also Bobbio, *The Age of Rights*, 143–162.
78. See C. B. Macpherson, *The Political Theory of Possessive Individualism*, 138.
79. Henry Ireton, “Extract from the Debates at Putney” (October 29, 1647), in Andrew Sharp, *The English Levellers*, 108–109.
80. Sharp, *The English Levellers*, 110.
81. Richard Overton, “An Arrow against All Tyrants,” in *ibid.*, 55.
82. See Macpherson, *The Political Theory of Possessive Individualism*, 148.
83. See Christopher Hill, *The World Turned Upside Down*, 15.
84. Locke, “On Property,” *The Second Treatise*, in Ishay, *The Human Rights Reader*, 97.
85. C. Edward Merriam, *American Political Theories*, 75.
86. *Ibid.*, 84.
87. *Ibid.*, and see A. J. Beitzinger, *A History of American Political Thought*, 183.
88. Beitzinger, *A History of American Political Thought*, 280.
89. *Ibid.*, 295.
90. R. R. Palmer, *The Age of the Democratic Revolution*, vol. 1, 225.
91. Merriam, *American Political Theories*, 85.
92. *Ibid.*
93. “The 1789 Declaration of the Rights of Man and of the Citizen,” in Ishay, *The Human Rights Reader*, 139.
94. Abbé de Sieyès, Preliminary to the French Constitution, August 1789, in Lynn Hunt, *The French Revolution and Human Rights*, 81.
95. Robespierre, “On the Right to Vote,” delivered variously in the Constituent Assembly 1789–1791 and the National Convention (September 1792–July 1794), in *Robespierre*, 21–22.
96. Robespierre, “On Property” (April 24, 1793), in *Robespierre*, 51–57.
97. See Bartolo da Sassoferato, *La Tiberiade*; Cecil Nathan Sidney Woolf, *Bar-tolo de Sassoferato*; Joseph Canning, *The Political Thought of Baldus de Ubaldi*; and Francisco de Vitorio, *Relaciones sobre los indios y el derecho de guerra* and *Political Writings*.
98. Samuel Pufendorf, *On the Law of Nature and of Nations in Eight Books*, in *The Political Writings of Samuel Pufendorf*, 258; Richard Zouche, *Juris et iudicii facialis*, vol. 2; Emmerich de Vattel, *Le droit des gens ou principe de la loi naturelle*, vol. 2.
99. John Kelsay and James Turner Johnson, *Just War and Jihad*; Terry Nardin, *The Ethics of War and Peace*.
100. Grotius, *The Rights of War and Peace*, bk. 2, chap. 1, sec. 1–4, 73–84, and bk. 2, chap. 20, sec. 1–3, 220–255; see also Peter R. Remec, *The Position of the Individual in International Law according to Grotius and Vattel*, 88–89.
101. Grotius, *The Rights of War and Peace*, bk. 2, chap. 22, sec. 12, 398.
102. Samuel Pufendorf, *On the Law of Nature and of Nations in Eight Books*, in *The Political Writings of Samuel Pufendorf*, 258; and Vattel, *Le droit des gens ou principe de la loi naturelle*, vol. 2, chap. 3, par. 42–50.

103. Pufendorf, *On the Law of Nature and of Nations in Eight Books*, in *The Political Writings of Samuel Pufendorf*, 259.
104. Grotius, *The Rights of War and Peace*, bk. 1, chap. 1, sec. 14, 25.
105. Ibid., bk. 1, chap. 3, sec. 7, 62.
106. Adam Smith, *The Wealth of Nations*, bk. 1, 477; and Smith, *The Theory of Moral Sentiments*, 304.
107. See Smith, *The Wealth of Nations*, bk. 1 and 2.
108. Ibid., bk. 5, 236.
109. See ibid., bk. 4.
110. Paine, “The Rights of Man,” in *The Essential Thomas Paine*, 267.
111. Kant, “Idea of a Universal History,” in *Kant’s Political Writings*, 50.
112. By focusing on commerce, Adam Smith later reversed what the Physiocrats thought was profitable.
113. Rousseau, *Considération sur le gouvernement de Pologne et sur sa réformation projetée*, in *The Political Writings of Jean-Jacques Rousseau*, vol. 2, 477.
114. Abbé Charles de Saint-Pierre, *Abridgement of the Project for Perpetual Peace*, in Ishay, *The Human Rights Reader*, 104–110.
115. Rousseau, *Judgement on Perpetual Peace*, in Ishay, *The Human Rights Reader*, 110–114.
116. Quoted in Ishay, *Internationalism and Its Betrayal*, 59.
117. Kant, “The Metaphysics of Morals,” in *Kant’s Political Writings*, 174, or in Ishay, *The Human Rights Reader*, 172.
118. J. W. Thornton, *The Pulpit of the American Revolution*, 250.
119. The United States Declaration of Independence, in Ishay, *The Human Rights Reader*, 127.
120. Paine, “Address to the People of France,” in *Complete Writings of Paine*, 540.
121. Robespierre, National Convention, February 15, 1794, in *Oeuvres*, vol. 3, 538–539 (my translation).
122. Robespierre, National Convention, December 25, 1793, in *ibid.* (my translation).
123. Kant, “The Contest of the Faculties,” in *Kant’s Political Writings*, 182.
124. Kant, *On the Old Saw: That May Be Right in Theory but It Won’t Work in Practice*, 67.
125. Refers to Kant, *Perpetual Peace*, in *Kant’s Political Writings*, 94–96.
126. Gerrard Winstanley, “A New Yeers Gift (1650),” in David Wooton, “*Divine Right and Democracy*,” 322; see also Winstanley, *Selections from His Works*.
127. Jefferson, “Letter to Madison,” Fontainebleau (October 28, 1785), in *The Life and Selected Writings of Thomas Jefferson*, 389.
128. See Monroe Stearns, *Shay’s Rebellion*.
129. Friedrich Engels, “The Book of Revelation,” in Marx and Engels, *Collected Works*, vol. 26, 112–117. (Originally published in *Progress* 2, no. 2 [August 1883]: 113.)
130. Hill, *The World Turned Upside Down*, 306.
131. Ibid., 314.
132. Ibid., 308.

133. Carole Pateman, *The Sexual Contract*, 53.
134. Mary Astell, “Some Reflections upon Marriage,” in Isaac Kramnick, *The Enlightenment Reader*, 563.
135. Paine, “An Occasional Letter to the Female Sex,” 362.
136. Abigail Adams to John Adams (March 31, 1776), and John Adams to Abigail Adams (April 14, 1776), in Lyman Tower Sargent, *Political Thought in the United States*, 66–67.
137. Olympe de Gouge, The Declaration of the Rights of Woman (1790), in Ishay, *The Human Rights Reader*, 140–147; see also Marquis de Condorcet, “On the Admission of Women to the Rights of Citizenship” (July 1790), and Etta Palm d’Aelders, “Discourse on the Injustice of the Laws in Favor of Men, at the Expense of Women” (December 30, 1790), in Hunt, *The French Revolution and Human Rights*, 119–123.
138. Mary Wollstonecraft, *A Vindication of the Rights of Woman*.
139. Louis-Marie Prudhomme, “On the Influence of the Revolution on Women” (February 12, 1791), in Hunt, *The French Revolution and Human Rights*, 131.
140. Philippe Fabre d’Eglantine (National Convention, October 19, 1793), Jean Baptiste Amar (Committee of Public Safety, October 30, 1793), Pierre Chaumette (*Moniteur Universel*, November 19, 1793), in Hunt, *The French Revolution and Human Rights*, 135–139.
141. Soon after, Holland granted emancipation to its Jewish population. See Pierre Birnbaum and Ira Katzenbach, *Paths of Emancipation*, 24.
142. Vern L. Bullough, *Homosexuality*, 45, and generally chap. 3.
143. Lefebvre, *The French Revolution*, vol. 1, 151.
144. “Motion Made by Vincent Ogé the Younger to the Assembly of Colonists, 1789,” in Hunt, *The French Revolution and Human Rights*, 103–104.
145. “Speech of Barnave,” March 8, 1790, in Hunt, *The French Revolution and Human Rights*, 109.
146. On April 6, 1793, a Committee of Public Security was created as a political police designed to protect the revolutionary republic from its internal and external enemies.
147. Paine, “African Slavery in America” (1775), in Ishay, *The Human Rights Reader*, 130–133.
148. See Jefferson, *Notes on Virginia* (1784), in *The Life and Selected Writings of Thomas Jefferson*, 210–213, 255; see also Eugene D. Genovese, *The Political Economy of Slavery*.
149. Robert Ferguson, “The American Enlightenment,” in Sacvan Bercovitch and Cyrus R. K. Patell, *The Cambridge History of American Literature*, 496.
150. Prince de Broglie, “The Jewish Question,” December 24, 1789, in Hunt, *The French Revolution and Human Rights*, 92.
151. La Fare, Bishop of Nancy, “Opinion on the Admissibility of Jews to Full Civil and Political Rights,” spring 1790, in Hunt, *The French Revolution and Human Rights*, 97–98.
152. Admission of Jews to Rights of Citizenship, September 27, 1791, in Hunt, *The French Revolution and Human Rights*, 99.

153. Jacob Katz, *Out of the Ghetto*, 2; Birnbaum and Katznelson, *Paths of Emancipation*, 128; Pierre Pluchon, *Nègres et juifs au XVIII^e siècle*.

154. Some passages of the following section are drawn from Ishay, *Internationalism and Its Betrayal*, 78–82.

155. *The New Cambridge Modern History*, vol. 8, 711; or Palmer, *The World of the French Revolution*,

156. See A. J. Grant and Harold Temperley, *Europe in the Nineteenth and Twentieth Centuries*, 197.

CHAPTER 3

1. On this question, see Stephen Lukes, *Marxism and Morality*, 61–70, or his “Can a Marxist Believe in Human Rights?” in *Moral Conflict and Politics*, 173–188; and Michel Foucault, “Two Lectures,” 79–108, and “Truth and Power,” 109–133, in *Power/Knowledge*. See also Claude Lefort, *L’invention démocratique*, 46.

2. Joel Colton and Robert Palmer, *History of the Modern World*, 464.

3. From about 1760 on, enclosure meant the transformation of formerly common or open fields into private property. Because of their control over parliament, landlords succeeded in accelerating the conversion of land. The result was a patchwork of individual ownership in which landlords employed wage workers. This enabled independent farmers, freed from old custom-based restrictions, to improve commercially cultivated lands.

4. See H. de B. Gibbens, *Industry in England*, 343–347.

5. See Eric Hobsbawm, *The Age of Revolutions*. For an interesting discussion of the impact of 1848, see Stephen Bronner, *Socialism Unbound*, 12–15.

6. William L. Langer, *Political and Social Upheaval*.

7. Norman Davies, *Europe*, 802.

8. Jay Kinsbruner, *Independence in Spanish America*; see also Michael Costeloe, *Response to Revolution*.

9. Davies, *Europe*, 803–804.

10. Colton and Palmer, *History of the Modern World*, 499.

11. The People’s Charter was a bill drafted by the London radical William Lovett in May 1837. See Mark Hovell, *The Chartist Movement*.

12. For an interesting discussion of Chartism, see Gareth Stedman Jones, “Rethinking Chartism,” in *Languages of Class*.

13. Georges Duveau, *The Making of a Revolution*, 33–44.

14. Colton and Palmer, *History of the Modern World*, 515.

15. Hobsbawm, *The Age of Revolutions*, 140.

16. Alice Bullard, “Paris 1871/New Caledonia 1878: Human Rights and the Managerial State,” in Lynn Hunt, Jeffrey Wasserstrom, and Marilyn B. Young, *Human Rights and Revolutions*, 79.

17. Henry David Thoreau, *On the Duty of Civil Disobedience*.

18. James M. McPherson, *Drawn with the Sword*; Brian Holden Reid, *The American Civil War and the Wars of the Industrial Revolution*; Marshall DeRosa, *The Politics of Dissolution*.

Concerning the True Original Extent and End of Civil Government

Chapter I Of Political Power

1. It having been shown in the foregoing discourse:

Firstly. That Adam had not, either by natural right of fatherhood or by positive donation from God, any such authority over his children, nor dominion over the world, as is pretended.

Secondly. That if he had, his heirs yet had no right to it.

Thirdly. That if his heirs had, there being no law of Nature nor positive law of God that determines which is the right heir in all cases that may arise, the right of succession, and consequently of bearing rule, could not have been certainly determined.

Fourthly. That if even that had been determined, yet the knowledge of which is the eldest line of Adam's posterity being so long since utterly lost, that in the races of mankind and families of the world, there remains not to one above another the least pretence to be the eldest house, and to have the right of inheritance.

All these promises having, as I think, been clearly made out, it is impossible that the rulers now on earth should make any benefit, or derive any the least shadow of authority from that which is held to be the fountain of all power, "Adam's private dominion and paternal jurisdiction"; so that he that will not give just occasion to think that all government in the world is the product only of force and violence, and that men live together by no other rules but that of beasts, where the strongest carries it, and so lay a foundation for perpetual disorder and mischief, tumult, sedition, and rebellion (things that the followers of that hypothesis so loudly cry out against), must of necessity find out another rise of government, another original of political power, and another way of designing and knowing the persons that have it than what

Sir Robert Filmer hath taught us.

2. To this purpose, I think it may not be amiss to set down what I take to be political power. That the power of a magistrate over a subject may be distinguished from that of a father over his children, a master over his servant, a husband over his wife, and a lord over his slave. All which distinct powers happening sometimes together in the same man, if he be considered under these different relations, it may help us to distinguish these powers one from another, and show the difference betwixt a ruler of a commonwealth, a father of a family, and a captain of a galley.

3. Political power, then, I take to be a right of making laws, with penalties of death, and consequently all less penalties for the regulating and preserving of property, and of employing the force of the community in the execution of such laws, and in the defence of the commonwealth from foreign injury, and all this only for the public good.

Chapter II Of the State of Nature

4. To understand political power aright, and derive it from its original, we must consider what estate all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the law of Nature, without asking leave or depending upon the will of any other man.

A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another, there being nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of Nature, and the use of the same faculties, should also be equal one amongst another, without subordination or subjection, unless the lord and master of them all should, by any manifest declaration of his will, set one above another, and confer on him, by an evident and clear appointment, an undoubted right to dominion and sovereignty.

5. This equality of men by Nature, the judicious Hooker looks upon as so evident in itself, and beyond all question, that he makes it the foundation of that obligation to mutual love amongst men on which he builds the duties they owe one another, and from whence he derives the great maxims of justice and charity. His words are:

“The like natural inducement hath brought men to know that it is no

less their duty to love others than themselves, for seeing those things which are equal, must needs all have one measure; if I cannot but wish to receive good, even as much at every man's hands, as any man can wish unto his own soul, how should I look to have any part of my desire herein satisfied, unless myself be careful to satisfy the like desire, which is undoubtedly in other men weak, being of one and the same nature: to have anything offered them repugnant to this desire must needs, in all respects, grieve them as much as me; so that if I do harm, I must look to suffer, there being no reason that others should show greater measure of love to me than they have by me showed unto them; my desire, therefore, to be loved of my equals in Nature, as much as possible may be, imposeth upon me a natural duty of bearing to themward fully the like affection. From which relation of equality between ourselves and them that are as ourselves, what several rules and canons natural reason hath drawn for direction of life no man is ignorant." (Eccl. Pol. i.)

6. But though this be a state of liberty, yet it is not a state of licence; though man in that state have an uncontrollable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for it. The state of Nature has a law of Nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions; for men being all the workmanship of one omnipotent and infinitely wise Maker; all the servants of one sovereign Master, sent into the world by His order and about His business; they are His property, whose workmanship they are made to last during His, not one another's pleasure. And, being furnished with like faculties, sharing all in one community of Nature, there cannot be supposed any such subordination among us that may authorise us to destroy one another, as if we were made for one another's uses, as the inferior ranks of creatures are for ours. Every one as he is bound to preserve himself, and not to quit his station wilfully, so by the like reason, when his own preservation comes not in competition, ought he as much as he can to preserve the rest of mankind, and not unless it be to do justice on an offender, take away or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another.

7. And that all men may be restrained from invading others' rights, and from doing hurt to one another, and the law of Nature be observed,

which willetteth the peace and preservation of all mankind, the execution of the law of Nature is in that state put into every man's hands, whereby every one has a right to punish the transgressors of that law to such a degree as may hinder its violation. For the law of Nature would, as all other laws that concern men in this world, be in vain if there were nobody that in the state of Nature had a power to execute that law, and thereby preserve the innocent and restrain offenders; and if any one in the state of Nature may punish another for any evil he has done, every one may do so. For in that state of perfect equality, where naturally there is no superiority or jurisdiction of one over another, what any may do in prosecution of that law, every one must needs have a right to do.

8. And thus, in the state of Nature, one man comes by a power over another, but yet no absolute or arbitrary power to use a criminal, when he has got him in his hands, according to the passionate heats or boundless extravagancy of his own will, but only to retribute to him so far as calm reason and conscience dictate, what is proportionate to his transgression, which is so much as may serve for reparation and restraint. For these two are the only reasons why one man may lawfully do harm to another, which is that we call punishment. In transgressing the law of Nature, the offender declares himself to live by another rule than that of reason and common equity, which is that measure God has set to the actions of men for their mutual security, and so he becomes dangerous to mankind; the tie which is to secure them from injury and violence being slighted and broken by him, which being a trespass against the whole species, and the peace and safety of it, provided for by the law of Nature, every man upon this score, by the right he hath to preserve mankind in general, may restrain, or where it is necessary, destroy things noxious to them, and so may bring such evil on any one who hath transgressed that law, as may make him repent the doing of it, and thereby deter him, and, by his example, others from doing the like mischief. And in this case, and upon this ground, every man hath a right to punish the offender, and be executioner of the law of Nature.

9. I doubt not but this will seem a very strange doctrine to some men; but before they condemn it, I desire them to resolve me by what right any prince or state can put to death or punish an alien for any crime he commits in their country? It is certain their laws, by virtue of any sanction they receive from the promulgated will of the legislature, reach not a stranger. They speak not to him, nor, if they did, is he bound to hearken to them. The legislative authority by which they are in force

over the subjects of that commonwealth hath no power over him. Those who have the supreme power of making laws in England, France, or Holland are, to an Indian, but like the rest of the world—men without authority. And therefore, if by the law of Nature every man hath not a power to punish offences against it, as he soberly judges the case to require, I see not how the magistrates of any community can punish an alien of another country, since, in reference to him, they can have no more power than what every man naturally may have over another.

10. Besides the crime which consists in violating the laws, and varying from the right rule of reason, whereby a man so far becomes degenerate, and declares himself to quit the principles of human nature and to be a noxious creature, there is commonly injury done, and some person or other, some other man, receives damage by his transgression; in which case, he who hath received any damage has (besides the right of punishment common to him, with other men) a particular right to seek reparation from him that hath done it. And any other person who finds it just may also join with him that is injured, and assist him in recovering from the offender so much as may make satisfaction for the harm he hath suffered.

11. From these two distinct rights (the one of punishing the crime, for restraint and preventing the like offence, which right of punishing is in everybody, the other of taking reparation, which belongs only to the injured party) comes it to pass that the magistrate, who by being magistrate hath the common right of punishing put into his hands, can often, where the public good demands not the execution of the law, remit the punishment of criminal offences by his own authority, but yet cannot remit the satisfaction due to any private man for the damage he has received. That he who hath suffered the damage has a right to demand in his own name, and he alone can remit. The damned person has this power of appropriating to himself the goods or service of the offender by right of self-preservation, as every man has a power to punish the crime to prevent its being committed again, by the right he has of preserving all mankind, and doing all reasonable things he can in order to that end. And thus it is that every man in the state of Nature has a power to kill a murderer, both to deter others from doing the like injury (which no reparation can compensate) by the example of the punishment that attends it from everybody, and also to secure men from the attempts of a criminal who, having renounced reason, the common rule and measure God hath given to mankind, hath, by the unjust violence and slaughter

he hath committed upon one, declared war against all mankind, and therefore may be destroyed as a lion or a tiger, one of those wild savage beasts with whom men can have no society nor security. And upon this is grounded that great law of nature, "Whoso sheddeth man's blood, by man shall his blood be shed." And Cain was so fully convinced that every one had a right to destroy such a criminal, that, after the murder of his brother, he cries out, "Every one that findeth me shall slay me," so plain was it writ in the hearts of all mankind.

12. By the same reason may a man in the state of Nature punish the lesser breaches of that law, it will, perhaps, be demanded, with death? I answer: Each transgression may be punished to that degree, and with so much severity, as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like. Every offence that can be committed in the state of Nature may, in the state of Nature, be also punished equally, and as far forth, as it may, in a commonwealth. For though it would be beside my present purpose to enter here into the particulars of the law of Nature, or its measures of punishment, yet it is certain there is such a law, and that too as intelligible and plain to a rational creature and a studier of that law as the positive laws of commonwealths, nay, possibly plainer; as much as reason is easier to be understood than the fancies and intricate contrivances of men, following contrary and hidden interests put into words; for truly so are a great part of the municipal laws of countries, which are only so far right as they are founded on the law of Nature, by which they are to be regulated and interpreted.

13. To this strange doctrine—viz., That in the state of Nature every one has the executive power of the law of Nature—I doubt not but it will be objected that it is unreasonable for men to be judges in their own cases, that self-love will make men partial to themselves and their friends; and, on the other side, ill-nature, passion, and revenge will carry them too far in punishing others, and hence nothing but confusion and disorder will follow, and that therefore God hath certainly appointed government to restrain the partiality and violence of men. I easily grant that civil government is the proper remedy for the inconveniences of the state of Nature, which must certainly be great where men may be judges in their own case, since it is easy to be imagined that he who was so unjust as to do his brother an injury will scarce be so just as to condemn himself for it. But I shall desire those who make this objection to remember that absolute monarchs are but men; and if government is to be

the remedy of those evils which necessarily follow from men being judges in their own cases, and the state of Nature is therefore not to be endured, I desire to know what kind of government that is, and how much better it is than the state of Nature, where one man commanding a multitude has the liberty to be judge in his own case, and may do to all his subjects whatever he pleases without the least question or control of those who execute his pleasure? and in whatsoever he doth, whether led by reason, mistake, or passion, must be submitted to? which men in the state of Nature are not bound to do one to another. And if he that judges, judges amiss in his own or any other case, he is answerable for it to the rest of mankind.

14. It is often asked as a mighty objection, where are, or ever were, there any men in such a state of Nature? To which it may suffice as an answer at present, that since all princes and rulers of “independent” governments all through the world are in a state of Nature, it is plain the world never was, nor never will be, without numbers of men in that state. I have named all governors of “independent” communities, whether they are, or are not, in league with others; for it is not every compact that puts an end to the state of Nature between men, but only this one of agreeing together mutually to enter into one community, and make one body politic; other promises and compacts men may make one with another, and yet still be in the state of Nature. The promises and bargains for truck, etc., between the two men in Soldania, in or between a Swiss and an Indian, in the woods of America, are binding to them, though they are perfectly in a state of Nature in reference to one another for truth, and keeping of faith belongs to men as men, and not as members of society.

15. To those that say there were never any men in the state of Nature, I will not oppose the authority of the judicious Hooker (Eccl. Pol. i. 10), where he says, “the laws which have been hitherto mentioned”—i.e., the laws of Nature—“do bind men absolutely, even as they are men, although they have never any settled fellowship, never any solemn agreement amongst themselves what to do or not to do; but for as much as we are not by ourselves sufficient to furnish ourselves with competent store of things needful for such a life as our Nature doth desire, a life fit for the dignity of man, therefore to supply those defects and imperfections which are in us, as living single and solely by ourselves, we are naturally induced to seek communion and fellowship with others; this was the cause of men uniting themselves as first in politic societies.” But I,

moreover, affirm that all men are naturally in that state, and remain so till, by their own consents, they make themselves members of some politic society, and I doubt not, in the sequel of this discourse, to make it very clear.

Chapter III Of the State of War

16. The state of war is a state of enmity and destruction; and therefore declaring by word or action, not a passionate and hasty, but sedate, settled design upon another man's life puts him in a state of war with him against whom he has declared such an intention, and so has exposed his life to the other's power to be taken away by him, or any one that joins with him in his defence, and espouses his quarrel; it being reasonable and just I should have a right to destroy that which threatens me with destruction; for by the fundamental law of Nature, man being to be preserved as much as possible, when all cannot be preserved, the safety of the innocent is to be preferred, and one may destroy a man who makes war upon him, or has discovered an enmity to his being, for the same reason that he may kill a wolf or a lion, because they are not under the ties of the common law of reason, have no other rule but that of force and violence, and so may be treated as a beast of prey, those dangerous and noxious creatures that will be sure to destroy him whenever he falls into their power.

17. And hence it is that he who attempts to get another man into his absolute power does thereby put himself into a state of war with him; it being to be understood as a declaration of a design upon his life. For I have reason to conclude that he who would get me into his power without my consent would use me as he pleased when he had got me there, and destroy me too when he had a fancy to it; for nobody can desire to have me in his absolute power unless it be to compel me by force to that which is against the right of my freedom—i.e. make me a slave. To be free from such force is the only security of my preservation, and reason bids me look on him as an enemy to my preservation who would take away that freedom which is the fence to it; so that he who makes an attempt to enslave me thereby puts himself into a state of war with me. He that in the state of Nature would take away the freedom that belongs to any one in that state must necessarily be supposed to have a design to take away everything else, that freedom being the foundation of all the rest; as he that in the state of society would take away the freedom

belonging to those of that society or commonwealth must be supposed to design to take away from them everything else, and so be looked on as in a state of war.

18. This makes it lawful for a man to kill a thief who has not in the least hurt him, nor declared any design upon his life, any farther than by the use of force, so to get him in his power as to take away his money, or what he pleases, from him; because using force, where he has no right to get me into his power, let his pretence be what it will, I have no reason to suppose that he who would take away my liberty would not, when he had me in his power, take away everything else. And, therefore, it is lawful for me to treat him as one who has put himself into a state of war with me—i.e., kill him if I can; for to that hazard does he justly expose himself whoever introduces a state of war, and is aggressor in it.

19. And here we have the plain difference between the state of Nature and the state of war, which however some men have confounded, are as far distant as a state of peace, goodwill, mutual assistance, and preservation; and a state of enmity, malice, violence and mutual destruction are one from another. Men living together according to reason without a common superior on earth, with authority to judge between them, is properly the state of Nature. But force, or a declared design of force upon the person of another, where there is no common superior on earth to appeal to for relief, is the state of war; and it is the want of such an appeal gives a man the right of war even against an aggressor, though he be in society and a fellow-subject. Thus, a thief whom I cannot harm, but by appeal to the law, for having stolen all that I am worth, I may kill when he sets on me to rob me but of my horse or coat, because the law, which was made for my preservation, where it cannot interpose to secure my life from present force, which if lost is capable of no reparation, permits me my own defence and the right of war, a liberty to kill the aggressor, because the aggressor allows not time to appeal to our common judge, nor the decision of the law, for remedy in a case where the mischief may be irreparable. Want of a common judge with authority puts all men in a state of Nature; force without right upon a man's person makes a state of war both where there is, and is not, a common judge.

20. But when the actual force is over, the state of war ceases between those that are in society and are equally on both sides subject to the judge; and, therefore, in such controversies, where the question is put, "Who shall be judge?" it cannot be meant who shall decide the

controversy; every one knows what Jephtha here tells us, that “the Lord the Judge” shall judge. Where there is no judge on earth the appeal lies to God in Heaven. That question then cannot mean who shall judge, whether another hath put himself in a state of war with me, and whether I may, as Jephtha did, appeal to Heaven in it? Of that I myself can only judge in my own conscience, as I will answer it at the great day to the Supreme Judge of all men.

Chapter IV Of Slavery

21. The natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only the law of Nature for his rule. The liberty of man in society is to be under no other legislative power but that established by consent in the commonwealth, nor under the dominion of any will, or restraint of any law, but what that legislative shall enact according to the trust put in it. Freedom, then, is not what Sir Robert Filmer tells us: “A liberty for every one to do what he lists, to live as he pleases, and not to be tied by any laws”; but freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it. A liberty to follow my own will in all things where that rule prescribes not, not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man, as freedom of nature is to be under no other restraint but the law of Nature.

22. This freedom from absolute, arbitrary power is so necessary to, and closely joined with, a man’s preservation, that he cannot part with it but by what forfeits his preservation and life together. For a man, not having the power of his own life, cannot by compact or his own consent enslave himself to any one, nor put himself under the absolute, arbitrary power of another to take away his life when he pleases. Nobody can give more power than he has himself, and he that cannot take away his own life cannot give another power over it. Indeed, having by his fault forfeited his own life by some act that deserves death, he to whom he has forfeited it may, when he has him in his power, delay to take it, and make use of him to his own service; and he does him no injury by it. For, whenever he finds the hardship of his slavery outweigh the value of his life, it is in his power, by resisting the will of his master, to draw on himself the death he desires.

23. This is the perfect condition of slavery, which is nothing else but

the state of war continued between a lawful conqueror and a captive, for if once compact enter between them, and make an agreement for a limited power on the one side, and obedience on the other, the state of war and slavery ceases as long as the compact endures; for, as has been said, no man can by agreement pass over to another that which he hath not in himself—a power over his own life.

I confess, we find among the Jews, as well as other nations, that men did sell themselves; but it is plain this was only to drudgery, not to slavery; for it is evident the person sold was not under an absolute, arbitrary, despotical power, for the master could not have power to kill him at any time, whom at a certain time he was obliged to let go free out of his service; and the master of such a servant was so far from having an arbitrary power over his life that he could not at pleasure so much as maim him, but the loss of an eye or tooth set him free (Exod. 21.).

Chapter V Of Property

24. Whether we consider natural reason, which tells us that men, being once born, have a right to their preservation, and consequently to meat and drink and such other things as Nature affords for their subsistence, or “revelation,” which gives us an account of those grants God made of the world to Adam, and to Noah and his sons, it is very clear that God, as King David says (Psalm 115. 16), “has given the earth to the children of men,” given it to mankind in common. But, this being supposed, it seems to some a very great difficulty how any one should ever come to have a property in anything, I will not content myself to answer, that, if it be difficult to make out “property” upon a supposition that God gave the world to Adam and his posterity in common, it is impossible that any man but one universal monarch should have any “property” upon a supposition that God gave the world to Adam and his heirs in succession, exclusive of all the rest of his posterity; but I shall endeavour to show how men might come to have a property in several parts of that which God gave to mankind in common, and that without any express compact of all the commoners.

25. God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life and convenience. The earth and all that is therein is given to men for the support and comfort of their being. And though all the fruits it naturally produces, and beasts it feeds, belong to mankind in common, as they are

produced by the spontaneous hand of Nature, and nobody has originally a private dominion exclusive of the rest of mankind in any of them, as they are thus in their natural state, yet being given for the use of men, there must of necessity be a means to appropriate them some way or other before they can be of any use, or at all beneficial, to any particular men. The fruit or venison which nourishes the wild Indian, who knows no enclosure, and is still a tenant in common, must be his, and so his—i.e., a part of him, that another can no longer have any right to it before it can do him any good for the support of his life.

26. Though the earth and all inferior creatures be common to all men, yet every man has a “property” in his own “person.” This nobody has any right to but himself. The “labour” of his body and the “work” of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this “labour” being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.

27. He that is nourished by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself. Nobody can deny but the nourishment is his. I ask, then, when did they begin to be his? when he digested? or when he ate? or when he boiled? or when he brought them home? or when he picked them up? And it is plain, if the first gathering made them not his, nothing else could. That labour put a distinction between them and common. That added something to them more than Nature, the common mother of all, had done, and so they became his private right. And will any one say he had no right to those acorns or apples he thus appropriated because he had not the consent of all mankind to make them his? Was it a robbery thus to assume to himself what belonged to all in common? If such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him. We see in commons, which remain so by compact, that it is the taking any part of what is common, and removing it out of the state Nature leaves it in, which begins the property, without which the common is of no use. And the taking of this or that part does not depend on the express consent of all

the commoners. Thus, the grass my horse has bit, the turfs my servant has cut, and the ore I have digged in any place, where I have a right to them in common with others, become my property without the assignation or consent of anybody. The labour that was mine, removing them out of that common state they were in, hath fixed my property in them.

28. By making an explicit consent of every commoner necessary to any one's appropriating to himself any part of what is given in common. Children or servants could not cut the meat which their father or master had provided for them in common without assigning to every one his peculiar part. Though the water running in the fountain be every one's, yet who can doubt but that in the pitcher is his only who drew it out? His labour hath taken it out of the hands of Nature where it was common, and belonged equally to all her children, and hath thereby appropriated it to himself.

29. Thus this law of reason makes the deer that Indian's who hath killed it; it is allowed to be his goods who hath bestowed his labour upon it, though, before, it was the common right of every one. And amongst those who are counted the civilised part of mankind, who have made and multiplied positive laws to determine property, this original law of Nature for the beginning of property, in what was before common, still takes place, and by virtue thereof, what fish any one catches in the ocean, that great and still remaining common of mankind; or what amber-gris any one takes up here is by the labour that removes it out of that common state Nature left it in, made his property who takes that pains about it. And even amongst us, the hare that any one is hunting is thought his who pursues her during the chase. For being a beast that is still looked upon as common, and no man's private possession, whoever has employed so much labour about any of that kind as to find and pursue her has thereby removed her from the state of Nature wherein she was common, and hath begun a property.

30. It will, perhaps, be objected to this, that if gathering the acorns or other fruits of the earth, etc., makes a right to them, then any one may engross as much as he will. To which I answer, Not so. The same law of Nature that does by this means give us property, does also bound that property too. "God has given us all things richly." Is the voice of reason confirmed by inspiration? But how far has He given it us—"to enjoy"? As much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in. Whatever is beyond this is more than his share, and belongs to others. Nothing was

made by God for man to spoil or destroy. And thus considering the plenty of natural provisions there was a long time in the world, and the few spenders, and to how small a part of that provision the industry of one man could extend itself and engross it to the prejudice of others, especially keeping within the bounds set by reason of what might serve for his use, there could be then little room for quarrels or contentions about property so established.

31. But the chief matter of property being now not the fruits of the earth and the beasts that subsist on it, but the earth itself, as that which takes in and carries with it all the rest, I think it is plain that property in that too is acquired as the former. As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, enclose it from the common. Nor will it invalidate his right to say everybody else has an equal title to it, and therefore he cannot appropriate, he cannot enclose, without the consent of all his fellow-commoners, all mankind. God, when He gave the world in common to all mankind, commanded man also to labour, and the penury of his condition required it of him. God and his reason commanded him to subdue the earth—i.e., improve it for the benefit of life and therein lay out something upon it that was his own, his labour. He that, in obedience to this command of God, subdued, tilled, and sowed any part of it, thereby annexed to it something that was his property, which another had no title to, nor could without injury take from him.

32. Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough and as good left, and more than the yet unprovided could use. So that, in effect, there was never the less left for others because of his enclosure for himself. For he that leaves as much as another can make use of does as good as take nothing at all. Nobody could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left him to quench his thirst. And the case of land and water, where there is enough of both, is perfectly the same.

33. God gave the world to men in common, but since He gave it them for their benefit and the greatest conveniences of life they were capable to draw from it, it cannot be supposed He meant it should always remain common and uncultivated. He gave it to the use of the industrious and rational (and labour was to be his title to it); not to the fancy or covetousness of the quarrelsome and contentious. He that had as good left for his improvement as was already taken up needed not

complain, ought not to meddle with what was already improved by another's labour; if he did it is plain he desired the benefit of another's pains, which he had no right to, and not the ground which God had given him, in common with others, to labour on, and whereof there was as good left as that already possessed, and more than he knew what to do with, or his industry could reach to.

34. It is true, in land that is common in England or any other country, where there are plenty of people under government who have money and commerce, no one can enclose or appropriate any part without the consent of all his fellow-commoners; because this is left common by compact—i.e., by the law of the land, which is not to be violated. And, though it be common in respect of some men, it is not so to all mankind, but is the joint property of this country, or this parish. Besides, the remainder, after such enclosure, would not be as good to the rest of the commoners as the whole was, when they could all make use of the whole; whereas in the beginning and first peopling of the great common of the world it was quite otherwise. The law man was under was rather for appropriating. God commanded, and his wants forced him to labour. That was his property, which could not be taken from him wherever he had fixed it. And hence subduing or cultivating the earth and having dominion, we see, are joined together. The one gave title to the other. So that God, by commanding to subdue, gave authority so far to appropriate. And the condition of human life, which requires labour and materials to work on, necessarily introduce private possessions.

35. The measure of property Nature well set, by the extent of men's labour and the conveniency of life. No man's labour could subdue or appropriate all, nor could his enjoyment consume more than a small part; so that it was impossible for any man, this way, to entrench upon the right of another or acquire to himself a property to the prejudice of his neighbour, who would still have room for as good and as large a possession (after the other had taken out his) as before it was appropriated. Which measure did confine every man's possession to a very moderate proportion, and such as he might appropriate to himself without injury to anybody in the first ages of the world, when men were more in danger to be lost, by wandering from their company, in the then vast wilderness of the earth than to be straitened for want of room to plant in.

36. The same measure may be allowed still, without prejudice to anybody, full as the world seems. For, supposing a man or family, in the state they were at first, peopling of the world by the children of Adam or

Noah, let him plant in some inland vacant places of America. We shall find that the possessions he could make himself, upon the measures we have given, would not be very large, nor, even to this day, prejudice the rest of mankind or give them reason to complain or think themselves injured by this man's encroachment, though the race of men have now spread themselves to all the corners of the world, and do infinitely exceed the small number was at the beginning. Nay, the extent of ground is of so little value without labour that I have heard it affirmed that in Spain itself a man may be permitted to plough, sow, and reap, without being disturbed, upon land he has no other title to, but only his making use of it. But, on the contrary, the inhabitants think themselves beholden to him who, by his industry on neglected, and consequently waste land, has increased the stock of corn, which they wanted. But be this as it will, which I lay no stress on, this I dare boldly affirm, that the same rule of propriety—viz., that every man should have as much as he could make use of, would hold still in the world, without straitening anybody, since there is land enough in the world to suffice double the inhabitants, had not the invention of money, and the tacit agreement of men to put a value on it, introduced (by consent) larger possessions and a right to them; which, how it has done, I shall by and by show more at large.

37. This is certain, that in the beginning, before the desire of having more than men needed had altered the intrinsic value of things, which depends only on their usefulness to the life of man, or had agreed that a little piece of yellow metal, which would keep without wasting or decay, should be worth a great piece of flesh or a whole heap of corn, though men had a right to appropriate by their labour, each one to himself, as much of the things of Nature as he could use, yet this could not be much, nor to the prejudice of others, where the same plenty was still left, to those who would use the same industry.

Before the appropriation of land, he who gathered as much of the wild fruit, killed, caught, or tamed as many of the beasts as he could—he that so employed his pains about any of the spontaneous products of Nature as any way to alter them from the state Nature put them in, by placing any of his labour on them, did thereby acquire a propriety in them; but if they perished in his possession without their due use—if the fruits rotted or the venison putrefied before he could spend it, he offended against the common law of Nature, and was liable to be punished: he invaded his neighbour's share, for he had no right farther than his use called for any of them, and they might serve to afford him

conveniences of life.

38. The same measures governed the possession of land, too. Whatsoever he tilled and reaped, laid up and made use of before it spoiled, that was his peculiar right; whatsoever he enclosed, and could feed and make use of, the cattle and product was also his. But if either the grass of his enclosure rotted on the ground, or the fruit of his planting perished without gathering and laying up, this part of the earth, notwithstanding his enclosure, was still to be looked on as waste, and might be the possession of any other. Thus, at the beginning, Cain might take as much ground as he could till and make it his own land, and yet leave enough to Abel's sheep to feed on: a few acres would serve for both their possessions. But as families increased and industry enlarged their stocks, their possessions enlarged with the need of them; but yet it was commonly without any fixed property in the ground they made use of till they incorporated, settled themselves together, and built cities, and then, by consent, they came in time to set out the bounds of their distinct territories and agree on limits between them and their neighbours, and by laws within themselves settled the properties of those of the same society. For we see that in that part of the world which was first inhabited, and therefore like to be best peopled, even as low down as Abraham's time, they wandered with their flocks and their herds, which was their substance, freely up and down—and this Abraham did in a country where he was a stranger; whence it is plain that, at least, a great part of the land lay in common, that the inhabitants valued it not, nor claimed property in any more than they made use of; but when there was not room enough in the same place for their herds to feed together, they, by consent, as Abraham and Lot did (Gen. xiii. 5), separated and enlarged their pasture where it best liked them. And for the same reason, Esau went from his father and his brother, and planted in Mount Seir (Gen. 36. 6).

39. And thus, without supposing any private dominion and property in Adam over all the world, exclusive of all other men, which can no way be proved, nor any one's property be made out from it, but supposing the world, given as it was to the children of men in common, we see how labour could make men distinct titles to several parcels of it for their private uses, wherein there could be no doubt of right, no room for quarrel.

40. Nor is it so strange as, perhaps, before consideration, it may appear, that the property of labour should be able to overbalance the

community of land, for it is labour indeed that puts the difference of value on everything; and let any one consider what the difference is between an acre of land planted with tobacco or sugar, sown with wheat or barley, and an acre of the same land lying in common without any husbandry upon it, and he will find that the improvement of labour makes the far greater part of the value. I think it will be but a very modest computation to say, that of the products of the earth useful to the life of man, nine-tenths are the effects of labour. Nay, if we will rightly estimate things as they come to our use, and cast up the several expenses about them—what in them is purely owing to Nature and what to labour—we shall find that in most of them ninety-nine hundredths are wholly to be put on the account of labour.

41. There cannot be a clearer demonstration of anything than several nations of the Americans are of this, who are rich in land and poor in all the comforts of life; whom Nature, having furnished as liberally as any other people with the materials of plenty—i.e., a fruitful soil, apt to produce in abundance what might serve for food, raiment, and delight; yet, for want of improving it by labour, have not one hundredth part of the conveniences we enjoy, and a king of a large and fruitful territory there feeds, lodges, and is clad worse than a day labourer in England.

42. To make this a little clearer, let us but trace some of the ordinary provisions of life, through their several progresses, before they come to our use, and see how much they receive of their value from human industry. Bread, wine, and cloth are things of daily use and great plenty; yet notwithstanding acorns, water, and leaves, or skins must be our bread, drink and clothing, did not labour furnish us with these more useful commodities. For whatever bread is more worth than acorns, wine than water, and cloth or silk than leaves, skins or moss, that is wholly owing to labour and industry. The one of these being the food and raiment which unassisted Nature furnishes us with; the other provisions which our industry and pains prepare for us, which how much they exceed the other in value, when any one hath computed, he will then see how much labour makes the far greatest part of the value of things we enjoy in this world; and the ground which produces the materials is scarce to be reckoned in as any, or at most, but a very small part of it; so little, that even amongst us, land that is left wholly to nature, that hath no improvement of pasturage, tillage, or planting, is called, as indeed it is, waste; and we shall find the benefit of it amount to little more than nothing.

43. An acre of land that bears here twenty bushels of wheat, and another in America, which, with the same husbandry, would do the like, are, without doubt, of the same natural, intrinsic value. But yet the benefit mankind receives from one in a year is worth five pounds, and the other possibly not worth a penny; if all the profit an Indian received from it were to be valued and sold here, at least I may truly say, not one thousandth. It is labour, then, which puts the greatest part of value upon land, without which it would scarcely be worth anything; it is to that we owe the greatest part of all its useful products; for all that the straw, bran, bread, of that acre of wheat, is more worth than the product of an acre of as good land which lies waste is all the effect of labour. For it is not barely the ploughman's pains, the reaper's and thresher's toil, and the baker's sweat, is to be counted into the bread we eat; the labour of those who broke the oxen, who digged and wrought the iron and stones, who felled and framed the timber employed about the plough, mill, oven, or any other utensils, which are a vast number, requisite to this corn, from its sowing to its being made bread, must all be charged on the account of labour, and received as an effect of that; Nature and the earth furnished only the almost worthless materials as in themselves. It would be a strange catalogue of things that industry provided and made use of about every loaf of bread before it came to our use if we could trace them; iron, wood, leather, bark, timber, stone, bricks, coals, lime, cloth, dyeing-drugs, pitch, tar, masts, ropes, and all the materials made use of in the ship that brought any of the commodities made use of by any of the workmen, to any part of the work, all which it would be almost impossible, at least too long, to reckon up.

44. From all which it is evident, that though the things of Nature are given in common, man (by being master of himself, and proprietor of his own person, and the actions or labour of it) had still in himself the great foundation of property; and that which made up the great part of what he applied to the support or comfort of his being, when invention and arts had improved the conveniences of life, was perfectly his own, and did not belong in common to others.

45. Thus labour, in the beginning, gave a right of property, wherever any one was pleased to employ it, upon what was common, which remained a long while, the far greater part, and is yet more than mankind makes use of Men at first, for the most part, contented themselves with what unassisted Nature offered to their necessities; and though afterwards, in some parts of the world, where the increase of people and

stock, with the use of money, had made land scarce, and so of some value, the several communities settled the bounds of their distinct territories, and, by laws, within themselves, regulated the properties of the private men of their society, and so, by compact and agreement, settled the property which labour and industry began. And the leagues that have been made between several states and kingdoms, either expressly or tacitly disowning all claim and right to the land in the other's possession, have, by common consent, given up their pretences to their natural common right, which originally they had to those countries; and so have, by positive agreement, settled a property amongst themselves, in distinct parts of the world; yet there are still great tracts of ground to be found, which the inhabitants thereof, not having joined with the rest of mankind in the consent of the use of their common money, lie waste, and are more than the people who dwell on it, do, or can make use of, and so still lie in common; though this can scarce happen amongst that part of mankind that have consented to the use of money.

46. The greatest part of things really useful to the life of man, and such as the necessity of subsisting made the first commoners of the world look after—as it doth the Americans now—are generally things of short duration, such as—if they are not consumed by use—will decay and perish of themselves. Gold, silver, and diamonds are things that fancy or agreement hath put the value on, more than real use and the necessary support of life. Now of those good things which Nature hath provided in common, every one hath a right (as hath been said) to as much as he could use; and had a property in all he could effect with his labour; all that his industry could extend to, to alter from the state Nature had put it in, was his. He that gathered a hundred bushels of acorns or apples had thereby a property in them; they were his goods as soon as gathered. He was only to look that he used them before they spoiled, else he took more than his share, and robbed others. And, indeed, it was a foolish thing, as well as dishonest, to hoard up more than he could make use of If he gave away a part to anybody else, so that it perished not uselessly in his possession, these he also made use of And if he also bartered away plums that would have rotted in a week, for nuts that would last good for his eating a whole year, he did no injury; he wasted not the common stock; destroyed no part of the portion of goods that belonged to others, so long as nothing perished uselessly in his hands. Again, if he would give his nuts for a piece of metal, pleased with its colour, or exchange his sheep for shells, or wool for a sparkling pebble

or a diamond, and keep those by him all his life, he invaded not the right of others; he might heap up as much of these durable things as he pleased; the exceeding of the bounds of his just property not lying in the largeness of his possession, but the perishing of anything uselessly in it.

47. And thus came in the use of money; some lasting thing that men might keep without spoiling, and that, by mutual consent, men would take in exchange for the truly useful but perishable supports of life.

48. And as different degrees of industry were apt to give men possessions in different proportions, so this invention of money gave them the opportunity to continue and enlarge them. For supposing an island, separate from all possible commerce with the rest of the world, wherein there were but a hundred families, but there were sheep, horses, and cows, with other useful animals, wholesome fruits, and land enough for corn for a hundred thousand times as many, but nothing in the island, either because of its commonness or perishableness, fit to supply the place of money. What reason could any one have there to enlarge his possessions beyond the use of his family, and a plentiful supply to its consumption, either in what their own industry produced, or they could barter for like perishable, useful commodities with others? Where there is not something both lasting and scarce, and so valuable to be hoarded up, there men will not be apt to enlarge their possessions of land, were it never so rich, never so free for them to take. For I ask, what would a man value ten thousand or an hundred thousand acres of excellent land, ready cultivated and well stocked, too, with cattle, in the middle of the inland parts of America, where he had no hopes of commerce with other parts of the world, to draw money to him by the sale of the product? It would not be worth the enclosing, and we should see him give up again to the wild common of Nature whatever was more than would supply the conveniences of life, to be had there for him and his family.

49. Thus, in the beginning, all the world was America, and more so than that is now; for no such thing as money was anywhere known. Find out something that hath the use and value of money amongst his neighbours, you shall see the same man will begin presently to enlarge his possessions.

50. But, since gold and silver, being little useful to the life of man, in proportion to food, raiment, and carriage, has its value only from the consent of men—whereof labour yet makes in great part the measure—it is plain that the consent of men have agreed to a disproportionate and unequal possession of the earth—I mean out of the bounds of society

and compact; for in governments the laws regulate it; they having, by consent, found out and agreed in a way how a man may, rightfully and without injury, possess more than he himself can make use of by receiving gold and silver, which may continue long in a man's possession without decaying for the overplus, and agreeing those metals should have a value.

51. And thus, I think, it is very easy to conceive, without any difficulty, how labour could at first begin a title of property in the common things of Nature, and how the spending it upon our uses bounded it; so that there could then be no reason of quarrelling about title, nor any doubt about the largeness of possession it gave. Right and conveniency went together. For as a man had a right to all he could employ his labour upon, so he had no temptation to labour for more than he could make use of. This left no room for controversy about the title, nor for encroachment on the right of others. What portion a man carved to himself was easily seen; and it was useless, as well as dishonest, to carve himself too much, or take more than he needed.

Chapter VI Of Paternal Power

52. It may perhaps be censured an impertinent criticism in a discourse of this nature to find fault with words and names that have obtained in the world. And yet possibly it may not be amiss to offer new ones when the old are apt to lead men into mistakes, as this of paternal power probably has done, which seems so to place the power of parents over their children wholly in the father, as if the mother had no share in it; whereas if we consult reason or revelation, we shall find she has an equal title, which may give one reason to ask whether this might not be more properly called parental power? For whatever obligation Nature and the right of generation lays on children, it must certainly bind them equal to both the concurrent causes of it. And accordingly we see the positive law of God everywhere joins them together without distinction, when it commands the obedience of children: "Honour thy father and thy mother" (Exod. 20. 12); "Whosoever curseth his father or his mother" (Lev. 20. 9); "Ye shall fear every man his mother and his father" (Lev. 19. 3); "Children, obey your parents" (Eph. 6. 1), etc., is the style of the Old and New Testament.

53. Had but this one thing been well considered without looking any deeper into the matter, it might perhaps have kept men from running



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What Are Human Rights? Four Schools of Thought

*Marie-Bénédicte Dembour**

ABSTRACT

A close reading of academic literature reveals that we do not all conceive of human rights in the same way. This contribution proposes that “natural scholars” conceive of human rights as *given*; “deliberative scholars” as *agreed upon*; “protest scholars” as *fought for*; and “discourse scholars” as *talked about*. The position of each of these four schools on the foundation, universality, possible realization, and legal embodiment of human rights is reviewed, as well as is the schools’ faith, or lack thereof, in human rights. Quotations from academic texts illustrate how the four school model cuts across the academic disciplines with examples drawn from philosophy, politics, law, and anthropology.

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I. INTRODUCTION

Different people hold different concepts of human rights. This proposition might initially appear somewhat at odds with the commonly heard assertion that human rights are both universal and obvious (in the sense that they are derived from reason), which may suggest that human rights are unambiguous and uncontroversial. However, there is in practice a lack of agreement on what human rights are. Based on an analysis of the human rights academic literature, this contribution identifies four schools of thought on human rights.¹ It proposes that “natural scholars” conceive of human rights as *given*; “deliberative scholars” as *agreed upon*; “protest scholars” as *fought for*; and “discourse scholars” as *talked about*. It further proposes that these four schools act as ideal-types, which, arranged around two axes, potentially cover the whole conceptual field of human rights (see Figure 1). This mapping exercise is useful in that it clarifies positions from which various arguments about human rights are made, helping to understand where, why, and to what extent agreements are reached and disagreements persist in the human rights field. It also highlights the pregnancy of a variety of positions, which are far less idiosyncratic than the received orthodoxy would suggest.²

II. THE SCHOOLS IN A NUTSHELL

A. Introducing Each School

The natural school embraces the most common and well-known definition of human rights: a definition that identifies human rights as those rights one possesses simply by being a human being. This definition, where human rights are viewed as given, can be considered the credo of the natural school. For most natural scholars, human rights are entitlements that, at their core, are negative in character and thus, are absolute.³ These entitlements

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1. Using the word “schools” is misleading both in that lay people (rather than just scholars) participate and share in this conceptualization and in that scholars associated with one particular school may dislike being bracketed together. The word nonetheless usefully connotes explicit or implicit adherence to a number of precepts, which is why it is adopted here.
 2. At the end of a presentation that I gave to the Danish Centre for Human Rights, two members of the perhaps twenty-strong audience came to me (independently from each other) to say that my identification of four schools was a relief to them, lifting their sense of being almost a fraud in the Centre due to their fear that their position on human rights was just too unorthodox to be acceptable.
 3. The natural school tends to conceive of human rights as entailing negative obligations that can be expressed as an obligation (e.g. on the government) to refrain from doing

are based on “nature,” a short-cut which can stand for God, the Universe, reason, or another transcendental source. The universality of human rights is derived from their natural character. Natural scholars believe that human rights exist independently of social recognition, even though recognition is preferable. They welcome the inscription of human rights in positive law. The natural school has traditionally represented the heart of the human rights orthodoxy.

The orthodoxy is increasingly moving, however, towards the deliberative school of thought, which conceives of human rights as political values that liberal societies *choose* to adopt. Deliberative scholars tend to reject the natural element on which the traditional orthodoxy bases human rights. For them, human rights come into existence through societal agreement. Deliberative scholars would like to see human rights become universal, but they also recognize that this will require time. In addition, they understand that this will happen only when and if everybody around the globe becomes convinced that human rights are the best possible legal and political standards that can rule society and therefore, should be adopted. This school invariably stresses the limits of human rights, which are regarded as fit to govern exclusively the polity and not being relevant to the whole of moral and social human life. Deliberative scholars often hold constitutional law as one of the prime ways to express the human rights values that have been agreed upon.

The protest school is concerned first and foremost with redressing injustice. For protest scholars, human rights articulate rightful claims made by or on behalf of the poor, the unprivileged, and the oppressed. Protest scholars look at human rights as claims and aspirations that allow the status quo to be contested in favor of the oppressed. As such, they are not particularly interested in the premise that human rights are entitlements (though they do not reject it). Protest scholars advocate relentlessly fighting for human rights, as one victory never signals the end of all injustice. They accept that the ultimate source of human rights lies on a transcendental plane, but most of them are more concerned with the concrete source of human rights in social struggles, which are as necessary as they are perennial. Even if they sometimes regard the elaboration of human rights law as a goal, they nonetheless tend to view human rights law with suspicion as participating in a routinization process that tends to favor the elite and thus may be far from embodying the true human rights idea.

something (e.g. torturing). Only negative obligations can be absolute, for positive obligations (e.g. to provide education) are never as clear-cut as a simple prohibition to do something. On the way human rights orthodoxy's logic has been able to accommodate positive obligations, see MARIE- BÉNÉDICTE DEMBOUR, WHO BELIEVES IN HUMAN RIGHTS? REFLECTIONS ON THE EUROPEAN CONVENTION 78–85 (2006).

The discourse school is characterized by its lack of reverence towards human rights. In its perspective, human rights exist only because people talk about them. Discourse scholars are convinced neither that human rights are given nor that they constitute the right answer to the ills of the world, but they do recognize that the language surrounding human rights has become a powerful language with which to express political claims. Discourse scholars fear the imperialism of human rights imposition and stress the limitations of an ethic based on individualistic human rights. Nonetheless, some accept that the human rights discourse, as the prominent political ethical discourse of our time, occasionally yields positive results. But they do not *believe* in human rights and often wish superior projects of emancipation could be imagined and put into practice.

B. Mapping the Field

The four schools identified above should be approached as Weberian ideal-types rather than fixed categories that neatly and perfectly describe single track thought processes. The model does not assume or claim that social reality (here, academic writings on human rights) always *exactly* conforms to its propositions. Moreover, for two people to belong to the same school does not mean that they conceive of human rights in precisely the same way—in many respects, they may fiercely disagree with each other. Nonetheless, the model is able to identify the connections among broad orientations, as the next section demonstrates by exploring the way each of the four schools approaches various issues, including human rights law, the foundation of human rights, their concrete realization, what it means to say they are universal, and whether one can/should believe in them.

The four-school model leads to a mapping of the entire human rights conceptual field, as Figure 1 suggests. In this figure, the top half of the field corresponds to an orientation that tends to ground human rights transcendentally and the bottom half to an orientation that tends to see human rights as a society/language-based reality; the left hand-side of the field corresponds to a liberal and individualistic orientation and the right hand-side to a more collective orientation of social justice.⁴

The model was constructed abductively: while trying to make sense of academic writings, the author identified two, three, and then four schools of

4. The scholars who identify with the liberal and individualistic orientation corresponding to the left side need not be in favor of the status quo. For natural scholars who are denouncing a situation and calling—and indeed acting—for its immediate change, see, for example GUGLIELMO VERDIRAME & BARBARA HARRELL-BOND, *RIGHTS IN EXILE: JANUS-FACED HUMANITARIANISM* (2005).

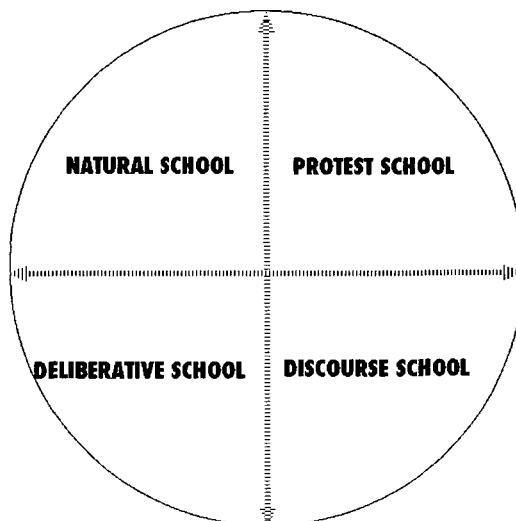


Figure 1. The Human Rights Field

thought. It is only when relationships among schools were examined that it suddenly appeared that the four schools could cover the whole conceptual human rights field. Empirically, so far, the model has been able to accommodate existing views on human rights. However, its heuristic value over time will need to be confirmed through persistence in its ability to associate any human rights thinker with a particular school(s).

III. THE POSITION OF THE SCHOOLS

A. On Human Rights Law

Natural scholars tend to celebrate human rights law. For the great majority of them, human rights law embodies the human rights concept: the law exists in direct continuation with the transcendental existence of human rights. Admittedly, a small minority is not convinced that human rights law, as it has been developed, corresponds to human rights. Nonetheless, most natural scholars regard the development of international human rights law in the last half-century as undeniable progress. For natural scholars, societies where human rights, by and large, are respected either already exist or can be created.

Deliberative scholars also have great faith in the potential of human rights law. All of their efforts are geared toward identifying, agreeing, and

entrenching principles that allow for democratic decision and fair adjudication. For them, there are no human rights beyond human rights law: the law, especially as it is embodied in constitutional principles of deliberation, is all there is to human rights. This law is more procedural than substantive in nature: it acts as a guide on how to do things in the political sphere.

By contrast, it would be hard to persuade protest scholars that conditions of effective human rights protection have been realized. In their perspective, there is always further injustice (human rights abuses) in need of redress. They tend to distrust human rights law: they fear that it may be hijacked by the elite and are wary of bureaucratization. They generally do not believe that institutions, including so-called human rights institutions, can be trusted to realize the human rights ideal. For them, human rights law is unlikely to be true to the human rights ideal. They regard human rights law as a mitigated progress at best and a sham at worst.

The position of the discourse scholars, the nihilists on the concept of human rights, believe that human rights law is as good or as bad as any other law. It must be judged in each different situation on its merits.

B. On the Foundation of Human Rights

Natural scholars believe human rights are founded in nature. However, they are aware that founding human rights on something akin to nature is unlikely to be universally compelling. Faced with this difficulty, many fall back on the legal consensus. As stated above, natural scholars tend to see human rights law to be in direct continuation with the human rights concept. From there, conflating transcendental human rights with human rights law is a step that some natural scholars are ready to take. This explains why a good number of them are happy to rely on the concrete manifestation of human rights in international law in order to dismiss the need to find a metaphysical basis for human rights. However, logically, in the natural school's perspective, a legal consensus can only ever be the *proof* of the existence of human rights, not a foundation of human rights. Presumably, natural scholars would still believe in human rights even in the absence of the so-called consensus that has developed since World War II. Indeed, occasionally, a natural scholar rejects the present form of human rights law as wrong. Not surprisingly, there are natural scholars who specifically refuse to rely on consensus to found human rights. The search for an ontological basis for human rights occupies some key natural scholars.

The protest scholars encounter the same problem as the natural scholars when it comes to identifying the ground on which they base their belief in human rights. Naturally suspicious of human rights law, they cannot adopt the route followed by some natural scholars of relying on the legal consensus.

Instead, they rely on the less specific idea of the historical development of a tradition. Belgian philosopher and protest scholar Guy Haarscher speaks of “*dressage*,” a French word that connotes the training of animals and thus, may provocatively suggest an internalization by the individual of a logic that is not entirely instinctive.⁵ The typical emphasis of this school on a learned tradition explains why protest scholars are generally very interested in human rights education. While a long established tradition may perhaps seem to offer more permanence than the mere legal consensus of a particular historical moment, those who deny the existence of human rights still criticize it. It is ultimately as dissatisfying for protest scholars as it is for natural scholars to shun completely a metaphysical foundation on which to base human rights. Not surprisingly, some protest scholars seek to ground human rights on a more metaphysical basis than a social discourse.⁶

The foundation of human rights concerns the natural and protest schools only. It simply does not interest the discourse school that believes that human rights exist only because they are talked about. Discourse scholars look at discussions of the foundation of human rights with disdain and as fundamentally flawed. As for deliberative scholars, who see human rights as emerging from agreement, the foundation of human rights is not an interesting issue. This does not detract them from being highly concerned with the issue of how to find, found, or reach agreement (where the emphasis shifts, expectedly given their general orientation, to process). They are more interested in justification than foundation.⁷

C. On the Realization of Human Rights

Natural scholars conceive of human rights as entitlements: entitlements to specific objects that every individual should have respected. For them, human beings *have* human rights, and human rights are typically realized through individual enjoyment. A possession paradox arises, as noted by the natural scholar Jack Donnelly: “Where human rights are effectively protected, [the individual] continue[s] to *have* human rights, but there is no need or occasion to *use* them.”⁸ Mr. Donnelly rephrases this idea: “[H]aving’ a right is of most value precisely when one does not ‘have’ (the object of) the right

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5. GUY HAARSCHER, *PHILOSOPHIE DES DROITS DE L'HOMME* 124, 130 (4th ed. 1993). On the identification of Haarscher as a protest scholar, see DEMBOUR, *supra* note 3, at 236–38, 243–48.
 6. Costas Douzinas is a prime example. See COSTAS DOUZINAS, *THE END OF HUMAN RIGHTS: CRITICAL LEGAL THOUGHT AT THE TURN OF THE CENTURY* (2000).
 7. See, e.g., JAMES W. NICKEL, *MAKING SENSE OF HUMAN RIGHTS* (2d ed. 2007).
 8. JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 14 (1st ed. 1989). See main text below for excerpts from Donnelly’s work illustrating why he can be classified as a natural scholar.

. . . . [, leading to a situation of] ‘having’ (possessing) and ‘not having’ (not enjoying) a right at the same time.”⁹ For the purpose of classification, the important point is that most natural scholars stress that the individual *has* human rights by virtue of being a human being.

Protest scholars would also accept that human beings have human rights. Though, instead of thinking of human rights as entitlements to particular objects that each individual, as it were, is selfishly at liberty to claim for herself, they think of the concept of human rights as a call to ensure that the rights of others be respected. In other words, when my rights are secured, I must ensure that the rights of my neighbor are secured as well as the rights of the neighbor of my neighbor and so on. In their perspective, the problem that arises out of the possession or enjoyment of human rights is that once individuals enjoy human rights, they often only use them for their own benefit. The loss of the sense of obligation to fight for the human rights of others is a betrayal of the human rights concept. For the protest school, human rights are realized through a perpetual fight for their realization. They conceive of human rights not so much as tangible but as a utopia or a project always in the making (and reversible).

Having human rights does not enter the logic of the deliberative school. For deliberative scholars, human rights serve to guide action. As such, human rights are not and cannot be a matter of possession. They lay down the parameters of deliberation, the outcome of which is not presumed in advance. In the perspective of this school, human rights do not directly dictate how things should be substantively, therefore granting little sense to the idea that human rights can be possessed. What marks the realization of human rights is liberal, democratic, and fair processes that enable good political governance. Human rights are realized not through possession but through a particular mode of political action.

It makes no sense for discourse scholars to think about the realization of human rights, as they do not believe in human rights to begin with. Discourse scholars instead repeatedly point to the shortcomings of the human rights discourse that does not deliver what it promises, namely, equality between human beings. Discourse scholars are not surprised by the repeated failures of the human rights discourse to achieve its declared goals. Many of them intimate that a more solid project of emancipation is needed. Some simply refrain from making grand pronouncements on ethical issues and seek, from a resolutely empirical approach, to observe and describe the contradictory features of human rights discourse.

9. JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 9 (2d ed. 2003).

D. On the Universality of Human Rights

For natural scholars, human rights derive from nature; their universality is therefore a given. Faced with the fact that human rights have taken different forms over time, they concede that human rights can, in practice, receive particular articulations. These are legitimate as long as they remain true to the principle of human rights, which, by contrast, is unique. The notion of "overlapping consensus" encapsulates this idea.

For protest scholars, the ubiquity of injustice points to the universal relevance of human rights. Less inclined than natural scholars to look at human rights as entitlements to specific objects, the different articulations of human rights over time is not a logical problem for their school of thought. Indeed, as the world evolves, so do the forms of suffering, potentially requiring new formulations of human rights.

For deliberative scholars, the universality of human rights is at best a project: it is certainly not a given. In their perspective, human rights will only become universal through the global adoption of the liberal values they express. Whether this will happen or not remains to be seen. While deliberative scholars would welcome the universalization of human rights principles, not all concern themselves deeply with what is happening in societies that they regard as geographically, politically, and culturally very different from their own.

Discourse scholars are extremely irritated by the claims of scholars in the other three schools about the universality of human rights. They find the natural school's perspective intellectually untenable in view of the diversity of moral forms in human society over time and space. They denounce its imperialism. Discourse scholars are also wary of the deliberative school and feel that the school's repeated invocation of consensus dangerously obscures power relations. They tend to be more sympathetic to the position of the protest school, which shares their commitment to denouncing injustice.

E. On Their Overall Faith/Position Toward Human Rights

Natural scholars *believe* in human rights. Historically, they also are the ones who set up the parameters within which human rights came to be both conceived and debated, at least intellectually. They have traditionally represented the human rights orthodoxy.

Protest scholars also *believe* in the concept of human rights, though they deplore the fact that human rights have been institutionally highjacked. Thus, they call for a return to true human rights. Furthermore, they stress that human rights constitute an extremely demanding ethic (one can never do enough in the perpetual fight for the realization of human rights). They

could be said to be to human rights what Liberation theologians are to Catholicism, and in that sense, they are dissidents from the orthodoxy.

In keeping with the religion analogy, deliberative scholars would represent secularity in human rights thought. This label does not make any presumption about their lack or possession of religious faith. Rather, in this context, a secular label with respect to human rights (and human rights only) points to the fact that deliberative scholars do not *believe* in human rights, even though they are entirely committed to the idea of trying to enact and perhaps to spread the values they associate with human rights. In a somewhat ironic twist of language, they increasingly represent the current human rights orthodoxy.

Finally, discourse scholars are human rights nihilists. Philosophically, nihilism does not entail the rejection of all moral principles. Instead, following Nietzsche, it can signal the call for new values to be created through the re-interpretation of old values that have lost their original sense. Having to live with the supremacy of the language of human rights in contemporary political discourse, to the extent that discourse scholars accept this language, they call for its re-evaluation.

IV. THE SCHOOLS IN THE PRACTICE OF ACADEMIC WRITINGS

A. Identifying Clues

Table 1 lays out the propositions presented above in a systematic form. It can serve as a reference when attempting to place arguments made about human rights in one of the four sections of the human rights conceptual field. For example, the conflation of human rights with human rights law, whether expressed or implicit, can generally be considered a powerful clue for an affiliation with the natural school. However, this clue is not devoid of possible ambiguities: deliberative scholars tend to equate (rather than conflate) human rights law with human rights, making it potentially difficult to interpret a positive reference to human rights law. To complicate matters further, some identifying clues can be missing or expressed in a very different way than what is generally the case in that school. For example, Mark Goodale, a recognizable natural scholar, specifically rejects current human rights law as being unfaithful to the true human rights.¹⁰ Moreover, the appearance of

10. See MARK GOODALE, *SURRENDERING TO UTOPIA: AN ANTHROPOLOGY OF HUMAN RIGHTS* 37 (2009). “[The ethnography of human rights] calls into question many of the basic assumptions of postwar human rights theory and practice. Moreover, to the extent that the international human rights system is a reflection of these assumptions, then it too must be reconsidered.” *id.* See *infra* section IV(B) for excerpts from Goodale’s work illustrating why he can be classified as a natural scholar.

Table 1.
Systematic Comparison of the Schools

<i>Schools of thought</i>	Natural school (HR old orthodoxy)	Deliberative school (HR secularism/ new orthodoxy)	Protest school (HR dissidence)	Discourse school (HR nihilism)
Are conceived, in short, as Consist in Entitlements	A given Entitlements (probably negative at their core)	Agreed upon	Fought for	Talked about
Are for	Every single human being	Principles	Claims/Aspirations	Whatever you put into them
Can be embodied in law?	Running the polity fairly	First and foremost those who suffer	Should be, but are not, for those who suffer	Should be, but are not, for those who suffer
See HR law since 1948 as definite progress	Definitely—this is the aim	Yes—law is typical if not only mode of existence	HR law exists but does not embody anything grand	HR law exists but does not embody anything grand
Are based on	Yes*	Yes	No	No
Are realizable?	Nature/God/ Universe/Reason [with legal consensus acting as a fallback for many]	A consensus as to how the polity should be run [with reason in the background]	A tradition of social struggles [but with a yearning for the transcendental]	No, unsurprisingly, they are a failure
Are universal?	Yes, definitely, they are part of the structure of the universe (even if they get translated in practice in slightly different forms)	Potentially, if the consensus broadens	At source, yes, if only because suffering is universal	No, their supposed universality is a pretence

* Though exceptionally a natural scholar will reject the present form of human rights law as not embodying human rights.

a key word can be misleading. For example, the fact that Jürgen Habermas is famous for his discourse theory on law and democracy does not make him a discourse scholar. As we shall see in subsection B, Habermas is best classified as a deliberative scholar. Affiliation with a particular school, to be securely assessed, must always be confirmed on a number of issues. Even then, it is possible for an argument to straddle different schools.

B. Naming Some Scholars

This section places a variety of human rights scholars in each school. In each individual case, short passages from one single text are quoted without a further explanation as to why they can be attached to the school to which they are attached (as the above text and table should enable the reader to work this through alone). The selected passages reflect the personal views of their author—they do not represent general statements and their direct purpose is not to rehearse or engage with the ideas of others. While the quotations are often truncating the original text, they hopefully do not distort the views of their authors. It should nonetheless be borne in mind that their aim is not to capture the main point of the publication from which they are extracted. Inevitably, the exercise also fails to do justice to the authors' arguments, which are invariably more sophisticated than the sample of words presented here indicates.

1. In the Natural School

Alan Gewirth, philosopher, in *The Community of Rights*:

[A] right is an individual's interest that ought to be respected and protected; and this "ought" involves, on the one side, that the interest in question is something that is due or owed to the subject or right-holder as her personal property, as what she is personally entitled to have and control for her own sake; and, on the other side, that other persons, as respondents, have a mandatory duty at least not to infringe this property.¹¹

Are there any human rights? Or, more generally, since human rights are a species of moral rights, are there any moral rights at all? Or, to put it still more generally, do humans have any rights? . . . [W]here does one look to ascertain the existence of moral rights or human rights?¹²

[What I call the *Principle of Generic Consistency* (PGC)] is the principle of human rights. . . . The argument for the PGC has . . . dialectically established that the human rights have as their objects the necessary conditions of action and successful action in general and that all humans equally have these rights.¹³

11. ALAN GEWIRTH, THE COMMUNITY OF RIGHTS 9 (1996).

12. *Id.* at 10.

13. *Id.* at 19.

Jack Donnelly, political scientist, in *Universal Human Rights in Theory and Practice*:

If human rights are the rights one has simply because one is a human being, as they usually are thought to be, then they are held “universally,” by all human beings.¹⁴

[H]uman rights claims rest on a prior moral (and international legal) entitlement.¹⁵

The source of human rights is man’s moral nature.¹⁶

Human rights are at once a utopian ideal and a realistic practice for implementing that ideal.¹⁷

Michael Perry, lawyer, in *The Idea of Human Rights: Four Inquiries*:

The idea of human rights—the idea that has emerged in international law in the period since the Second World War—is complex.¹⁸

The idea of human rights that informs . . . international human rights documents . . . is . . . the idea that *there is something about each and every human being, simply as a human being, such that certain choices should be made and certain other choices rejected; in particular, certain things ought not to be done to any human being and certain other things ought to be done for every human being.*¹⁹

[T]he force of a claim about what ought not to be done to or about what ought to be done for human beings does not depend on whether the claim is expressed in the language of rights. Even though the language of moral rights is . . . useful, it is not essential.²⁰

Mark Goodale, anthropologist, in *Surrendering to Utopia: An Anthropology of Human Rights*:

[A]t mid-twentieth century anthropology had established itself as the preeminent source of scientific expertise on many empirical facets of culture and society, . . . [but] it was at precisely this moment . . . [that anthropology] was blocked from contributing in any meaningful way to the development of understanding about what was—and still is—the most important putative cross-cultural fact: that human beings are essentially the same and that this essential sameness entails a specific normative framework.²¹

14. DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* (2d ed.), *supra* note 9, at 1.

15. *Id.* at 12.

16. *Id.* at 14.

17. *Id.* at 15.

18. MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* 11 (1998).

19. *Id.* at 13.

20. *Id.* at 55–56.

21. GOODALE, *supra* note 10, at 18.

[M]ost people intuit . . . that this essential sameness suggests an entire moral and perhaps legal framework, one that is expressed in what is for many people around the world an unintelligible normative language (rights), yet one that either does, or ought to, supersede all of those political, religious, or other structures that work to oppress, restrict, or diminish.²²

2. In the Deliberative School

Jürgen Habermas, philosopher, in *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*:

The philosopher *tells* citizens which rights they *should* acknowledge mutually if they are legitimately to regulate their living together by means of positive law. . . . [A] change of perspective [is] necessary if citizens are to be capable of applying the discourse principle *for themselves*. . . . After this change in perspective, we can no longer ground equal communicative and participatory rights from *our vantage point*. The citizens themselves become those who deliberate and, acting as a constitutional assembly, decide how they must fashion the rights that give the discourse principle legal shape as a principle of democracy. . . . [Political rights] are meant to guarantee that all formally and procedurally correct outcomes enjoy a presumption of legitimacy. . . . The scope of citizens' public autonomy is not restricted by natural or moral rights just waiting to be put into effect. . . . Nothing is given prior to the citizen's practice of self-determination other than the discourse principle, which is built into the conditions of communicative association in general, and the legal medium as such.²³

Michael Ignatieff, political commentator, in *Human Rights as Politics and Idolatry*:

[T]here is nothing sacred about human beings, nothing entitled to worship or ultimate respect. All that can be said about human rights is that they are necessary to protect individuals from violence and abuse, and if it is asked why, the only possible answer is historical.²⁴

We need to stop thinking of human rights as trumps and begin thinking of them as a language that creates the basis for deliberation. . . . [R]ights are not the universal credo of a global society, not a secular religion, but something much more limited and yet just as valuable: the shared vocabulary from which our arguments can begin, and the bare human minimum from which differing ideas of human flourishing can take root.²⁵

The fundamental moral commitment entailed by rights is not to respect, and certainly not to worship. It is to deliberation.²⁶

22. *Id.* at 57.

23. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 126–28 (1996).

24. MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* 83 (2001).

25. *Id.* at 95.

26. *Id.* at 84.

Tom Campbell, lawyer, in *Rights: A Critical Introduction*:

My view is that what rights people have is a matter of social fact, . . . [though I] accept that moral judgment is involved in answering the next question: what rights ought to exist?²⁷

[R]ights as we know them are contingent historical phenomena with inherited meanings and contents, rather than cultural and historical universals, although this is what we may strive to make them for the future.²⁸

[R]ights do not exist until they are routinely secured. . . . [The question to be answered is] how we can best turn manifesto rights which express demands or proposals as to what rights ought to exist into rights that actually do exist.²⁹

Sally Merry, anthropologist, in *Human Rights and Gender Violence: Translating International Law into Local Justice*:

Human rights are part of a distinctive modernist vision of the good and just society that emphasizes autonomy, choice, equality, secularism, and protection of the body.³⁰

Over time, a gradual expansion of norms creates institutional structures, leading ultimately to a norms cascade as the ideas of human rights become widespread and internalized.³¹

Instead of viewing human rights as a form of global law that imposes rules, it is better imagined as a cultural practice, as a means of producing new cultural understandings and actions. The human rights legal system produces culture by developing general principles that define problems and articulate normative visions of a just society in a variety of documents ranging from lawlike ratified treaties to nonbinding declarations of the General Assembly.³²

[Human rights law] is a fragmentary and largely persuasive mechanism very much in the making.³³

3. In the Protest School

Jacques Derrida, philosopher, in *On Cosmopolitanism and Forgiveness*:

Where have we received the image of cosmopolitanism from? And what is happening to it? . . . [H]ow can we . . . dream of a novel status . . . for the “cities of refuge”, through a renewal of international law?³⁴

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- 27. TOM CAMPBELL, *RIGHTS: A CRITICAL INTRODUCTION*, at xii (2006).
 - 28. *Id.* at xvii.
 - 29. *Id.* at 206.
 - 30. SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* 220 (2006).
 - 31. *Id.* at 221.
 - 32. *Id.* at 228–29.
 - 33. *Id.* at 227.
 - 34. JACQUES DERRIDA, *ON COSMOPOLITANISM AND FORGIVENESS* 3 (Mark Dooley trans., 2001).

There is still a considerable gap separating the great and generous principles of the right to asylum inherited from the Enlightenment thinkers and from the French Revolution and, on the other hand, the historical reality . . . of these principles.³⁵

It is a question of knowing how to transform and improve the law, and of knowing if this improvement is possible within an historical space which takes place between the Law of an unconditional hospitality, offered *a priori* to every other, to all newcomers, *whoever they may be*, and the conditional laws of a right to hospitality without which *The unconditional Law of hospitality* would be in danger of remaining a pious and irresponsible desire, without form and without potency, and [in danger] of . . . being perverted at any moment.³⁶

Neil Stammers, political/social theorist, in *Human Rights and Social Movements*:

This book explores the analytical significance of the historical link between human rights and social movements, arguing that ordinary people—working together in social movements—have always been a key originating source of human rights.³⁷

[T]he historical emergence and development of human rights needs to be understood and analysed in the context of social movement struggles against extant relations and structures of power.³⁸

[O]nce institutionalised[,] human rights come to stand in a much more ambiguous relation to power. While they can still be used to challenge power, their origins and meanings as “struggle concepts” can get lost or be switched in ways that result in human rights becoming a tool of power, not a challenge to it.³⁹

Upendra Baxi, lawyer, in *The Future of Human Rights*:

I take it as axiomatic that the historic mission of “contemporary” human rights is to give voice to human suffering, to make it visible, and to ameliorate it.⁴⁰

Whether or not a world bursting forth with human rights norms and standards is a better world than one bereft of human rights languages still remains an open question.⁴¹

[T]he originary authors of human rights are people in struggle and communities of resistance.⁴²

35. *Id.* at 11.

36. *Id.* at 22–23.

37. NEIL STAMMERS, *HUMAN RIGHTS AND SOCIAL MOVEMENTS* 1 (2009).

38. *Id.* at 2.

39. *Id.* at 3.

40. UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* 6 (2d ed. 2006).

41. *Id.* at 2.

42. *Id.* at xiv.

What makes contemporary human rights movements *precious* is the fact that they . . . deny all *cosmological*, as well as *terrestrial*, *justifications* for the imposition of unjustified human suffering.⁴³

June C. Nash, anthropologist, in *Mayan Visions: The Quest for Autonomy in an Age of Globalization*:

When grassroots movements converge, . . . the particular merges with the universal as the claims of poor market vendors to keep their posts in the old market merge with the plea to end the war raised by other speakers at [the protest I described above]. Frequently these “lesser voices” are lost as a movement gains power, but their claims are the elemental challenges for justice that ignite social movements.⁴⁴

A hidden benefit of global integration is the opening up of local protests against growing inequalities to a worldwide audience. This depends on a conscientious press whose reports are made available to a wide audience. It also depends upon data collection agencies inspired by human rights concerns. The conjuncture of these two conditions made the Chiapas uprising available to a wide reading public throughout the world. The press and human rights NGOs provided both a mirror for the indigenous people to perceive how the world was responding to their protest and a catalyst to world opinion.⁴⁵

4. In the Discourse School

Alasdair MacIntyre, philosopher, in *After Virtue: A Study in Moral Theory*:

[Rights is one of three concepts which occupy a] key place . . . in the distinctively modern moral scheme . . . By “rights” I do not mean those rights conferred by positive law or custom on specified classes of person; I mean those rights which are alleged to belong to human beings as such and which are cited as a reason for holding that people ought not to be interfered with in their pursuit of life, liberty and happiness. . . . [T]he truth is plain: there are no such rights, and belief in them is one with belief in witches and in unicorns.⁴⁶

The best reason for asserting so bluntly that there are no such rights is indeed of precisely the same type as the best reason which we possess for asserting that there are no witches and the best reason which we possess for asserting that there are no unicorns: every attempt to give good reasons for believing that there *are* such rights has failed.⁴⁷

Wendy Brown, political theorist, in an article entitled “The Most We Can Hope For . . . : Human Rights and the Politics of Fatalism”:

43. *Id.* at xxiii.

44. JUNE C. NASH, *MAYAN VISIONS: THE QUEST FOR AUTONOMY IN AN AGE OF GLOBALIZATION* 213 (2001).

45. *Id.* at 253.

46. ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 68–69 (3d ed. 2007).

47. *Id.* at 69.

What are the implications of human rights assuming center stage as an international justice project, or as *the progressive international justice project?*⁴⁸

[W]e must take account of that which rights discourse does not avow about itself. It [the rights discourse] is a politics and it organizes political space, often with the aim of monopolizing it. It also stands as a critique of dissonant political projects, converges neatly with the requisites of liberal imperialism and global free trade, and legitimates both as well. If the global problem today is defined as terrible human suffering consequent to limited individual rights against abusive state powers, then human rights may be the best tactic against this problem. But if it is diagnosed as the relatively unchecked globalization of capital, postcolonial political deformations, and superpower imperialism combining to disenfranchise peoples in many parts of the first, second, and third worlds . . . , other kinds of political projects . . . may offer a more appropriate and far-reaching remedy for injustice defined as suffering *and* as systematic disenfranchisement from collaborative self-governance.⁴⁹

Makau Mutua, lawyer, in *Human Rights: A Political and Cultural Critique*:

I wrote this book . . . [because] I wanted to explain why I believe that the human rights corpus should be treated as an experimental paradigm, a work in progress, and not a final inflexible truth. It is important that the human rights movement be fully exposed so that its underbelly can be critically examined. I know that many in the human rights movement mistakenly claim to have seen a glimpse of eternity, and think of the human rights corpus as a summit of human civilization, a sort of an end to human history. This view is so self-righteous and lacking in humility that it of necessity must invite probing critiques from scholars of all stripes.⁵⁰

Shannon Speed, anthropologist, in *Rights in Rebellion: Indigenous Struggle and Human Rights in Chiapas*:

The widespread utilization of human rights as a discourse of resistance reflects the hegemonic position of both Western legal institutions and the liberal ideology of the global market that sustains them. . . . Theoretically, we can learn more by looking at the various reappropriations of the discourse of human rights, and the ways that they emerge in particular interactions: the way the tool is held by particular social actors in particular contexts. Politically, we can even embrace the discourse to support the people we work with when it is necessary, based on our own historically and politically contingent interpretations and understandings.⁵¹

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48. Wendy Brown, "*The Most We Can Hope For. . .": Human Rights and the Politics of Fatalism*, 103 S. ATL. Q. 451, 453 (2004).
49. *Id.* at 461–62.
50. MAKAU MUTUA, *HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE*, at ix–x (2002).
51. SHANNON SPEED, *RIGHTS IN REBELLION: INDIGENOUS STRUGGLE AND HUMAN RIGHTS IN CHIAPAS* 181 (2008).

V. FINAL OBSERVATIONS

A. Avoiding Boxing Academic Disciplines in Particular Corners

The model presented in this contribution does not assume that one discipline is tied to a particular conception of human rights. As the above examples demonstrate, two scholars who are trained in the same discipline do not have to share the same conception of human rights.⁵² In light of the oversimplified external renditions of disciplines current in human rights scholarship (of the type: anthropologists asserting that “lawyers believe that . . .” or vice-versa), the fact that the model allows every academic discipline to be found anywhere in the human rights conceptual field should be welcomed. While the exercise of naming particular representatives of each school has only been done here with respect to philosophy, political theory, law, and anthropology, the process could no doubt be repeated with respect to further disciplines such as sociology, international relations, cultural studies, psychology, history, as well as theoretical perspectives, such as feminism.

B. The Respective Prevalence of the Schools

An empirical investigation of the actual prevalence of the schools remains to be conducted. Nonetheless, this article will venture to offer some preliminary suggestions as to the respective influence of each school. As hinted above, the natural school has long represented, in the Western world at least, the prevalent “common sense” or human rights orthodoxy that defines human rights as the rights that everybody has by virtue of being a human being. However, in academic circles, a new orthodoxy, represented by the deliberative school, seems to be replacing this old orthodoxy. The protest school seems to host the most human rights activists (and thus perhaps also activist-scholars). The discourse school of thought, with its lack of faith in human rights, is probably the least prevalent school, especially among human rights academics who most likely choose their field of research partly out of a commitment to furthering the concept of human rights: discourse scholars do not even share the non-transcendental commitment to human rights that characterizes the deliberative school of thought.

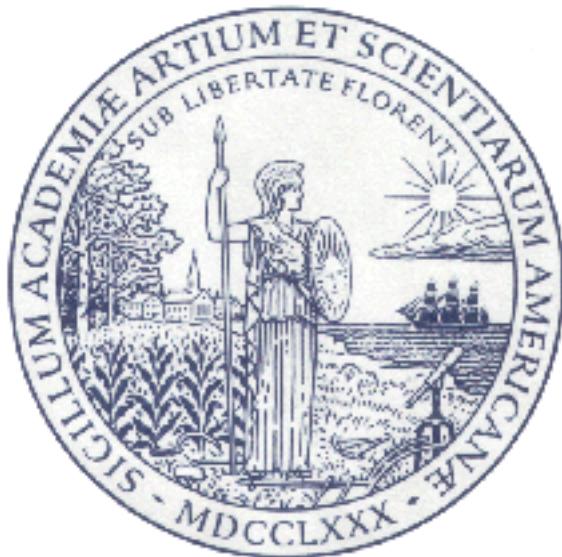
52. For some additional linking of particular scholars to each of the four schools, see DEMBOUR *supra* note 3, at 232–71.

Interestingly, some empirical qualitative work, which is admittedly limited, suggests that a variety of positions are found among non-scholars in a way that echoes the model presented in this article.⁵³

C. The Attractions of Each and Every School

For the sake of conceptual clarity, the model has been presented here in a clear-cut manner. However, it should be stressed that both multiple and ambiguous affiliations are possible.⁵⁴ Each school of thought presents persuasive arguments—all have something of interest to offer. Not surprisingly then, many scholars, including the author and some of the scholars quoted above, waver in their orientations.

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53. Paul Stenner, Identifying Patterns Amongst Lay Constructions of Human Rights: A Psychosocial Approach, Paper given at the workshop “Towards a Sociology of Human Rights: Theoretical and Empirical Contributions” at the International Institute for the Sociology of Law, Oñati, Spain (24–25 May 2007) (on file with author). Stenner notes that the lay positions on human rights he identifies by recourse through Q methodology overlap to a large extent with the four schools identified in this contribution. *Id.*
 54. For some concrete examples, see DEMBOUR, *supra* note 3, at 258–61.



What Human Rights Mean

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What human rights mean

The Universal Declaration of Human Rights is the founding document of modern human rights doctrine. Adopted by the United Nations General Assembly in 1948, it was composed by an international committee of experts representing a great range of ethical traditions – even today we would regard the original Human Rights Commission as remarkably multicultural. At the same time, drafting the Declaration seems to have been a considerably more collegial enterprise than many international negotiations. Although members never lost sight of the political dimensions of their assignment, they made an extraordinary effort to understand each other and to identify common ground.

So it is a fact of particular importance that, early in their work, the Declaration's framers found that it was much easier to agree on the content of a declaration of human rights than about a common set of underlying principles. It was the philosophical, not the practical,

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arguments that were most difficult, and in the end the framers simply agreed to disagree about the theoretical foundations of human rights.

This is why, unlike various earlier declarations of rights, the 1948 document does not propose any justifying theory. It does not, like the American Declaration of Independence, hold that people are “endowed by their Creator” with certain rights, or, like the French Declaration of the Rights of Man, describe human rights as “natural” and “sacred.” After a prefatory reference to the “inherent dignity” of all human beings, the Universal Declaration simply *declares* certain values to be human rights. The framers evidently believed that people in various cultures could find reasons within their own ethical traditions to support the Declaration’s practical requirements.¹

From one point of view the Declaration’s silence about theoretical foundations can seem to be part of its brilliance.² The framers were surely correct that their philosophical differences would never be fully resolved: without an agreement to disagree, at best the De-

1 Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001), chap. 3.

2 As Michael Ignatieff suggests in *Human Rights as Politics and Idolatry* (Princeton, N.J.: Princeton University Press, 2001), 88.

claration would have been politically empty; at worst there would have been no declaration at all.

From another point of view, however, the absence of an official theory of international human rights is an embarrassment. This is partly because there is no public basis for settling the problems of interpretation and implementation that the framers bequeathed to their successors. As any reader of the Declaration will recognize, these problems can be serious. For one thing, many of its provisions are very general and need interpretation in order to be applied to particular circumstances. (What, for example, does the right “to take part in the government of [one’s] country” [art. 21] entail?) For another, under some conditions the practical requirements of various provisions might conflict and require a decision about political priorities. (Consider, for example, the potential for conflict between the right to “just and favorable remuneration” for work and the need for investment sufficient to sustain future generations.) And, of course, there is the need to determine what political actions are justified in pursuit of a right, and who is responsible to undertake them. Without a justifying theory it is unclear how these problems might be resolved.

But difficulties of interpretation are only part of the problem – and perhaps not the major part. The lack of an official theory invites a kind of philosophical subversion of the political aims of the Declaration’s framers. This is evident, for example, in a widely read article by Maurice Cranston, published in *Dædalus* nearly twenty years ago. Cranston asked the skeptical question “Are There Any Human Rights?”³ His reply, only semi-

skeptical, was that there are indeed some human rights, but many fewer than the Declaration maintains: there are human rights to life and basic civil liberties (freedom of speech, press, and assembly), but there are no human rights to economic goods such as material subsistence, health care, social security, or the notorious (and unjustly maligned) “periodic holidays with pay” (art. 24).

Cranston regarded human rights as “the twentieth-century name for what has been traditionally known as ‘natural rights.’”⁴ And he argued, not implausibly, that the idea of a natural right as it comes to us from the tradition sits uncomfortably with some of the rights of the Declaration. Cranston took Lockean rights to life and liberty to be paradigmatic. Such rights are minimalist: they protect people against being treated in certain ways, but they do not, except in extremis, entitle them to the affirmative support of others. This perspective led him to conclude that much of the Declaration was philosophically fraudulent: it misrepresented as universal human rights objects that were neither *universal* nor *human* nor even *rights*.

This kind of philosophical suspicion of international human rights was typical of a generation of Anglo-American writers. It can be found, for example, in the work of John Finnis, the influential natural law theorist, who, like Cranston, identified human rights as a contemporary idiom for natural rights and argued therefore that the realm of genuine human rights is significantly narrower than international doctrine maintains.⁵ And Michael Ignatieff – himself an articulate

length in *What Are Human Rights?* (London: Bodley Head, 1973).

⁴ Cranston, *What Are Human Rights?* 1.

⁵ John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 198, 210 – 213.

advocate of human rights – wrote recently that human rights rest upon natural rights and thus, properly understood, set a less demanding standard than the Declaration.⁶

I believe, however, that the tendency to identify human rights with natural rights represents a kind of unwitting philosophical dogmatism. It leads to a damaging misconception of the legitimate scope of international human rights and of their potential for remediating injustice. As with most dogmatisms, the first challenge is to recognize it for what it is. And the best way to see this is to look first at human rights as they actually operate in the world today and then consider whether the natural rights paradigm is a help or a hindrance in grasping their ethical and political significance. Once we see how the traditional paradigm misrepresents the practice of human rights, we will be in a better position to appreciate the real nature of human rights and the reasons why we should care about them.

This is not simply a question of words. Whether it is best to think of human rights as natural rights or as something more ambitious – for example, as the rights of global justice – is ultimately a question about the kind of world we should aspire to and the range of responsibilities that follow for politics and foreign policy. It is a central ethical question about the direction of world politics in the years ahead.

Consider the way that talk about human rights actually functions in the world today. What are human rights as international doctrine conceptualizes them? And what role do ideas of human rights play in the world's conduct of its political business?

⁶ Ignatieff, *Human Rights as Politics and Idolatry*, 88.

We may begin with the original Universal Declaration adopted by the UN in 1948 and the two principal covenants – one on civil and political, the other on economic, social, and cultural rights – that came into force in 1976.

The Declaration itself is a remarkable document whose name, regrettably, is far better known than its contents. It consists of thirty articles stating a broad array of aims that are supposed to serve as “a common standard of achievement for all peoples and all nations.” The covenants, which unlike the Declaration have the force of law, elaborate on these aims and seek to put them into a form that has legal effect.

These documents set forth an ambitious and, in some ways, a surprisingly specific set of aspirations.⁷ Their provisions read far more like a list of concrete institutional standards than of generalized, abstract rights that might exist in a ‘state of nature.’ They name certain core rights that evoke Lockean principles – for example, rights to life, liberty, and security of the person; and against arbitrary imprisonment, slavery, and torture, as well as the more complex right against genocide. Beyond these, there are also provisions associated with the rule of law (e.g., the right to a fair trial); political rights (including the right “to take part in the government of the country” and to “periodic and genuine elections”); economic rights (including free choice of employment, “just and favourable remuneration [sufficient for] an existence worthy of human dignity,” and health care); and rights of communities (self-determination). These enumerated rights are said to belong to everyone regardless of race, color, sex, language,

⁷ I rely in some of what follows on my article “Human Rights as a Common Concern,” *American Political Science Review* 95 (2) (June 2001): 269 – 282.

religion, birth, and social status, and without distinction “on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs.”

Taken together, these rights are not best interpreted as “minimum conditions for any kind of life at all.”⁸ The rights of the Declaration and the covenants bear on nearly every dimension of a society’s basic institutional structure, from protections against the misuse of state power to requirements for the political process, health and welfare policy, and levels of compensation for work. In scope and detail, international human rights are not very much more minimal than those proposed in many contemporary theories of social justice. If we consider the list of human rights as a single package – in the words of the 1993 Vienna Declaration, as “indivisible and interdependent and interrelated”⁹ – then we must understand international human rights as stating, or trying to state, something more like necessary conditions of political legitimacy, or even of social justice.

In the years since the UN covenants came into force, human rights have played a variety of roles in world politics. The most sensational has been the use of human rights to justify foreign interference in a state’s internal affairs. In circumstances as different as those of Haiti, Somalia, and Kosovo, local human rights violations have catalyzed military action by outside agents acting with the

⁸ Ignatieff, *Human Rights as Politics and Idolatry*, 56.

⁹ United Nations, “Vienna Declaration and Programme of Action,” adopted by the World Conference on Human Rights, 25 June 1993 (A/CONF.157/23) <[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En)>.

authority of multinational bodies. Indeed, reflecting on these and other interventions of the 1990s, Kofi Annan called for the development of a systematic doctrine of UN-sponsored humanitarian intervention, noting that “the world cannot stand aside when gross and systematic violations of human rights are taking place.”¹⁰ That the secretary-general could undertake such an initiative with any hope of success would astonish the framers of the 1948 Declaration (much as a few might welcome it – in particular, the Indian delegate Hansa Mehta, who argued explicitly that the UN should have authority for human rights-based intervention¹¹).

But intervention in any form has been exceptional, and in recent years the political functions of human rights have more often been considerably less dramatic. For example, a government’s human rights record can serve as a criterion of eligibility for participation in bilateral and multilateral development programs and of its access to financial adjustment assistance. The impact on human rights may also be used as a standard of evaluation for the policies of international financial and trade institutions.

In the United States, legislation requires periodic reporting by the government on human rights practices in other countries (though not in the United States itself), and a country’s eligibility for preferential treatment in U.S. foreign policy can depend on satisfaction of human rights standards. In various parts of

¹⁰ Kofi Annan, “Two Concepts of Sovereignty,” *The Economist* (18 September 1999).

¹¹ M. Glen Johnson, “A Magna Carta for Mankind: Writing the Universal Declaration of Human Rights,” in *The Universal Declaration of Human Rights: A History of its Creation and Implementation*, ed. M. Glen Johnson and Janusz Symonides (Paris: UNESCO, 1998), 32.

the world – most notably in Europe – regional codes of human rights have been adopted (though they are not always as expansive as the UN documents) and there is a developing international capacity for adjudication and something like enforcement.

Beyond the multiple roles of human rights in international organizations and national foreign policies, human rights also have important functions as foci of political activity, both within and outside the policy process, for a large and growing number of nongovernmental organizations (NGOs) – the components of a “curious grapevine,” in Eleanor Roosevelt’s evocative phrase.¹² These functions include education and advocacy, standard-setting, monitoring, and, sometimes, enforcement.

The human rights NGOs are often described as the core of a global civil society. That might be misleading – these organizations, after all, frequently speak with a developed-country accent, and many lack effective internal mechanisms of accountability. Still, the human rights NGOs have done important work in popularizing the idea of human rights and in drawing international attention to egregious violations. They have encouraged the growth of a global human rights culture that cuts across national political boundaries while changing the structure of incentives that those who make decisions about national foreign policy must negotiate.

Political scientists sometimes say there is a global ‘human rights regime.’ (A ‘regime,’ in the jargon of the discipline, is a set of “explicit or implicit principles, norms, rules and decision-making procedures around which actors’ expecta-

¹² Quoted in William Korey, *NGOs and the Universal Declaration of Human Rights: “A Curious Grapevine”* (New York: St. Martin’s Press, 1998), ix.

tions converge in a given area of international relations.”¹³) It would be hard to deny that this is true, but the term does not fully embrace the reality of international human rights practice. For one thing, by focusing on norms and decision procedures, the idea of a regime deflects attention from the fact that human rights operate as normative standards in various informal political arenas; consider, for example, the annual human rights compliance reports of the Department of State, whose political significance is at best tangential to their role in the official processes of foreign policy. Moreover, the idea of a human rights regime does not properly describe the growing activity and achievements of NGOs. The transnational culture spawned by these organizations is at least as important for its diffuse effects on attitudes and beliefs as for its capacity to influence formal processes of policy-making.

Finally, the idea of a regime does not reflect the emergent and aspirational character of human rights. Unlike, say, the financial or trade regimes, human rights politics doesn’t aim only to institutionalize and regulate existing interactions; it seeks to propagate ideals and motivate political change. Human rights stand for a certain ambition about how the world might be. To whatever extent contemporary international political life can be said to have what, in the domestic analog, John Rawls calls a “sense of justice,” its language is the language of human rights.¹⁴

¹³ Stephen D. Krasner, ed., *International Regimes* (Ithaca, N.Y.: Cornell University Press, 1983), 2. John Gerard Ruggie argues that there is a global human rights regime in “Human Rights and the Future International Community,” *Dædalus* 112 (4) (Fall 1983): 103–104.

¹⁴ For Rawls, the “sense of justice” is a principled conception of social justice broadly shared

Human rights as we find them in international practice don't fit the mold of natural rights in at least three important ways: natural rights are supposed to be pre-institutional; they are supposed to belong to people 'naturally' – that is, solely in virtue of their common humanity; they are supposed to be timeless. But international human rights don't meet any of these standards. The question is what we should make of this. Is there something wrong with human rights?

Natural rights theorists imagined that political society developed by means of a social contract from a pre-political 'state of nature' where people had certain rights that nobody was entitled to violate. These rights, in Robert Nozick's phrase, were "side constraints."¹⁵ Natural rights express protections upon which people are entitled to insist regardless of their institutional memberships. The idea of a state of nature models this fact: it imagines that individuals establish institutions in a pre-institutional situation that is already constrained by certain moral prohibitions; because people have no authority to abrogate these prohibitions, any institutions they establish must respect them.

If natural rights are pre-institutional, then it must make sense to think that they could exist in a condition where there are no institutions. It is not difficult to conceive of Lockean rights to life, liberty, and property in this way. On the other hand, many of the rights enumerated in the human rights documents

within a society that defines a political ideal and serves as a basis for criticism of the status quo. John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, Mass.: Harvard University Press, 1999), 41.

¹⁵ Robert Nozick, *Anarchy, State, and Utopia* (Cambridge, Mass.: Harvard University Press, 1974), 30–33.

can't be so conceived. Think, for example, of rights to an impartial trial, to take part in the government of the country, and to free elementary education. Because these rights describe features of an acceptable *institutional* environment, we can't give meaning to the thought that these rights might exist in a state of nature. What force could they possibly have in a world where there are no institutions?

But why should *human* rights be conceived as pre-institutional? Natural rights theories, at least in the more liberal variants such as Locke's, were primarily attempts to formulate constraints on the use of a government's monopoly of coercive power. They were theoretical devices by which legitimate and illegitimate uses of power could be distinguished, and they make sense only against a background assumption that a central problem of political life is the protection of individual liberties against a predictable threat of tyranny or oppression. This is not the nature of the human rights of the Declaration, which describes "a common standard of achievement for all peoples and all nations." If natural rights are about guaranteeing individual liberty against infringement by the state, human rights are about this *and more*: to put it extravagantly, though I think not wrongly, international human rights, taken as a package, are about establishing social conditions conducive to the living of dignified human lives. These rights represent an assumption of moral responsibility for the public sphere that was missing in classical natural rights theories.

What the proper bounds of that responsibility are, how its burdens should be distributed, and, for that matter, whether we should believe that *any* such responsibility lodges in the public sphere – all are reasonable questions. I don't

mean to foreclose them. The point is that none of these questions can be resolved, so to speak, by conceptual fiat. They are substantial questions of political morality and deserve to be answered on their merits.

The Universal Declaration holds that all human beings are “born free and equal in dignity and rights” (art. 1) and that “everyone is entitled to all the rights” subsequently enumerated (art. 2). These passages say that everyone has human rights. This is one sense in which rights can be ‘universal.’

But the idea that human rights are like natural rights in belonging to people in virtue of their common humanity involves a further thesis bearing on the *justification* of human rights. It holds that human rights, if they are to be really universal, must be grounded on characteristics that all human beings possess, and therefore their justification must not depend on merely contingent social relationships.

Philosophers have given the idea of “belonging to people in virtue of their common humanity” a specific and, as it turns out, a very restrictive interpretation. It derives from H. L. A. Hart’s important article “Are There Any Natural Rights?” first published in 1955 and widely read more recently because of its influence on the political philosophy of John Rawls.¹⁶ (Interestingly, the phrase ‘human rights’ does not appear in Hart’s article at all.)

Hart distinguishes between “general rights” and “special rights”: special rights arise out of “special transactions [or] special relationships,” such as promises and contracts or membership in political society, whereas general

¹⁶ H. L. A. Hart, “Are There Any Natural Rights?” *Philosophical Review* 64 (2) (1955): 175 – 191.

rights belong to “all men capable of choice . . . in the absence of those special conditions which give rise to special rights.”¹⁷ Hart identifies only one general right – “the equal right of all men to be free.” He does not claim that there are no other general rights, but he mentions none, and he describes every other right either as deriving from this one general right or as a special right.

Now if all rights must fall into one of these two categories, then natural rights must be general. As Hart says, this is because natural rights belong to men “*qua* men and not only if they are members of some society or stand in some special relation to each other.”¹⁸ Many theorists have thought that human rights must be general rights for the same reason.¹⁹

But if we assume that human rights must be general rights as Hart understood them, then we must conclude that there are very few genuine human rights. Consider, for example, the right to an adequate standard of living. Any plausible explanation of the moral basis of this right will have to refer to certain features of people’s social relations. This may not be immediately obvious; rights talk tends to focus on the beneficiaries of rights, so it might seem that we can explain the moral importance of an adequate standard of living without having to refer to anything other than facts about the beneficiary’s ‘humanity’ – for example, her physical needs. However, this is only half the story – and the easier half at that. A complete explanation of the right would also have to say where

¹⁷ Ibid., 183, 188; on political society as a cooperative scheme, see 185.

¹⁸ Ibid., 175.

¹⁹ For example, Peter Jones, *Rights* (New York: St. Martin’s Press, 1994), 81.

the resources should come from to satisfy the right and why anyone has a duty to provide them. Answers to these questions inevitably force us to consider people's social relations. That is why, in the domestic case, similar questions have their natural home in a discourse about social justice.

Well, so what? One might say, as one philosopher has recently written, that “[t]he correct conclusion is that many of the rights affirmed in the *Universal Declaration* are really not human rights at all....”²⁰

But this is another case of conceptual fiat. Why must we insist that human rights be justified by considerations of common humanity as such? The mistake, I think, is to infer from the fact that human rights are supposed to be claimable by everyone, that they must be *general* rights in Hart's sense. Human rights might, instead, be conceived as a category of special rights – roughly speaking, as rights that arise out of people's relationships as participants in a global political economy. Philosophers of global justice disagree about how these relationships should be understood, and particularly, whether it is right to regard them as coincident with membership in domestic society. The latter question is worth thinking about: Why, for example, should we think that social justice requires U.S. citizens to do more for the steel worker in West Virginia than for the factory worker in a Mexican maquiladora? The question resists facile answers.

²⁰ Carl Wellman, “Social Justice and Human Rights,” in *An Approach to Rights* (Dordrecht: Kluwer, 1997), 197. Similarly, Cranston: “Another test of a human right is that it must be a universal right, one that pertains to every human being as such – and economic and social rights clearly do not.” Cranston, “Are There Any Human Rights?” 13.

For the moment, fortunately, we can be agnostic; for, short of denying that there is such a thing as one's role as a participant in the global economy, any plausible view about global justice will generate *some* conception of the sort of ‘special right’ I refer to here. And this is all we need to refute the idea that human rights must be limited to those rights we can understand as belonging to people solely in virtue of their common humanity.

When we say that human rights are universal, we might mean that all human beings at all times and places would be justified in claiming them. Natural rights were supposed to have this kind of timelessness, and this might encourage someone to believe that human rights should too.

But of course few of the human rights listed in the Universal Declaration would pass the test. The framers of the Declaration could not have intended that the doctrine of human rights apply, for example, to the ancient Greeks or to China in the Ch'in Dynasty or to European societies in the Middle Ages. International human rights, to judge by the contents of the Declaration and covenants, are suited to play a role in a certain range of societies. Roughly speaking, these are societies that have at least some of the defining features of modernization: a reasonably well-developed legal system (including a capability for enforcement), an economy with some significant portion of employment in industry rather than agriculture, and a public institutional capacity to raise revenue and provide essential collective goods. It is hard to imagine any interesting sense in which a doctrine of human rights pertaining principally to societies meeting these conditions could be said to be ‘timeless.’

One philosopher therefore adopts a more cautious formulation: he says that human rights should "have weight and bearing for future human beings in societies not yet existing...."²¹ But this doesn't seem right, either. International human rights are not even *prospectively* timeless. They are standards appropriate to the institutions of modern or modernizing societies coexisting in a global political economy in which human beings face a series of predictable threats. As Jack Donnelly observes, the composition of the list of human rights is explained by the nature of these threats.²² As the economic and technological environment evolves, the array of threats will change, and so, over time, will the list of human rights. The lack of timelessness is a problem only if we insist that human rights should be something they were plainly not meant to be.

The mind seeks simplifying models, so perhaps we should not be surprised that in the absence of a better alternative, philosophers would persist in thinking of human rights as natural rights. The paradigm is coherent and familiar and makes the most of the historical continuity of the human rights movement with earlier efforts to advance the 'rights of man.' As we have seen, however, accepting the paradigm has its price: it diminishes and distorts the aspirations of international human rights doctrine. So it is worth considering how else we might conceive of human rights and whether as a matter of political theory a different conception would be more plausible.

²¹ Rex Martin, *A System of Rights* (New York: Oxford University Press, 1993), 74–75.

²² Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, N.Y.: Cornell University Press, 1989), 26.

Here is a proposal. Suppose we begin with two of the ideas central to contemporary international human rights doctrine.

First, human rights are closely connected to human dignity: they state conditions that domestic social institutions should satisfy in order to respect, in the words of the 1993 Vienna Declaration, "the dignity and worth inherent in the human person."

Second, human rights are a global concern: their systematic violation in a society over a period of time could justify some appropriate form of remedial action by agents outside of the society where the violation occurs.

Putting these two ideas together, we might say that human rights are the basic requirements of global justice. They describe conditions that the institutions of all domestic societies should strive to satisfy, whatever a society's more comprehensive aims. And their violation identifies deficiencies that, if not made good locally, should command the attention and resources of the international community. If a country failed to satisfy these conditions even though it were equipped to fulfill them, that country would become susceptible to outside corrective interference. If the failure were due to a lack of local resources, this could justify a requirement on others to assist.²³

There is no escaping that on this view human rights represent a partisan ideal. And the reference to human dignity and human worth guarantees that the ideal will almost certainly be more congenial to some than to other conceptions of justice or political good.

²³ John Rawls proposes something like this conception of human rights in *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999), sec. 10.

On the other hand, it is a capacious ideal, and at this level of generality it is consistent with the aspirations of all the world's main moral cultures. If evidence is needed, one might simply look to the virtually unanimous endorsement of international human rights norms in a succession of increasingly inclusive international fora.

The qualification about level of generality is important. When we consider practices such as capital punishment in the United States or female genital mutilation in Sahelian Africa, we are reminded that there can be serious intercultural disagreement about what is necessary to respect human dignity and human worth. But one should not be misled by these examples. For one thing, neither of these cases really involves a confrontation between a morally monolithic local culture and the international culture of human rights; in both cases there are significant divisions within the local culture that conflict with majority interpretations of human rights. But even if this were not true, these examples are much more the exception than the rule. Anyone who reads the major international human rights instruments with reasonable charity would see that most of the values found there fit comfortably within a wide range of cultural moral traditions. When human rights are controversial in political practice, it is not usually because they are culturally partisan, but rather because people disagree about their relative priority over other values, or about the nature and extent of the international right and responsibility to remediate.

It is this last point that is likely to evoke the greatest concern. If human rights are requirements of global justice, and if violations could trigger an international duty to act, then human rights might

threaten to engulf many other values we care about. International human rights imperatives could undermine the integrity of local communities by encouraging indiscriminate, well-meaning intervention; they could command resource transfers from societies with their own internal problems; they could play into regional conflicts and exacerbate existing instabilities. The old view of human rights, however misleading it might have been in theory, at least had the political virtues of minimalism. Does the paradigm of global justice demand too much?

Part of the answer depends on the content of the idea of global justice, and part depends on the nature of the remedial rights and responsibilities that flow from human rights violations. The first question is interesting and points to a large, unresolved set of philosophical issues. But I think the second one is more important practically. Here the key point is that the ideas of corrective interference and requirement to assist could each encompass many kinds of action. Interference, for example, could mean military intervention (as in Kosovo) but could also involve nonviolent forms of intervention (like making foreign aid conditional on upholding human rights). Similarly, assistance might consist of direct transfers (as in development aid), but it might also entail less direct forms of help (like reforming discriminatory trade practices). Indeed, human rights violations could command international attention in a meaningful way even if neither corrective interference nor tangible assistance were feasible – for example, by triggering advocacy or cross-border political action by NGOs.

Moreover, the fact that persistent violations *could* justify international action does not mean they always *do*. As in any aspect of political morality, a host of

practical considerations bear on a decision whether and how to act, even when there is an uncontroversially meritorious cause of action. The theory of the just war presents a useful parallel: even when there is a just cause, a country may not resort to war if there is no reasonable expectation that the cause can be won without disproportionate use of force or unacceptable collateral damage. Nor may a country resort to war if it is unable or unwilling to commit the resources necessary to win its cause – that would simply inflict harm without hope of achieving a just result. Similarly in the case of human rights, the international community should act only if there is a reasonable hope of stopping egregious violations of human rights without incurring disproportionate costs or causing unacceptable collateral harm.

These reflections do not add up to a philosophical defense of the idea that human rights are requirements of global justice; they only aim to make that idea plausible as a description of international practice, and to show that the most common worries about it may be overstated.

But someone who is still attached to the traditional paradigm might say it was a mistake from the beginning to give so much weight to the international doc-

trine of human rights and to the role of ideas of human rights in real-world international political practice. Perhaps international doctrine and practice are simply wrong – perhaps they amount to no more than the reification of a bad idea – and perhaps we would be better off dispensing with human rights talk altogether.

I doubt that this will turn out to be right, but the point to be made in conclusion is that there is only one way to find out. Theory has to begin somewhere. We begin with the observation that there is an international practice of human rights, and we ask some distinctively theoretical questions: What kinds of things are these human rights, why should we believe in them, and what follows if we do?

But whereas present practice is the beginning, it need not be the end; in fact, it would be surprising if a critical theory of human rights did not argue for revisions in the practice – conceivably substantial ones. If so, however, one should expect this to be the conclusion of an argument that takes seriously the aspirations of the practice as we have it. To dismiss the practice because it doesn't conform to a received philosophical construction seems to me dogmatic in the most unconstructive way.

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Introduction

THE USES OF RIGHTS IN POLITICAL CONFLICT

In Egypt’s nationwide protests against the Muslim Brotherhood government in 2013, one of the loudest and most resonant cries was “Rights!”—for women, religious minorities, and secular Egyptians. Yet, on July 3, 2013, the liberal groups headlining the demonstrations welcomed a military takeover in which hundreds were soon killed, thousands imprisoned, and basic human rights greatly diminished. No doubt most protesters did not expect this bloodbath and rejected the Muslim Brotherhood’s apparent plans for Egypt. Elected only one year before in a tumultuous vote, it had made constitutional and legal changes that scared many of those who supported a secular, rather than religiously inflected, government of Egypt. But in battling for another regime change so soon after the election and only two years after the fall of the Mubarak dictatorship, the protesters’ eagerness to accept destruction of the country’s first democratic government suggested that they had also used human rights strategically. By portraying the Brotherhood as Islamist radicals and inveterate rights abusers, demonstrators could frame themselves as victims, rallying support at home and abroad. Even as they allied with the military and refused at first to call its actions a “coup,” liberals seemed to believe that they were protecting their rights. Yet by subverting the Muslim Brotherhood government that had so recently won power through a flawed but real electoral process, they also subverted

rights. The dictatorship of General Abdel Fattah el-Sisi quickly committed far greater abuses than the Muslim Brotherhood had done. Most of the victims were suspected Brotherhood members. But liberals who had lived in Egypt during the Brotherhood government also fell victim, and many were forced to flee abroad.

The Egyptian liberals' use of human rights as a rhetorical weapon to undermine a flawed but struggling democracy might seem surprising. Rights are sometimes thought to transcend politics, furnishing a moral bedrock for societies and activists. For many, rights are progressive goals whose achievement brings peaceful reform. In some visions, rights embody humanity's best hope for achieving its highest aspirations. The United Nations promotes a universal rights culture as an antidote to conflict and domination. Many observers focus on rights' defensive uses: to protect the vulnerable and uplift the needy. For the influential legal scholar Ronald Dworkin, rights are "trumps" that safeguard individuals against invasive policies, repressive states, and oppressive cultures.¹

Certainly they protect against these things, but rights, including liberal rights, can also be used as weapons of politics and for illiberal ends. How and why are rights used for aggressive purposes? In answering these central questions, this book focuses on the ways in which powerful forces use rights to batter weaker groups, smash minority ideas, or, as in Egypt, Thailand, and other states in recent years, unseat democratically elected governments. Groups such as Thailand's Yellow Shirts have argued that their movements are simply striving to protect the rule of law from governments that they decry as populist. Yet the rights language of such groups often masks a last-ditch effort to hold on to power when previously marginalized or repressed groups assert different views on social, economic, and political relations.

Nationalist battles involve the thrust and parry of rival rights—both individual and group. In places as diverse as Quebec, Scotland, and Catalonia, cultural, language, and minority rights are at the center of conflict. In Malaysia, India, and Nigeria, "sons of the soil" movements have won special rights to political, economic, and social status for indigenous majorities, even as "migrant" groups, both from overseas and from other regions of the same countries, seek their own rights. Nativist and populist movements in Europe demand cultural protections for majority groups in the face of mass migration from Africa and Asia.

Women's rights have been used in France, Belgium, Austria, and elsewhere to justify *burqa* bans. Although couched as a way of liberating Muslim women, the claim acts as a powerful attack on "unassimilated" Muslims. Meanwhile, Muslim women in these countries have begged to differ from

their self-proclaimed defenders. They protest that wearing the burqa is itself a basic right. Internationally, women's rights served as post hoc justification for America's war against the Taliban and NATO's support for a corrupt new Afghan government. In another recent case, American and European governments have elevated LGBT rights to a central plank of foreign policy. The World Bank has followed suit, withholding development loans to poor countries, such as Uganda, for draconian laws attacking LGBT populations.² Yet traditional Catholics, Protestants, and Muslims in Africa and elsewhere view these policies as misguided international attacks on their right to live by the time-tested or majority-approved values of their own cultures. Many in the West condemn the resulting violations of LGBT rights in the name of majority cultural rights, but the societies targeted with internationally based rights claims see themselves as under threat by powerful outsiders.

Nor is there anything novel in offensive usages of rights. Natural rights, civil rights, and human rights have been used in such ways for centuries, not only to protect the powerless but also to boost dominant communities at others' expense. John Locke, philosopher and partisan of his day, stressed the right to "property" in "lives, liberties and estates."³ He did so not only to weaken the British monarchy of James II in its conflict with Parliament, but also to increase the political power of the landed gentry and middle classes against propertyless Britons who also demanded rights.⁴ In revolutionary France, the "Declaration of the Rights of Man" undermined the old regime but limited political rights to men of means. When radical women such as Olympe de Gouges issued a "Declaration of the Rights of Woman and the Citizen," they were rebuffed, then guillotined; women would not gain the vote in France until 1945. In nineteenth- and twentieth-century America, states' rights repeatedly stifled African Americans' claims to equality. These and many other cases reveal that rights are and have always been Janus-faced. They are used not only for defensive ends but just as much for aggressive purposes. They may protect the powerless, but just as commonly the powerful employ them to expand their influence.

This book focuses on this understudied aspect of rights, providing an answer to the puzzle of how rights may not only help achieve liberation but also end up justifying or facilitating oppression. The book provides the first systematic account of the multiple ways in which activists use rights in conflicts. In particular, I show how they invoke rights to *mobilize* their political forces, then *deploy* them against their foes—and how foes in turn *counter* these advances with their own rights tactics. The result is a new approach to understanding how political actors use rights as offensive weapons of conflict, not just as noble objectives to be achieved through selfless struggle.

I analyze the variety of ways in which all sides to conflict invoke rights, particularly highlighting aggressive usages by the powerful against the weak. Ultimately, this perspective helps explain why some who appeal to rights end up undermining them in practice.

Prior Perspectives

Until now, the scholarly literature has primarily contemplated the appealing first face of rights, largely ignoring the less attractive second face. The most optimistic accounts focus on individual human rights, chronicling their historical triumph and foreseeing their future victories. For some, such liberal rights represent a global “script” that magnetically attracts new adherents around the world.⁵ In this view, rights inevitably expand over time and across space, and any delays or diversions are ascribed to governmental repression, cultural backwardness, or individual false consciousness. In this vision, rights’ achievement will ultimately realize humanity’s greatest dreams, raising it to its highest stage of development. In such an “indivisible” rights culture, as the United Nations asserts, “the improvement of one right facilitates advancement of the others,” and “likewise the deprivation of one right adversely affects the others.”⁶ Missing, however, is the recognition that contending political forces often dress up their causes as human rights, whether individual or group. Vindicating the rights of one comes at the expense of another. In the name of rights, powerful forces have engaged in invasions, coups, and even torture.

Academics who take a more political approach to rights nonetheless continue to conceptualize them narrowly, portraying them as unequivocal goods attained through principled methods and high-minded persuasion. Movements for civil rights, women’s rights, indigenous rights, and countless others are analyzed this way. It is seldom recognized, however, that in rhetorical, political, and legal conflicts over rights, they are means—potent tools to defeat opposing forces—not just ends. This is most obvious in the “cause litigation” common to highly institutionalized settings, such as American or Indian courtrooms. There rights are fought with and fought over—with direct consequences not only for the individual litigants but also for the societal groups whose interests they embody. It is equally true in other, less structured political contexts, such as newspapers, parliaments, public squares, and even battlefields. An invocation of rights, whether group or individual, can cover up less estimable goals, mobilize armed forces, shatter opposing coalitions, and destroy entire societies. This is why rights are so commonly used by the most powerful forces in modern societies, as well as

by the weakest. Indeed, as this book shows, rights are multiform weapons and are popular not merely for their ostensibly progressive goals but also for their usefulness to all sides in all types of political disputes.

If scholars have recognized rights' instrumental uses, they have mostly seen them as defensive—as shields to protect the vulnerable or as hoists to raise the downtrodden. Michael Ignatieff has claimed that human rights are “universal because they define the universal interests of the powerless, namely, that power be exercised over them in ways that respect their autonomy as agents.”⁷ International relations specialists have highlighted the naming and shaming of violators as the primary means of vindicating rights. It is noteworthy, however, if often overlooked, that many basic rights are beloved of the powerful. A good example is property rights, which are staunchly upheld by a wealthy minority against insurgents claiming rights to food, education, work, and more. Oligarchs, who centuries ago had to protect their riches by employing private armies, have added rights as another arrow in the bulging quiver of protections they now use to maintain their status and the status quo.⁸ Internationally, a gamut of rights are now invoked by Western states to justify armed interventions into weaker societies. Rationalized by concern for the most vulnerable, such interventions often advance only the interests of the most powerful.

Those scholars who do take note of material and political matters nevertheless have not sufficiently analyzed how rights operate in practice. Critical scholars, following Marx's footsteps, have noted that rights can be tools of the powerful but have seldom explored how they are actually used in politics. Others confine deep analysis of rights to specific historical or organizational settings. Lawyers and law professors, who use rights on a daily basis, demonstrate their instrumental aspects. But much of this scholarship examines rights and law within well-ordered national legal systems, particularly the United States or Canada. In such contexts, it is easy to see how litigation can be utilized as a tool. Judicial decisions can provide definitive judgments in favor of needy claimants. Less analyzed, however, are the ways in which broad political movements use rights outside institutionalized settings—to mobilize domestic support during moments of societal change or to draw international awareness to their cause.⁹

What explains this neglect, even though rights' weaponlike utility has been, as I suggest here, central to their rise? One reason may be that proponents of rights are so imbued with the righteousness of their causes and the assumed universalism of their goals that they are blind to rights' aggressive aspects—or even actively conceal them. The necessary strategic element in political conflict is seldom celebrated, at least not by the winners. Instead,

theirs are triumphant tales of right over wrong. It is only those facing a rights campaign who cry that they are being attacked. Sometimes, of course, their protestations cover up their own controversial goals and repressive policies, which they themselves have draped in rights language (albeit a very different set of rights). Either way, there is much to be learned by analyzing rights as tools rather than being transfixed by their moral content.

It is true that pragmatically oriented analysts such as Ignatieff have noted that rights are “a fighting creed,” one that demands “taking sides, mobilizing constituencies powerful enough to force abusers to stop[, being] partial and political.”¹⁰ The legal historian Samuel Moyn argues that human rights have risen to prominence as the contingent outcome of long-term if indirect competition with other visions of “utopia.”¹¹ James Peck, Stephen Hopgood, and others have documented the ways in which human rights NGOs have sometimes tethered themselves to the violent foreign policies of powerful states.¹² This political realism is exactly right but limited in scope: it neither conceptualizes nor analyzes the ways in which proponents, both weak and strong, use rights in the pursuit of political goals.

Some, such as Ignatieff, claim that human rights are different from other forms of politics because they are “constrained by moral universals” that “discipline [activists’] partiality—their conviction that one side is right—with an equal commitment to the rights of the other side.”¹³ In fact, this is seldom the case. Rivals often portray rights conflicts as zero-sum, with full achievement of their foes’ rights necessarily coming at the expense of their own. In most cases, opponents are so sure of their rectitude that they brook no concession on core values. Those who promote their causes with rights reject their foes’ claims. Rights advocates denounce their opponents, even if they too come outfitted in a suit of rights. Governmental institutions may enforce particular rights, usually based on the influence of one side over those institutions. But such outcomes, variously portrayed as glorious wins, ignominious losses, or necessary but regrettable compromises, are seldom stable because the competing sides keep on fighting to achieve their rights more fully.

Some scholars recognize rights’ political aspects but lament this fact or urge restraint. Richard Thompson Ford’s *Universal Rights Down to Earth* typifies this view. He argues that activists overuse the concept of human rights. Instead, “only the most stark and discrete abuses” should be considered human rights issues, whereas “problems with more diffuse and complex causes are better understood as political questions.”¹⁴ Ford is hardly the first to decry rights’ “proliferation” or “rightsification.” For decades, academics of all political persuasions have pointed to the explosion of “rights

talk” as a problematic development in national and international politics. In this view, the overuse of rights fragments societies, leading to an individualistic dissensus that ignores the common good. Others more sympathetic to the rights project criticize the expansion of new rights beyond a civil and political core. For international human rights lawyers and scholars, the ceaseless propagation of rights waters down their essence. This makes it difficult to build agreement around “fundamental” rights and rally action against the worst violators.¹⁵

Notwithstanding these critiques, political leaders, alert to rights’ utility, ignore the dons’ warnings. Rights continue their historic march, used by all sides in all manner of conflicts. They are not so much goals as means in these struggles. As Nicola Perugini and Neve Gordon show, for instance, Israel’s Jewish settlers now employ indigenous and property rights to deprive Palestinians of land and ultimately to undermine Palestinian activism, if not Palestinian society itself.¹⁶ In the United States, where the Supreme Court in 2015 affirmed the right to same-sex marriage, Democrats are already using the *Obergefell v. Hodges* decision to drive wedges into a Republican Party torn between conservative religious voters who oppose the decision and party leaders who, with an eye on electoral victories, are more divided. In this move, liberals follow a well-worn path: before the Court’s decision, conservatives had used the ostensible threat that same-sex marriage posed to religious freedom as a means of wedging traditionalist Democrats away from the Democratic Party leadership as it became increasingly supportive of such marriages in the late 2000s.

All these examples of how aggressively rights can be used, how open they are to political manipulation, and how the powerful as well as the weak take advantage of them show that it is high time that scholars broaden their conceptual thinking about rights. I hope to contribute to this task by analyzing the varying ways in which rights are made to operate by political antagonists. This analysis will also illuminate the overwhelming strategic temptation to “rightsify”—to turn social problems into rights claims in contemporary conflicts.

Definitions and Preliminaries

PROONENTS AND FOES

In this book, I focus much of my attention on rights “proponents” or “activists”—individuals, organizations, and states that formulate, raise, or advance rights claims on behalf of themselves or other groups. Activists are usually linked to “movements,” defined broadly by Sidney Tarrow as “collective

challenges, based on common purposes and solidarities, in sustained interaction with . . . opponents.”¹⁷ “Opponents,” “rivals,” or “foes” are individuals, groups, and institutions that fight against the proposed right. They too are part of movements—rival ones with their own set of activists promoting a contrary set of rights. Finally, beyond the main parties to conflict, contention over rights involves third parties, those outside the opposing groups who hold resources that could help shift its outcome. Third parties sometimes become so closely enmeshed with one side to conflict that they can be difficult to separate from it in practice. Nonetheless, I use this tripartite division to examine the various tactics that movements use in rights conflicts.

It should be underlined that these definitions of activists and movements encompass more than just the left-wing groups highlighted in the scholarly literature. My definitions span the political spectrum to include an ideologically diverse set of actors. The same goes for opponents of a rights movement, who are not necessarily conservative groups, as the foes of the right-to-life movement attest. More controversially perhaps, the definitions I use include individuals and groups regardless of their relation to governmental institutions and political power. Political party leaders, government officials, or even states themselves may be considered rights proponents in certain circumstances, even if in others they resist or repress rights claims from opposition activists. Notwithstanding these and other complexities, in the conceptual sections of this book, I distinguish the various conflicting parties and their tactics. In the empirical chapters, I seek to do so as well, although the task of categorizing key actors as proponents or opponents is harder because of the dynamism and contention involved.

RIGHTS

What do I mean by “rights”? It should be clear already that I define the word more broadly and differently than many who study “human rights.” For one thing, I include within my purview property rights, group rights, and even majority rights that are seldom considered by scholars of human rights. For another, I downplay, although by no means omit, the moral component of rights, for reasons discussed later. Instead, in this book I adopt a definition loosely based on the ideas of the legal philosopher Wesley Hohfeld. I define a “right” as the power of one entity, the rights-holder, to enforce a duty on another, the duty-bearer, whether directly or through some institution such

as a court.¹⁸ The closely related term “rights claim” is a demand for such a right made by a proponent against an opponent through a rhetorical, legal, political, or military campaign.

These definitions of rights and rights claims are expansive. They cover individual human rights vis-à-vis a government, including the familiar “negative” rights—for instance, to free expression and association, which are realized when states leave individuals alone.¹⁹ These definitions also include “positive” rights, which require states or other entities to provide concrete goods to individuals, such as the right to food or the right to water. Finally, the definition includes group rights, whether those of ethnic, racial, religious, or other minorities—or of majorities or even states—to anything from land for their people to protection for their cultures and territories.

Notwithstanding the scope of this definition, a key point for my purposes is that neither rights claims nor rights are ends in themselves. As Paul Sniderman and his coauthors note, the politics of rights involves “not the existence of support for a particular democratic right or freedom, but rather . . . concrete questions of public policy and constitutional politics.”²⁰ This is a critical point, but it is important to go beyond it: rights and their correlative duties are means of achieving something substantive, whether that be abstract, such as freedom of thought or religion, or material, such as rights to food or shelter. This point is clearest for property rights, which are clearly rights *to* something. Now consider rights that might appear less concrete, such as the right to free expression. In this case, too, the right is inconsequential or at least incomplete without someone saying something—and almost always in the cases that matter most to defining the right, something controversial, hurtful, or offensive to another. Broadly defined rights such as women’s rights mean the right *to* equal treatment, among other things. Next consider the right to privacy, which might appear merely to involve the community’s leaving people alone. Again, however, being left alone permits the individual to gain something real, such as a contraceptive device or an abortion. In the digital world, the right to privacy provides something equally important if abstract—a zone in which others cannot observe the rights-holder. Reciprocally, the right to privacy imposes a duty on others, whether private or public entities, to stand clear. Finally, it is worth noting that rights provide another abstract but critical end: recognition of the rights bearer as an individual or group. Forcing those in power to grant such recognition may be as important to the rights proponent as attaining material aims.

RIGHTS VERSUS RIGHTS CLAIMS

If rights are means to such ends, the distinction between rights and rights claims recedes in importance. It is true that in legal practice a “vested right” is a right (usually to property) that cannot be taken away. However, in politics rights are seldom if ever irrevocable and self-implementing, automatically providing the entitlement, let alone the objective, they encompass on paper. This is so even for rights embodied in the constitutions of democratic states. In such countries, rights litigation remains a constant feature of larger politico-legal disagreements over shifting conceptions of the substantive goals embodied in particular rights. In these continuing struggles, activists use formal written rights much as they previously voiced rights claims to achieve these goals.

Much political conflict involves the problem of turning a rights claim into a right, usually embodied in a written law. There is no question that the codification of a right is a signal moment. In principle, at least in liberal democracies, it places the enormous power of the state behind enforcement of the duty correlative to the right. But this is never the end of the story. Even after promulgation of rights, rights campaigns continue focusing on three additional matters of critical importance: fighting back against the ostensible new duty-bearer’s continuing efforts at reversal; compelling the duty-bearer to implement the novel right, often through pressure on the state to enforce the duty; and shaping the constantly evolving interpretation of the right’s definition, contours, and limits. Obviously, there are substantial overlaps among these conceptually distinct but inescapably muddy situations. In recent years in many countries, contending groups have debated whether human rights encompass sexual rights, in particular gay and lesbian rights. Where that question is answered affirmatively with new law, further questions are whether sexual rights encompass the right to same-sex marriage, to adoption by same-sex couples, to rights of transgender people, and more. Given such overlaps, I use the terms “rights” and “rights claims” interchangeably in this book to encompass any of the foregoing attempts to achieve and maintain the underlying goals sought by campaigners.²¹

RIGHTS AND MORALITY

This book’s omission of a moral component from its definition of rights should now be even more glaring. In this, the definition used here differs from any number of others, particularly of human rights, such as Ignatieff’s

quoted earlier, or Micheline Ishay's definition of these rights as "universal," held "equally by everyone . . . simply because they are part of the human species."²² Similarly absent is any notion that rights are natural or inherent. Rather, my definition follows that of legal realists who argue that the rights available at a particular time and place reflect a transient and conditional balance, pivoting on the political question of who can enforce a duty on another.²³ In this book, I focus on the means by which that fluctuating balance is achieved—in particular, the ways in which political actors use all manner of rights as tools to do so.

Notwithstanding the power of the legal realist perspective, there is a critical moral dimension to rights that legal realists have largely overlooked. Rights gain their tactical usefulness in part from their ability to galvanize constituents and third parties into action, and this in turn hinges on the ethical pull they exert on those audiences. Countless numbers have enlisted in movements and militaries, believing in rights. People have protested, fought, and died in pursuit of rights and, more fundamentally, their substantive goals. Rights claims resonate across national borders and cultural communities. Rights gain acclaim and power because masses of people believe that they and the ends they help realize are good—and right. Yet it is notable that where the rhetoric of rights sounds loudly in a conflict, it resounds on all sides. Adversaries contend over different views of what is right and what their own rights should be. The attraction that one side's claims exercise over its own members leaves the rival movement's constituents cold. We shall see many examples in this book. What this righteous contention shows is that rights' moral dimension is powerful but limited: it may be formidable enough to rouse a particular community, but it is often negligible outside of that community, where other moral visions, rival rights, and contrary goals exercise equal and opposite appeal.

Following this approach, I view such charged terms as "human," "universal," and "inherent" as superfluous to the definition of rights, and even to the definition of human rights, despite being so frequently attached to them. If I am correct, however, this raises the question of the terms' purposes. This will be an important subject for detailed analysis in this book, particularly in chapter 2. The short answer is that these additional terms are rhetorical moves aimed at securing the claimant's underlying goals, most importantly by attracting adherents to the cause through moralistic rights language. Rights' proponents, particularly human rights advocates, may reject such views. After all, they are advocates, and many deeply believe in the goals that these rights help secure. To admit anything different, even if

they saw it, would be to call into question the fundamentality of the rights they most revere and reveal them as mere political preferences. However, their deep engagement in activism aimed at achieving those very rights belies this posture. It shows their actual political realism, even if they strategically cloud this with idealist oratory. Notwithstanding advocates' views, this book adopts a legal realist view of all rights, including those claimed to be human.

In adopting this definition, I similarly reject the idea of an *a priori* hierarchy of rights. Leaving aside the most trivial of rights claims—ones that have failed to generate major political movements—it is hard to prove that certain rights are by nature more important to human thriving than others. This has not stopped political actors from seeking to erect hierarchies of rights. Governments and scholars, especially in the West, have proclaimed civil and political rights more genuine or fundamental than economic, social, and cultural rights, even while Communist and developing states have sought to reverse the ranking.²⁴ Proponents take a hierarchical view as well: unsurprisingly, they elevate their preferred right to the superior position. Conflict between the right to life and right to choice suggests how controversial activists' rankings are in practice. For the type of analysis I attempt in this book, however, I eschew such *a priori* hierarchies and instead focus on ones that actually exist in practice (even if I may personally disagree with them). If one right is more fully vindicated than another—and this kind of differentiation is inevitable—it is primarily a matter of the right's having an influential political movement or power-holder behind it. Sometimes this movement is so successful that its goals have been incorporated into the state itself, through constitutional or legal provisions. In such cases, the movement may become almost invisible, its formerly controversial goals so broadly accepted as to be treated as unassailable common sense. Still, it is important to realize that no matter how thick the accretion of political, legal, and rhetorical support for a right, it remains subject to possible change in the future.

To go further, the substantive goals that rights help realize are not necessarily liberating or progressive. Rather, the ends that rights may achieve are open and indeterminate. Adversaries seeking divergent, even contradictory, goals invoke rights. The strong as well as the weak assert rights claims and seek to impose duties on others. Making a similar point about the broader concept of liberty, John Acton stated that it has “two hundred definitions, and . . . this wealth of interpretation has caused more bloodshed than anything, except theology.”²⁵ This point applies as well to human rights, al-

though most who promote them would claim that they have a deeper, moral foundation, one that necessarily protects the individual from the collective and the weak from the powerful. That is one potential way in which “human rights” may be implemented. It is by no means the only one, however, and quite possibly not the most common. In today’s world, governments and movements of all political persuasions regularly don the mantle of human rights. Some may proclaim the membership of countries such as Egypt and Saudi Arabia on the UN’s Human Rights Council as a perversion of the concept. Yet such perversions are inherent in the structure and vague terminology of rights themselves. As Perugini and Gordon argue, any political cause can be draped in a rights frame, even those that involve outright domination of one group by another.²⁶ Certainly, those who prefer “liberal” concepts are free to label themselves as the sole upholders of human rights. But they cannot prevent others from using the same terminology to advance contrary aims—nor from seeking to achieve them through the imposition of a duty on another.

The Argument

RIGHTS AS WEAPONS

If the ends that competing rights proponents seek are open, conflicting, and not necessarily liberating, activists of all political persuasions also treat rights as weapons of political conflict. They do so in three broad ways, whether leading insurgent social movements, reformist NGOs, or established states. Before the fray, they mobilize their supporters and sympathizers using righteous *rallying cries* to bolster support. In conflicts, they *deploy* rights against their foes. And those targeted *counter* the blows, using their own rights rhetoric to marshal forces against their attacker. In each of these three aspects, those mounting—or rebuffing—rights use a recurrent set of approaches or repertoires. Table 1.1 and the remainder of this section outline each of these tactics, and later chapters describe them in detail.

Consider rallying cries, the rhetoric that activists use to mobilize their own forces and sympathetic third parties. One such method is to argue that a particular right is *natural* or *human*. Broadening their ambitions, rights proponents proclaim certain rights to be *universal*, applicable everywhere and always. To forestall argument about the rights they promote, they portray them as *apolitical*, as neutral *baseline principles* that must *remain* immune from the sordid compromises of mere politics. On these foundations, they describe their preferred right as *absolute*, trumping rival interests or

TABLE 1.1. Rights Tactics in Political Conflicts**RALLYING CRIES**

Proponent mobilizes supporters and third parties by portraying its rights as:

- Human (or natural): Innate or inherent to all
- Universal: Applicable across time, space, and culture
- Absolute: Trumping other interests, concerns, or rights
- Apolitical: Above politics and beyond debate
- Violated: By opponent

DEPLOYMENTS

Proponent uses rights as:

- Camouflage: To hide underlying goals and motives
- Spear: To overturn discrete policy or law
- Dynamite: To undermine or destroy a foe's culture or community
- Blockade: To suppress another subordinate group
- Wedge: To weaken or break a rival coalition

COUNTERS

Opponent uses its own rights as:

- Shield: To protect itself from the proponent
- Parry: To repulse the proponent's rights claims through:
 - Denial: Rebutting the proponent's claims that its rights are human, universal, apolitical, and absolute
 - Rivalry: Promoting its own rights contrary to the proponent's
 - Reversal: Depicting itself as a victim of the proponent's violations
 - Repudiation: Rejecting seemingly authoritative decisions against itself

community concerns. Today all four of these rhetorical moves are often mistaken for incontrovertible facts. Certainly, activists advertise them as such, and trumpet them from the ramparts. Simultaneously, they depict their rights as *violated*, publicizing or even flaunting their foe's abuses. But too few scholars have examined these pronouncements as tactical devices aimed at mobilization; nor have they critically probed their sources, structures, and effects among aggrieved groups or potential third-party supporters.

Next consider proponents' deployments of rights to weaken their foes and obtain their objectives. Such tactics include the use of rights as *camouflage* to catch foes off-guard, by hiding or legitimating unpalatable ideas; as *spears* to attack specific policies in the hope of poisoning the larger system

over the long run; as *dynamite* to blow up entire cultural or social systems immediately; as *blockades* to thwart rival movements; and as *wedges* or crowbars to fracture or smash opposing coalitions. Nor are these multifold uses of rights mere happenstance. Activists carefully consider the most effective ways to use rights in particular political and social contexts, then put one or more of these tactics into action.

Rights' militant side is revealed not only by the activists who invoke them but also by their foes, who work to counter the initial campaign. When attacked, they use a different set of rights as rhetorical *shields* to defend their current status and privileges. In addition, they fight back. Repressive states facing a rights campaign may deploy paramilitaries, guns, and torture. In other societies, force may be exerted less brutally, with police, courts, and prisons playing key roles in the repression of a movement promoting new rights. Just as important, foes respond to a rights movement with rhetorical *parries* involving a contrary set of rights tactics. *Denial* seeks to puncture the original movement's Olympian pretensions to the naturalness, universality, neutrality, and absolutism of its rights. *Rivalry* raises a contrary set of rights, ones favorable to the original opponent. *Reversal* depicts the foe as a virtuous victim of the original rights movement—and the latter as a persecutor. Finally, there is *repudiation*, the rejection not just of claims but of seemingly authoritative judgments about them that go against the foe, whether these occur in courtrooms, elections, or the streets. Notably, just as with the original movement's rallying cries, these countering methods work to mobilize the opponent's own constituents and potential allies. Parrying tactics will seldom convince the original rights proponent that it is wrong, but that is not their purpose. Rather, like the use of righteous rallying cries to mobilize supporters of a movement, countering devices bolster the foe's defenses and ready its own movement for action.

A STRATEGIC VIEW OF THE RISE OF RIGHTS

To return to an earlier point, the effects of the righteous rallying cries, deployments, and countering tactics outlined here hinge in part on rights' moral appeal to a particular community. For centuries, masses of people have been moved to political action because they believed they were fighting for the good—even if others disagreed and were motivated by contrary rights to pursue opposite goals. Recognizing the intertwining of rights' strategic and ethical dimensions therefore opens an alternative perspective on their historical rise, highlighting their utility in political struggle in addition

to their moral magnetism. Few historians would dispute rights' dual nature as both ends and means of conflict. But fewer still have explored the latter dimension as itself a key factor in creating what the international lawyer Louis Henkin has called today's "age of rights," or what the political scientist James Ron and his collaborators argue is an increasingly internationalized rights culture. Some, such as the historian Lynn Hunt, argue that rights have risen to prominence through a seemingly unstoppable cultural shift as human empathy for those different from oneself has gradually expanded. Other scholars portray rights as the product of mankind's innate yearning for dignity; all people desire rights and all people will reach for them. International relations specialists highlight the role of enlightened outsiders—NGOs, international organizations, and fellow cosmopolitans—in bringing universal rights to the world's oppressed. Finally, Moyn holds that human rights represent the "last man standing" among a set of ideologies, such as socialism, that have failed to realize human thriving.²⁷

I do not directly challenge these historical interpretations. The rise of rights has many causes. Instead, I supplement these accounts by showing that rights have also risen because of their great utility in political conflicts. Although rights are not the only means of making claims, they are highly effective tools to this end. Proponents have therefore found them important to advancing their goals, as I will show by retelling key episodes in the rise of rights from this perspective. The result is a novel way of explaining how we have entered today's "age of rights." This is a story that is primarily strategic. It illuminates how rights arguments have advanced "progress"—but also slowed or prevented it. Of course, strategy is not everything. Contingency and uncertainty swirl around rhetorical conflicts, just as the fog of war enshrouds real battlefields. New issues arise, old ones look different at later times, and foes may turn one's tactics upon oneself. There is only so much that even the most skillful can predict in a context of inevitable reaction from foes, unforeseen actions by third parties, and random occurrences in the world at large. Notwithstanding such limitations, for analysts and activists alike, understanding the strategic uses of rights in politics—both to build a movement and to undermine a foe—is of great importance.

I am not the first to argue that rhetoric, including rights rhetoric, serves as a tool of politics. As E. H. Carr wrote long ago, "The intellectual theories and ethical standards of utopianism, far from being the expression of absolute and *a priori* principles, are historically conditioned, being both products of circumstances and interests and weapons framed for the furtherance of interests."²⁸ Daniel Rodgers argues that "keywords" such as "rights" have

been “instruments, rallying cries, tools of persuasion . . . often weapons” in American politics since the founding.²⁹ In his study of political identity, Joseph Margulies calls the nation’s ideals “verbal weapons in a continual struggle” over their content, and Michael Kammen has documented similar uses of the related concept of liberty.³⁰ The same can be said overseas: internationally, the use of rights language has proliferated as a “master frame,” proving Tarrow’s point that “contentious language that takes hold successfully in one context tends to diffuse to others.”³¹ However, as the outline of this book’s argument should show, I take the analogy between rights and weapons more seriously than others. Conceptually, I provide the first systematic framework for identifying, distinguishing, and understanding the forms that such weaponry can take. Analytically, I propose a set of hypotheses concerning each of these forms, including their most likely users, targets, content, mechanisms, and probabilities of success. Empirically, I provide sustained analyses of varied domestic and international rights conflicts to demonstrate the utility of the concepts and the plausibility of the hypotheses. Nor do I confine myself to the type of rights most frequently analyzed in recent years, human rights, but instead examine the full panoply of rights in a wide variety of contexts.

Caveats

RHETORICAL, NOT PHYSICAL, WEAPONS

Before detailing this argument in later chapters, let me clarify what I am not saying. First, I do not maintain that rights are literally the same as physical weapons or that activists use rights exclusively for cynical or aggressive purposes. Rights claims have resounded through the most significant advances in human history, helping to bring emancipation and freedom to millions. Many proponents have sincerely believed in the slogans they shout. Rights are commonly used for defensive purposes, and the scholarly literature on rights has highlighted such usages.

What I do claim, however, is that rights have an equally important and underanalyzed offensive capacity analogous to certain types of material weapons and aggressive tactics.³² Because rights are quintessential tools of politics, they can be used by any side to a conflict. As with material weapons, even the mildest application of rights may be perceived by the opponent as belligerent, no matter how much the claimant argues that this is a misperception.³³ This perception will then affect the way in which the foe reacts and the conflict unfolds. Proponents may not always intend to use rights

aggressively, but they can easily turn them this way and often do. Even if normative definitions predominate in scholarly works, hostile uses constantly obtrude in practical politics and legal actions. To identify rights only with the defensive or the good misses much that is intrinsic to their actual usages, even if rights proponents often hide the aggressive element. In short, I seek a realistic understanding of how and why rights are deployed as weapons, as well as the effect of such uses on the movement, its foes, and the larger conflict.

By focusing on the aggressive, I do not reject the fact that rights have other aspects or that they enjoy deep moral resonance among those who voice them. Nor do I hold that conflicts over rights boil down to mere struggles for power. The groups at odds with one another seek power for substantive aims, whether material or abstract. They form not out of individuals' will to power but out of shared identities, principles, or conditions, which in turn are shaped by their interactions with others who are different from themselves. All of this underlines again the need for scholars to analyze rights as offensive weapons that are used to advance a movement's goals and undermine its foe's, albeit weapons that gain much of their power from their strong but limited moral appeal.

This raises the issue of whether we can separate rights as ends from rights as means. Clearly, the two are interwoven. Yet it is possible and useful to disentangle them. Most analysts of rights have done so, but turn their eyes to rights as ends. I take a different tack, highlighting proponents' offensive uses of rights as weapons to achieve all manner of political goals. At the same time, I do not neglect the ends that rights are thought to achieve, but examine how they, and their glorious rhetorical casing, may become corroded when rights are used as means.

OTHER FORMS OF CLAIMS-MAKING

Second, I do not believe that people make claims exclusively by asserting rights, nor should they. Some make claims by pleading for their needs to be fulfilled, or they appeal to a foe's sense of morality or responsibility. Others demand justice, equity, or fairness. Still others posit the societal utility of their goals, bargaining for them against other groups with different goals. In many conflicts, protagonists make multiple arguments simultaneously. But these other demands hinge on the foe's goodwill, empathy, or judgment. They do not result in enforceable legal obligations. Rights do. We therefore frequently see efforts to turn these other arguments into rights claims and

rights. One example is the quest for economic development. Long seen as a social good, in recent years it has increasingly been framed as a right by a new movement for “rights-based development.” Another is the quest for environmental quality, once justified on ethical or utilitarian grounds but now increasingly portrayed by the environmental movement as a right, even a right of nature. In the end, however, these rights claims amount to little more than an effort to transform a political judgment into a legal mandate and a tool for mass mobilization. Whether or not the turn to rights is a wise strategy in any particular struggle, it is common today in a variety of issues.³⁴

Of course, even a right seldom provides certainty of enforcement. In many ways, rights are under constant threat. Foes seek to whittle them away, impose contrary rights, or ignore their duties. Sovereign power, dressed in the garb of majority rights, threatens individual rights, particularly in times portrayed as crises. In liberal democracies with working judicial and enforcement mechanisms, however, rights provide greater assurance that a goal will be realized than do other forms of claims-making.

Rights claims are prominent even in realms far removed from such societies, though they are not the only way that claims are made. Rights talk may have reached its zenith in the United States, but it is now internationally recognized. Such recognition encourages groups around the world, even those without long traditions of rights activism, to broadcast their goals and grievances in the form of rights and their violation. In terms used by scholars of contentious politics, rights are both symbolically resonant and modular.³⁵ They can be used in vastly different cultural settings with similar effects. Ultimately this entails imposing a duty on another entity, but it also involves using rights as tools to achieve the political goal. Today local activists in global backwaters often request support from powerful Western audiences, asserting that their rights are being violated. For these audiences, rights are an intelligible form of claims-making, even if the pleas emanate from alien locales. Or at least they appear understandable: distant appeals often mask a more complex and contrary reality. Just as important, the workings of power are legitimated by such claims, as we see in examples such as the divine right of kings historically or the supposed rights of the community against those even merely suspected of terrorism or crime today. In most societies, alternative forms of claims-making may offer independent bases of political action, but they must in the end be institutionalized as rights to be enforceable and meaningful. For this reason alone, rights are one of the commonest forms of political rhetoric in the contemporary world.

POWER, HIERARCHY, AND RIGHTS

Third, my downplaying of rights' moral dimension does not mean that I personally agree that "might makes right" or accept existing hierarchies of rights. Limits on state and corporate power have been major achievements in human history, even if much remains to be done.³⁶ They have not been reached through some immanent force in rights or the underlying goals they provide but only through enormous, generations-long efforts to harness countervailing power. Ultimately these efforts have been aimed at imposing a duty on some other entity. In this, rights strategies have played key roles both in advancing movements' agendas and in undermining foes' contrary aims.

On the other hand, those foes typically gained and maintained control using analogous rights tactics. Even if one opposes such power structures, the realities must be acknowledged for the sake of accurate analysis and critique. Doing so does not signal acceptance of the status quo as legitimate, inevitable, or unchanging, but rather emphasizes the inherently political basis on which rights exist, always in a form contingent on maintenance of the current constellation of power. For unfortunate confirmation of this view, one need only consult the recent history of torture in America. The George W. Bush administration implemented it secretly after 9/11, the Obama administration ended it but refused to prosecute its perpetrators, and Donald Trump shouted his belief in it, then successfully nominated CIA director Gina Haspel, who supervised waterboarding and allegedly destroyed evidence about doing so. The supposedly fundamental right to bodily integrity—one typically placed at the apex of the philosophers' rights hierarchy—has fallen victim, to one degree or another, to the right of the community to feel secure. Indeed, the U.S. government has justified torture using rights-based language and what Rebecca Sanders has called "plausible legality" in which "officials seek out legal cover to secure immunity and legitimacy for questionable policies."³⁷

SINCERITY AND CYNICISM

From a methodological stance, these points raise the question of whether and how I distinguish between sincere and insincere uses of rights. For the most part, I do not seek to do so and do not believe it is necessary to solve this conundrum. In political conflicts, proponents' motives are mixed: they may believe in their causes, but they are also willing to use their rights in-

strumentally to achieve their ultimate goals. Sincerity and cynicism are tightly interwoven, but separating them is seldom essential for analytic purposes. True, certain aspects of rights' effectiveness may hinge on an advocate's force of expression or her belief in the right's ethical imperative. Conversely, if rights were seen for what they are—as staple tools for achieving contending activists' conflicting moral visions—they might lose some of their inspirational force. Nonetheless, because both the weak and the strong use rights tactics to restrain others and to empower themselves, revealing rights' workings is fruitful and even potentially freeing. In any case, rights will still retain their critical legal power: crystallizing the entitlements and duties of individuals and groups, including the state itself, in the wake of political mobilization and conflict.

The Plan of the Book

To make this argument, I present a conceptual framework of the “rights as weapons” perspective, then apply it to historical and contemporary cases. In chapter 2, I detail the ways in which leaders of political movements raise rights as rallying cries to mobilize their members and third-party sympathizers. Chapter 3 turns to how foes counter these tactics, and the movements themselves, with their own rights tactics aimed at shielding their interests and parrying the blows against them.

In the next five chapters, I turn to the ways in which proponents use rights to advance their side or weaken their foe. Chapter 4 examines rights’ use as camouflage to cover ulterior motives, a tactic common to all manner of conflicts and one that often accompanies the other tactics I examine. The next two chapters consider the invocation of rights in simple conflicts pitting two antagonists against one another. Of course, conflicts are never so simple, because third parties are always available on the sidelines for mobilization. For heuristic purposes, however, it is helpful to examine this bare-bones scenario before turning to more complex ones. In chapter 5, I examine the common situation in which a weak actor uses rights against a stronger one. I call this a “spear” tactic because the weaker actor uses only a narrow claim against a single policy, typically because he does not have the power or resources to mount a broader campaign. Chapter 6 considers the opposite situation: the use of rights claims by powerful forces to quash weaker groups. This I call rights as “dynamite,” because the aims of making such claims are broad, immediate, and explosive: the destruction of key aspects of the foe’s social or cultural system—or the foe itself.

Chapters 7 and 8 examine rights tactics in more complex and realistic situations that involve not only two main antagonists but also third parties. In chapter 7, I examine “blockade” tactics: the refusal of a movement seeking its rights to join forces with other deprived groups against a powerful common foe. Instead, the movement appeals to the foe, arguing that a grant of its own rights will act as a bulwark against the rise of the other deprived group. In chapter 8, I analyze how activists use rights as “crowbars,” or “wedges,” to break third parties away from the rival coalition and, if possible, have them join its own alliance, weakening the foe and advancing the movement’s goals.

Each of these five chapters follows a similar format. First, I define the weapon-like usage of rights and its purposes. Then I discuss several issues: the political context in which rights are likely to be used in this particular way; the movements most likely to do so; the foes most likely to be targeted; the rights most easily fashioned to this purpose; the mechanism of their deployment; and the likelihood of success. Next, the chapters illustrate each tactic through detailed analysis of one or more conflicts. (Necessarily, these case studies also pay heed to the mobilizing, countering, and camouflaging tactics conceptualized in chapters 2, 3, and 4.) Admittedly, there is never a perfect fit between the ideal typical concepts I develop and their manifestations in actual cases. However, the empirical studies demonstrate the plausibility of the hypotheses I propose and indicate that viewing rights through the weapons analogy advances our understanding of political conflicts.

Some of the cases I examine in the empirical chapters are historical, such as America’s nineteenth-century voting rights movements (chapter 7 on blockade tactics) and twentieth-century civil rights movement (chapter 8 on wedge tactics). Others are contemporary. I examine the use of rights arguments in the nationalist struggles in Northern Ireland and Catalonia (chapter 4 on camouflage tactics), in Italy’s disputes over religious symbols (chapter 5 on spear tactics), and in Africa’s conflicts over LGBT rights, in America’s war in Afghanistan, and in European burqa bans (chapter 6 on dynamite tactics). In addition, I analyze rights claims surrounding the transgender movement (chapter 7 on blockade tactics) and LGBT rights in Israel-Palestine and the United States (chapter 8 on wedge tactics). As support for my argument, I rely on a wide variety of primary and secondary sources, including interviews. (A complete online bibliography, including active citations for unique activist sources, is available at the book’s Princeton University Press website.)

My major criterion in selecting this broad range of cases was to choose those cases that best illuminate the particular tactic under discussion. This approach is particularly useful in books such as this one, which propose new hypotheses and theoretical perspectives. Such “plausibility probes” accentuate key conceptual points and critical empirical processes. In addition, given the importance of many of the cases I examine, the approach suggests that this book’s perspective has broader analytic value.³⁸ On the other hand, it cannot show how common these tactics are. Other researchers will use other methods to answer that question. However, as the panoply of cases mentioned in this chapter and the others discussed in depth later should suggest, it seems likely that these aggressive tactics are common if largely overlooked. At minimum, this book should attune analysts to this possibility as they examine a wide variety of rights movements worldwide.

Conclusion

Notwithstanding the moral pull of rights and rights claims—at least for their proponents—rights of all kinds are inescapably political. From this perspective, this book’s central questions are: how do rights claimants achieve their goals, and how do they impose corresponding duties on others? Material factors obviously play a key role. Money, bodies, and arms—these have always been central to struggles for rights, and I do not believe that rights arguments displace them. Instead, I argue that the rhetorical and legal force of rights works powerfully, in mutual interaction with material factors. Threats to rights can and do spark violence. Rights conflicts can lead to real wars. As such, rights and rights claims cannot necessarily be seen as secondary to material factors. The rhetoric of rights, violation, and victim—used by all sides—is itself a potent force. As Stuart Scheingold has urged, rights should be treated “like other political resources: money, numbers, status, and so forth.”³⁹ Like them, rights are instruments of politics. Although they are not as easy to measure in concrete terms, rights are equally useful in a broader political strategy to achieve a particular goal—in part, as we shall see, because of the moral fervor that a rights claim, and the charge of violations, can unleash among the abused community and its sympathizers. This plays a key role in mobilizing a movement and sympathizers to the cause. Just as important, the sharp edge of rights claims makes them formidable and multifold tools against opponents.

If we supplement conventional perspectives on rights, what is the payoff? Most important, analyzing rights’ unexplored aggressive face directs

attention to rights claims' political aspects, which are frequently obscured or blurred when rights are examined from a moral vantage. Notwithstanding the fact that many campaigns aim to correct egregious and undeniable wrongs, there are numerous others whose claims are less clear-cut. Which should triumph: Reproductive rights or the right to life? The right to property or the right to work? The rights of criminal suspects or the rights of victims? The contention and compromises surrounding these and numerous other issues underline their political aspects, despite their obvious moral content.

In addition, rights campaigns involve continuous and critical strategic decisions, not least about the ways in which claims are made. Yet these decisions are shortchanged in heroic accounts of the subjugated dispatching the oppressor. Examining rights' aggressive face simultaneously directs attention to the resistance raised by this aggressiveness. This perspective also counters teleological analyses of rights campaigns that explicitly or implicitly assume the historical inevitability of a past or future right. In fact, rights as ends remain contingent and vulnerable, even in the most rights-conscious of countries. And a major reason why contestation over their implementation, scope, and meaning continues long after they are added to national constitutions, let alone international conventions, is that rights themselves serve as weapons, not only to advance their proponents' interests but also to wound or even destroy their opponents.



Evolving Conceptions of Human Rights as a Bourdieusian Distinction Strategy: A Critical Perspective on Policies Targeting Muslim Populations

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Abstract

This article examines post-9/11 efforts by Western governments to instill respect for human rights among the world's Muslim populations. The article argues that Western discourses on human rights are best conceptualized as a hegemonic Bourdieusian distinction strategy. In a dynamic strategy of this type, new human rights norms are continually produced and subverted by liberal elites in the West. Because these norms are constantly evolving, Muslim social practices can never "catch up" to them. This produces a perpetual distinction between a progressive liberal Occident and a backwards illiberal Orient, justifying the perpetual hegemony of the former over the latter. In developing its analysis, the article gives special attention to right-wing nationalist movements in Europe and the USA and US foreign policy in the Middle East. These developments are situated in relationship to liberal imperialism in the Colonial era, the Global War on Terrorism, and recent concerns over immigration.

Keywords Human Rights · Islam · Nationalism · Colonialism · Terrorism · Habitus

Introduction

Since the September 11 attacks of 2001, many have come to see Islam as a paramount threat to the secular liberal values that define modern Western civilization. Such views are at the heart of right-wing nationalist/populist movements in Europe and the USA. These movements have attained increasing influence following Trump's election and the Brexit vote in 2016 (Brubaker 2017; Lean 2017; Klein and Muis 2018). Responding to the perceived Islamic threat, Western governments have stepped up

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demands that Muslim populations acknowledge the authority of secular liberal values. In particular, it has been demanded that they prioritize respect for universal human rights over adherence to religious precepts. The goal of bringing human rights to Muslim populations has served to justify post-9/11 American military invasions/occupations of Muslim countries. It has likewise served to justify the establishment of an enormous network of Western-funded human rights NGOs operating across the Muslim world. Domestic policy in Western countries has been shaped by similar concerns, especially in Europe.

Recent Western government policies targeting Muslims have attracted a great deal of anthropological attention. Research on foreign policy has primarily focused on the Muslim Middle East. A number of studies examine the processes whereby activists, NGOs, and government officials strive to establish human rights in various Middle Eastern countries (Slymovics 2005; Osanloo 2009; Abu-Lughod 2013; Allen 2013. Also see Massad 2007; Puar 2007). A related strand of scholarship has investigated liberal efforts to advance human rights by promoting secular governance (Asad 2003; Mahmood 2005, 2016; Hirschkind 2006; Silverstein 2011; Agrama 2012). Regarding Western domestic policy, research has primarily concentrated on Muslim minorities within Europe (Bowen 2007, 2016; Ewing 2008; Selby 2012; Ozyurek 2015).

A key reason why government policies targeting Muslims have received so much attention is that they promise insight into the workings of secular liberal political power. Muslims, after all, are seen as a threat for not adequately acknowledging the authority of this power. Policies targeting Muslims aim to bring such acknowledgment into existence by remolding Muslim social practices and subjectivities. Coordinated at both a foreign and domestic level, these policies reveal a great deal about the preconditions required for establishing and maintaining liberal political power across the world.

The past two decades have seen scholars from a number of fields embark upon new efforts to critically theorize liberal power as a global system. Particular attention has been given to the function of human rights within this system (Agamben 1998; Hardt and Negri 2000; Brown 2004; Ranciere 2004; Zizek 2005; Fassin and Pandolfi 2010; Barnett 2011). The present article contributes to these efforts by drawing on insights from recent anthropological scholarship. Synthesizing these insights, the article proposes a new framework for understanding human rights discourse and shows how this framework illuminates post-9/11 policies targeting Muslims.

The proposed framework builds on Bourdieu's claim that contemporary Western elites perpetuate their authority through a strategy of producing and maintaining social distinctions. For Bourdieu, elite status is marked by a distinctive collection of cultural/aesthetic practices. He argues that these practices incorporate an ongoing dynamism, involving the continual arbitrary subversion of existing aesthetic standards. This ensures that dominated social groups who strive to attain elite status by imitating elite practices can never "catch up."

I suggest that human rights discourse embodies an analogous form of distinction strategy. Hence, human rights norms constantly evolve through a process of arbitrary subversion. Such evolution is identified with progress. The resulting idea of progressive human rights norms is used to perpetuate the domination of liberal elites both domestically and internationally. On an international level, liberal domination is justified in terms of an immutable distinction between the progressive liberal Occident and the backwards illiberal Orient. While many theorists believe that this distinction should be

understood as a faulty representation of reality, I will argue for understanding it as the sociological product of a global distinction strategy.

The remainder of the paper is divided into five sections. Section (I) discusses Western policies targeting Muslims in the post-9/11 era. Section (II) introduces the notion of a distinction strategy. Section (III) explains how human rights discourse can be understood as a distinction strategy. Section (IV) explains the largely arbitrary character of human rights discourse, challenging claims that such discourse can be understood in terms of reason, logic, or progress. Section (V) explains how human rights discourse functions to produce and maintain a global distinction between Orient and Occident.

Before beginning, two points deserve further clarification. First, I approach liberalism as a complex evolving discourse rather than a simple fixed set of principles. Second, in keeping with an influential article written by social theorist Kieran Healy (2017), I do not assume that an emphasis upon “nuance” and “complexity” is always useful. Healy argues that constructing a theoretical model necessarily entails foregrounding certain patterns within a complex corpus of data through processes of abstraction and simplification. Consequently, it is always possible to criticize a theoretical model by demanding that more attention be given to concrete cases and complexity (over abstraction and simplification). Healy concludes that if we desire to have good theoretical models, demands for additional nuance must be limited and consciously justified. Like all other theoretical models, the model of human rights as a distinction strategy can be criticized for giving insufficient attention to concrete cases and complexity. Yet, the relevant question is whether it offers any new and substantial insights into topics like human rights and the governance of Muslim populations.

Section (I): Recent Western Policies Targeting Muslims

Though somewhat abstract, the theoretical model of human rights as a distinction strategy derives from analysis of concrete historical developments. In particular, it is useful to situate this model vis-a-vis post-9/11 Western policies targeting Muslim populations. These policies are shaped by a number of social and political factors. One of the most important is the US-led Global War on Terrorism (GWOT). The GWOT was initiated in response to the 9/11 attacks, which were attributed to the Islamic terrorist group al-Qaeda. The GWOT has been justified both as a means of countering Islamic terrorism and spreading human rights. On this view, the USA is obliged to exercise a type of neocolonial power over Muslim populations through wide-ranging political-military interventions. It is believed that such interventions will enable the USA to protect itself from terrorist attacks while establishing human rights in Muslim countries (e.g., democracy, women’s rights, freedom of religion) (see Zizek 2005; Fassin and Pandolfi 2010; Abu-Lughod 2013).

To further the GWOT, the USA initiated long-term wars in the Muslim countries of Afghanistan and Iraq. These wars have contributed to regional instability and the emergence of larger Iraq-Syria and Afghanistan-Pakistan conflict zones wracked by civil strife/war. The USA regularly intervenes in these conflict zones, striking terrorist targets and backing some factions against others. It has been estimated that the GWOT and associated conflicts have caused around 800,000 (direct) deaths (Crawford and

Lutz 2019) and perhaps up to 2 million (direct and indirect) deaths (Physicians for Social Responsibility 2015). Moreover, the conflicts have produced 21 million Afghan, Iraqi, Pakistani, and Syrian war refugees and internally displaced persons (Costs of War Project at Watson Institute 2019).

The effects of these conflicts have been felt within Western countries. Thus, terrorist groups have continued to stage intermittent attacks in the West, often in retaliation for US operations in the Muslim world. Since the 9/11 attacks (which caused 2977 deaths), Islamic terrorist attacks have caused about 104 deaths in the USA (between 2001 and 2019)¹ and several hundred in Europe (i.e., 753 between 2000 and 2018).² Additionally, European countries have been deluged with Muslim refugees from GWOT conflict zones, generating serious strains on state resources. Thus, since 2014, the largest numbers of EU asylum seekers have come from Syria, Iraq, Afghanistan, Nigeria, and Pakistan (with Syria alone accounting for nearly a million asylum seekers) (BBC News 2018).

Post-9/11 Western policies have also been shaped by concerns about demographics and immigration. Presently, Muslims are about 1 % of the US population and 5 % of the European population. However, owing to immigration and higher Muslim fertility, these numbers are expected to increase over time. Thus, by 2050, Muslims are projected to account for about 2% of the US population and 7–15% of the European population (Hackett 2017; Mohamed 2018).

Right-wing nationalist movements have interpreted these developments as evidence that Muslims are seeking to destroy the West (Brubaker 2017; Lean 2017; Klein and Muis 2018; Uddin 2019). Thus, it is argued that Muslim population growth in the West will allow Muslims to promote Sharia norms. Many commentators go a step further, implausibly claiming that Muslims are in the process of conquering the West through terrorist attacks and an immigration “invasion.” It is asserted that these actions will result in an Islamic state (Caliphate), which will rule over Western lands with Sharia law and abrogate human rights. Thus, Matteo Salvini (Italy’s powerful right-wing deputy prime minister) has warned of a coming European Caliphate (Walker 2019). Although such a perspective is alarmist, it serves to legitimate measures against Islam/Muslims. These measures are seen as necessary to the preservation of human rights rather than as human rights violations.

Post-9/11 US domestic policy has been characterized by increased government surveillance of Muslim communities and growing anti-Muslim discrimination. However, these trends have reached new heights with the election of Trump. Thus, the Trump administration has enacted an (adjusted) ban on Muslim immigration. Trump has also voiced support for a special Muslim “registry” and hinted at the future possibility of Muslim internment camps (Monroe-Sheridan 2018; Uddin 2019:72). Trump has repeatedly attacked the only two Muslim women in Congress, accusing them of hating America and encouraging them to leave the country. He has also falsely claimed that one of the congresswomen supports terrorism, has praised al-Qaeda, and dances to celebrate the 9/11 attacks (see, e.g., Dale and Westwood 2019).

Trump’s policies reflect a broader shift in American discourse on religion over the past two decades. Thus, a sizable and increasing number of Americans reject the notion

¹ Bergen et al. 2019

² Le Figaro (Online) 2019

that freedom of religion applies to Islam. This is justified by claiming that Islam is not actually a religion, but rather a totalitarian political ideology akin to communism or Nazism. This dangerous ideology seeks world conquest through terrorism, using certain religious beliefs and practices to recruit support for its aims (Uddin 2019; also see Brubaker 2017). For instance, US Congressman Jody Hice has stated that “Most people think Islam is a religion, it’s not. It’s a totalitarian way of life with a religious component.” (Uddin 2019:53–54). Similar views have been echoed by Michael Flynn, a major GWOT figure who served as the highest-ranking US military intelligence officer before becoming Trump’s first national security advisor. In a 2016 speech, Flynn compares Islam to a “malignant cancer” and states that “Islam is a political ideology...[which] hides behind...this notion of it being a religion” (Right Wing Watch 2016). The notion that freedom of religion does not apply (or apply fully) to Islam functions to legitimate discriminatory policies like Trump’s Muslim ban.

Concerns about Islam are even more evident in the domestic policy of European countries. Thus, in 2004, France famously barred Muslim girls from wearing headscarves in state schools. French authorities have also expressed concerns that Muslim girls’ skirts are too long and do not show enough skin (Selby 2014). In 2011, France passed legislation prohibiting all Muslim women from veiling their faces in public. In 2016, local French politicians issued regulations barring Muslim women from wearing modest swimwear at the beach (i.e., the “burkini”) (Chabal 2016). The preceding bans have been justified as a way of protecting women’s rights to equality and free expression of their sexuality (Scott 2007; Bowen 2007; Selby 2012). In 2009, Switzerland moved to protect women’s rights from Muslim religiosity by outlawing the building of mosque minarets (Dodd 2015).

European concerns over Islam have also significantly impacted immigration regulations, leading to new restrictions on Muslim refugees and the introduction of what are informally known as “Muslim tests.” These tests seek to ensure that immigrants are committed to secular liberal values. Thus, in 2006, the Netherlands passed regulations obliging applicants from Muslim countries to watch video footage showing a topless woman on a beach and two gay men kissing in a meadow. Applicants are then tested to ensure they acknowledge the social acceptability of such behavior. Muslim tests have also been adopted in Germany (Butler 2008; Ewing 2008).

As in the USA, notions of religious freedom in Europe are rapidly shifting. This trend is most apparent in Northern European countries, although it is by no means limited to them. Over the past two decades, several of these countries³ have passed legislation banning homophobic hate speech. Such legislation has been used to prosecute Muslim and Christian preachers for scripturally based condemnations of homosexuality. Thus far, convictions have been overturned on appeal. However, judicial opinion on these matters remains unsettled (Leigh 2009; Bob 2014; also see Taylor 2005:77–84). Changing European attitudes on religion have been felt in other areas of the law as well. Consider ritual slaughter, an activity necessary for producing meat which conforms to Jewish and Muslim dietary rules. In 2014, Denmark joined several other European countries⁴ in banning ritual slaughter for the sake of preventing cruelty to animals (Sokol 2014; also see Uitz 2007:49–53). Moreover, in both Denmark and

³ For example, the Netherlands, Sweden, Iceland, and Norway

⁴ Poland, Iceland, Norway, Sweden, and Switzerland

Sweden, strong efforts are being made to ban the Muslim and Jewish practice of ritually circumcising young boys. The ban is justified as necessary to protect children from physical harm and mutilation (Huffington Post 2014). It is difficult to predict where all of this is leading. However, as noted by some commentators, in theory, such bans could proliferate until all religious texts, rituals, and forms of religious speech are rendered illegal (Leigh 2009:377).

Muslim practices are in particular danger given widespread sentiment that they are simultaneously anti-woman, anti-gay, anti-child, and even anti-animal. This danger is not hypothetical. Consider the popular Dutch right-wing nationalist politician and member of parliament Geert Wilders. Wilders has famously argued that to protect human rights, it is necessary for the government to shut down all mosques, ban new Muslim immigration, tax women who wear veils, and ban the Quran (in keeping with similar bans on Hitler's *Mein Kampf*) (Wildman 2017). In 2018, a group of leading French politicians and intellectuals published a newspaper manifesto claiming that various passages in the Quran incite violence and demanding that Muslim religious authorities somehow abolish these passages. The group responsible for the manifesto included former French president Nicolas Sarkozy as well as three former French prime ministers (see Piser 2018). European officials have also worked to help boost levels of Muslim discomfort in various other ways, like barring Muslim children from praying at school and altering school lunch rules to ensure that Muslim children are made to eat pork (Engy 2017:30, 56–57).

The 2000s have also seen private actors make concerted efforts to shock Muslim religious sensibilities. European newspapers have published derogatory depictions of the Prophet Muhammad (Asad et al. 2009). Meanwhile, pornographers have taken to commissioning videos of veiled Muslim women engaging in sex acts with groups of white men.⁵ Likewise, some activists have begun a “topless jihad” to harass Muslims across Europe. The jihad in question involves bare-breasted women gathering in front of mosques, profaning the Quran, and cursing Sharia law (Gordts 2013; al-Mahadin 2015).

Perhaps most importantly, many Europeans and Americans have taken to producing and circulating massive amounts of anti-Muslim content on websites and social media platforms like Facebook, YouTube, and Twitter. The production and circulation of such content is spearheaded by an “Islamophobia” network, consisting of dozens of professionally staffed organizations. These organizations had access to more than 200 million dollars in funding between 2008 and 2013 (Center for Race and Gender 2016; Lean 2017). Anti-Muslim content regularly emphasizes themes such as human rights violations among Muslim populations, the morally repugnant character of Muslim scripture, the violent character of Muslim history, Muslim tendencies to engage in terrorism and child rape, lack of Muslim scientific achievements, and IQ-based Muslim racial inferiority (see Awan 2016; Lean 2017; Klein and Muis 2018). Leading figures within the Islamophobia network explicitly refer to themselves as “human rights activists” and describe their projects as human rights work (see, e.g., Lean 2017, esp. 54, 68, 222). These figures believe that by constantly denigrating Islam, they can help weaken or destroy it, thereby preventing Islam from undermining human rights.

⁵ Although I do not wish to provide a link to such material, it can easily be located through an internet web search.

Although human rights discourse can be used to stigmatize and disempower Muslims, it does not have to be used this way. Thus, every anti-Muslim measure mentioned above has been vociferously criticized and resisted by Western activists and intellectuals in the name of human rights. These activists/intellectuals have decried the views of right-wing nationalists (e.g., Trump, Salvini, Sarkozy, Wilders, Flynn) while lamenting the excesses of the GWOT. They have exhibited great compassion for Muslim refugees, enabling the enormous influx of immigrants into Europe. They have sought to create a welcoming place for Muslim minorities in the West by advocating multiculturalism and legal measures against Islamophobic hate speech and discrimination.

These actions illustrate the fact that human rights discourse is highly flexible, such that it can be used to stigmatize and disempower Muslims or counter such stigmatization/disempowerment. The extent to which human rights discourse is used to stigmatize/disempower Muslims depends upon social conditions and can be intensified by factors like colonization, war, and immigration. I will argue that, generally speaking, human rights discourse has had the *net effect* of stigmatizing/disempowering Muslim populations. This is exemplified in the GWOT era. It is also exemplified in the Colonial era (which will be discussed later).

It could be argued that human rights discourse has only had the net effect of stigmatizing/disempowering Muslim populations because it has been shaped (or “exploited”) by Western ethnocentrism and imperialism. This might be true, yet I suggest that a proper anthropological/sociological assessment of human rights discourse must account for its enduring historical linkages with Western ethnocentrism and imperialism.

I would emphasize that many human rights activists consciously intend and desire to counter the stigmatization/disempowerment of subaltern groups (like Muslims). However, as constantly emphasized by Bourdieu (see, e.g., 1990:9–16), the ultimate effect of human social behavior often has little relationship to what is consciously intended or desired by individuals.

Section (II): Distinction Strategies and the Habitus

Bourdieu’s most extensive treatment of distinction strategies is found in *Distinction: A Social Critique of the Judgment of Taste* (Bourdieu 1984). The title of the book mentions “taste” because Bourdieu’s primary focus is on aesthetic matters such as art, music, dress, and cuisine. Bourdieu argues that aesthetic taste is central to the workings of power in contemporary liberal societies.

In the pre-modern West, membership in ruling elites was largely guaranteed through juridical codes, which explicitly stipulated which persons were entitled to share in aristocratic privileges. Bourdieu argues that the rise of liberalism has witnessed the decline of such codes in favor of more informal strategies of distinction (also see Bourdieu 1990:138–139). These strategies allow elites to circumscribe their membership unofficially through aesthetic taste.

Bourdieu frames his discussion of elite taste with respect to the notion of habitus, which he conceptualizes as a system of embodied dispositions inculcated through habitual practice (see Chap. 3 in Bourdieu 1990). In simpler and less technical terms,

Bourdieu is pointing to the fact that when individuals habitually practice an activity (e.g., piano playing), they not only become skilled at this activity but also come to enjoy and desire it. Bourdieu uses the term “habitus” to refer to skill and desire acquired through practice.

Bourdieu observes that the lifestyle of elites is characterized by a unique set of aesthetic practices (e.g., ways of dressing, types of cuisine, etc.). Those with an elite upbringing are exposed to these practices from a young age, thereby coming to find pleasure in them and desire them. This distinct set of desires (i.e., tastes) constitutes the elite habitus. Such a habitus serves to distinguish elites from non-elites, for the latter have internalized a different habitus through different lifestyle practices.

For Bourdieu, temporality is an essential element in maintaining distinctions between groups. Over time, non-elite groups strive for elite status by trying to acquire an elite habitus. Such efforts revolve around the gradual assimilation of elite practices. As the decades pass, forms of dress, music, and cuisine previously limited to the elite filter down to those below them. If allowed to proceed unchecked, this process would eventually allow non-elites to develop an elite habitus, thereby eliminating the cultural barrier distinguishing the elite from those they dominate. To prevent this from happening, elite aesthetic practices incorporate an ongoing dynamism (Bourdieu 1984:251–252). Elites value aesthetic production that is “creative,” “original,” and “cutting edge.” Production of this kind centers on the continual arbitrary subversion of existing aesthetic standards (i.e., “innovation for its own sake”). As a result, elite aesthetic practices are always undergoing a slow process of change, which means that elite forms of habitus are always evolving. This ensures that the dominated are always in a perpetual state of trying to “catch up.” However, the very possibility of “catching up” is an illusion, for whatever they catch up to has already been arbitrarily changed in order to keep them “behind.”

As stated earlier, when Bourdieu speaks about distinction strategies, he focuses on standard aesthetic matters like art and cuisine. However, he also notes that these strategies extend into the more general realm of lifestyle choices. These choices include things like marriage patterns, family size, sexual activities, gender roles, religious practices, and the like. All such choices have an aesthetic dimension, for they can and are subjected to aesthetic assessments. Hence, elites view the lifestyle choices they have become accustomed to as sophisticated, civilized, and beautiful. Meanwhile, they perceive the lifestyle choices of non-elites as crude, backwards, and repulsive. Naturally, non-elites have a different perspective. They are deeply and viscerally attached to their own distinct lifestyle choices, viewing alternative elite practices as alien and repugnant. To be sure, in striving for elite status, non-elites gradually assimilate elite practices. However, letting go of traditional forms of family life and religious practice is typically a slow and painful process that takes generations.

Muslim populations in Europe and the Middle East furnish a useful example. Although these populations are continually assimilating values and practices originated by liberal elites in the West, this process engenders constant social and political resistance. It is such resistance that fuels popular portrayals of Islam as nemesis to the liberal West.

Section (III): Distinction Strategies and the Evolution of Human Rights Legislation

As noted above, Bourdieu argues that elites value creativity/innovation in standard forms of aesthetic production (e.g., art, cuisine, dress). Interestingly, he also makes scattered comments implying that elites value creativity/innovation in the realm of general lifestyle choices (see Bourdieu 1984:432, 454–456). This line of analysis deserves to be systematically developed and deepened. I would suggest that it is more instructive to speak of elites valuing “subversion” rather than creativity or innovation. Just as liberal elites value the continual subversion (i.e., unsettling/overtaking) of existing aesthetic standards, they likewise value the continual subversion (i.e., unsettling/overtaking) of existing normative standards.

Generally speaking, any normative standard restricts human behavior in some way and reinforces a particular system of power.⁶ Within liberal discourse, efforts to subvert normative standards are usually described in terms of “valuing individual freedom,” “eliminating restrictions on freedom,” and “resisting power.” On the other hand, subversion of existing standards does not result in an absence of standards, but rather a different set of standards, which institute different restrictions and reinforce a different system of power. Within liberal discourse, it is typically claimed that changes in normative standards represent some type of coherent “progress” over their predecessors (a claim that I will address later). Nevertheless, I will argue that the continual subversion of normative standards is largely arbitrary and resembles the arbitrary subversion of aesthetic standards.

I suggest that in order to function, liberal regimes of governance must create subjects that idealize subversion of existing norms in the name of freedom. However, liberal ideologies work to obscure this fact. Such ideologies hold that human agents inherently place a heavy value on individual freedom and hence naturally wish to subvert any restrictions on this freedom, along with associated systems of power. Subversive tendencies are thereby depicted as existing prior to and independent from liberal regimes of governance. Here feminist anthropological scholarship on Muslim women is helpful. In her work on Egyptian Bedouin women, Lila Abu-Lughod (1990) argues that liberal academics tend to conceptualize “resistance” (i.e., subversion) in an overly simplistic manner, assuming that resistance/subversion is a mechanism for opposing power in some general sense. Abu-Lughod notes that liberal capitalist systems of power actually encourage certain types of resistance/subversion. For instance, liberal capitalism encourages women to embrace an individualistic lifestyle of consumerism and sexual freedom, sustained through purchases of clothing and cosmetics designed to enhance sexual attractiveness. By contrast, traditional Islamic-Bedouin norms restrict female sexual freedom with the aim of protecting marriage and kinship bonds – thereby reinforcing a particular system of power. Abu-Lughod observes that when Bedouin women purchase Western clothing and cosmetics, they are resisting/subverting Islamic-Bedouin norms in a manner encouraged by liberal capitalism. For Abu-Lughod, such resistance/subversion does not signify opposition to “power” in general, but rather opposition to one system of power in favor of another.

⁶ See below for examples.

Saba Mahmood draws on Abu-Lughod in developing a related line of analysis. Critiquing conventional liberal feminist assumptions, Mahmood disputes the proposition that all women inherently value individual freedom and are thereby naturally inclined to throw off and subvert restrictive norms sanctioned by custom, tradition, and religious authority. Pointing to the example of pious Egyptian Muslim women, Mahmood notes that some women exercise their agency to preserve these norms. Mahmood argues that just as pious women are social products of historically specific religious forms of power, subversive women are social products of historically specific liberal forms of power (2005:1–39; also see Abu-Lughod 2013). Although Mahmood focuses on women, her point is applicable more broadly to all people regardless of gender (also see Asad 2003; Hirschkind 2006; Agrama 2012; Mahmood 2016).

To appreciate the significance of these points, consider the notions of sexual “perversion” and “blasphemy.” Clearly, what is perceived to be perverse and blasphemous varies across societies. This being said, in the contemporary West, there are particular activities understood as falling within these categories. Traditional norms related to kinship/sexuality and religion are seen as especially formidable obstacles to freedom. Hence, attacking them through perversion and blasphemy symbolically marks allegiance to freedom through subversion as a sociopolitical ideal. Recent European developments must be seen in this light. Recall the Dutch immigration tests showing two men kissing. The point of these tests is to convey the idea that citizenship in a liberal polity is only possible if individuals endorse subversion as an ideal. Endorsing this ideal partly consists in accepting that it is legitimate for others to cast off religious norms (e.g., engage in same-sex behavior). However, it also usually entails some measure of personal willingness to cast off these norms. It is for this reason that Muslim schoolchildren are pressured to eat pork. It is also why Muslims themselves are expected to remove veils, shake hands with members of the opposite sex, or somehow abolish passages in the Quran.

In the same vein, anti-Muslim activism has an important pedagogical element. By publicly desecrating Islam (e.g., topless jihads, publishing derogatory depictions of the Prophet), liberal activists strive to teach and train Muslims to tolerate and even endorse the subversion of their religious norms. Put differently, these efforts aim at teaching Muslims how to emancipate themselves from the oppressive authority of their religious tradition (a sentiment very much in evidence in French justifications of banning the veil). For liberal activists, instilling subversive tendencies within Muslims is a means of protecting and perpetuating Europe’s liberal forms of governance. European Muslims who rejected subversion would stand as obstacles to Europe’s ongoing project of progressive change.

On Bourdieu’s account, distinction strategies operate in a manner that is fundamentally informal and extralegal. For Bourdieu, under liberal regimes, elites strive to distinguish themselves through lifestyle practices precisely because they cannot depend on the law to officially grant them special status. Breaking with Bourdieu, I wish to suggest that distinction strategies also have a great deal of significance in the formal legal realm. Here, it is useful to turn to Bourdieu’s work on law.⁷ A key point made by Bourdieu is that the habitus exerts a deep influence over how individuals interpret legal concepts. Accordingly, because elites have a unique habitus, they are thereby disposed

⁷ For a discussion of Bourdieu’s legal contributions, see Garcia-Villegas 2004; Dezalay and Madsen 2012.

to interpret legal concepts in a unique way (Bourdieu 1987). Although Bourdieu does not do so himself, his insights on legal interpretation can be combined with his insights on distinction strategies. Making such a move would imply that as elite forms of habitus change so do elite understandings of various legal concepts.

Human rights concepts are central to contemporary liberal legality. Moreover, it is not difficult to see how evolving forms of habitus directly give rise to evolving understandings of human rights. A right is simply a legal protection for a particular “interest” – in other words, a protection for something perceived as desirable (Kennedy 1997:330). As liberal elites come to desire new things, they demand legal protections for these desires in the form of new rights. New rights are as infinitely varied as the desires they protect (e.g., rights to college education, to free speech, to laicite-inspired elimination of religious signs from the public sphere, etc.) When new forms of desire come to be deeply rooted in elite lifestyles, elites frame them as “fundamental human rights.”

Notably, human rights systems are structured to encourage and incorporate evolutionary developments of precisely this type. A useful example is provided by the European Court of Human Rights (ECHR). The ECHR is generally viewed as the most developed human rights institution in the world. It is also the ECHR that is charged with evaluating legislation bearing on Europe’s Muslim minorities. A central feature of the ECHR’s approach to human rights is its embrace of what is termed “evolutive interpretation” (Donnelly 2003:138–140). According to this principle, human rights legislation should not merely be interpreted according to the intent of its original drafters. On the contrary, the court must constantly reinterpret such legislation in accordance with shifting social developments. As a practical matter, the court’s interpretive efforts privilege shifts in lifestyle choices and patterns of desire among liberal elites. The values of disempowered Muslim minorities are given little if any weight.

A similar pattern is discernible on a global scale with respect to UN conventions on human rights. Such conventions use vague aspirational language to proclaim general rights while leaving the scope and nature of these rights undefined. Consequently, any attempt to interpret declared rights is a highly creative endeavor, with much room left for interpretations to shift over time. As a practical matter, these shifts track changes in the opinions and lifestyles of the Western elites which dominate UN policy.

Arzoo Osanloo (2009) has highlighted the fact that Muslim countries such as Iran explicitly endorse the notion of human rights but disagree with the particular list of rights protected in UN conventions. These countries have come together to proclaim alternative lists of rights informed by Muslim religious values (e.g., the 1990 “Cairo Declaration on Human Rights in Islam”). Nevertheless, such proclamations have been ignored by the UN and harshly criticized by Western human rights activists. For Western activists, Muslim countries must simply submit, without criticism, to existing and (purportedly) “agreed upon” UN human rights standards (Dalacoura 2007:39–75; Mayer 2013). By contrast, such uncritical submission is not demanded of Western governmental institutions (like the ECHR) or Western human rights NGOs. On the contrary, these institutions and NGOs are entitled to continuously (but gradually) change existing standards, thereby promoting the ongoing evolution of human rights. The fact that Western institutions exert disproportionate control over human rights discourse is a primary reason why this discourse has the *net effect* of stigmatizing/disempowering Muslims.

Section (IV): Reason, Logic, and Progress in the Evolution of Human Rights

The claim that human rights evolve in an arbitrary manner contrasts strongly with conventional liberal perspectives. According to one such perspective, human rights are best understood as a reflection of reason, which is locked in conflict with irrational traditions rooted in religion and culture (see discussion in Merry 2006:1–35; Riles 2006; Abu-Lughod 2009). The claim that human rights reflect reason often goes hand in hand with the Hegelian assertion that they evolve in accordance with a pre-given logic of ever greater universality and inclusiveness. This perspective is exemplified in Lynn Hunt's widely celebrated history of human rights. Hunt explicitly claims that "human rights have an inner logic" (Hunt 2007:150). On Hunt's view, once Enlightenment figures proclaimed the idea of universal human rights, they implicitly established grounds for all groups to claim these rights. In the beginning, it was only white men who were successful in making such claims. Nevertheless, over time, other excluded groups gradually won their rights as well (Hunt 2007:146–175). Hunt remarks that this process has not come to an end. Rather "the human rights revolution is by definition ongoing," and we cannot know where it will lead (Hunt 2007:29). This is because with time and experience, we develop ever more refined sensibilities, becoming attuned to new forms of exclusion that we ignored in the past.

Hunt's claim that human rights develop according to an inner logic of ever greater inclusiveness conflicts with the view that they evolve in an arbitrary fashion. Nevertheless, Hunt's claim is problematic. Consider recent European efforts to ban veiling, male circumcision, and homophobic hate speech. If these efforts are successful, this success can be framed (respectively) as the inevitable triumph of women's rights, children's rights, and LGBT rights. However, if these efforts fail, this failure can be framed as the inevitable triumph of rights for religious minorities. In reality, the ultimate outcome depends upon unpredictable sociopolitical struggles. Regardless of what this outcome is, it will be possible to retrospectively portray it as consistent with the inner logic of human rights. Hence, invocations of this logic have very limited explanatory value.

In his own landmark history of human rights, Samuel Moyn goes out of his way to establish that there is "no such thing as a necessary 'logic of rights.'" (Moyn 2010:86). On the contrary, Moyn emphasizes that current human rights notions are a heterogeneous welter of disparate ideas: "The tangled history of how the political values today protected as 'human rights' arose shows that they bear no essential relationship...to each other...the real story of how the values protected by 'rights' crystallized is one about warring tendencies and dead projects, whose contributions to the package of modern rights were incidental not intentional." (Moyn 2010:19–20). Moyn's reading of history provides strong support for the view that vague human rights notions are malleable enough to be constantly shaped and reshaped in arbitrary ways.

Even if one concedes that changes in human rights are guided by some very vague and general principles, this would not establish that such changes can be adequately explained in terms of an inner logic. Rather, this would simply establish that human rights change in a manner which is *largely* arbitrary rather than *completely* arbitrary (a view that is perfectly compatible with the notion of human rights as a distinction strategy).

This brings us to the notion of civilizational “progress,” which holds that societies develop along a particular trajectory over time. More specifically, it is claimed that societies increase in technological-economic growth. It is also claimed that societies increase in moral goodness as they better realize liberal ideals (e.g., increasing individual freedom, increasing equality, increasingly humane punishments) (see Nisbet 1980:179–236; Thornton 2005:133–248; Barnett 2011). Today, “progress” is often referred to as “development,” while increases in moral goodness are often referred to as advances in “human rights.” Such advances are a core component of progress/development. Hence, prominent human rights activist Michael Ignatieff states that “the spread of human rights represents moral progress...[even though] calling the global diffusion of Western human rights a sign of progress may seem Eurocentric” (Ignatieff 2001:4; also see Donnelly 2003:3).

The notion of progress/development has been central to liberal political discourse since the eighteenth century and provided the justification for liberal imperialism/colonialism (see Nisbet 1969:104–136; 1980:171–316; Thornton 2005:133–248; Barnett 2011, esp. 57–75). Thus, by the late nineteenth and early twentieth centuries, European empires⁸ had used military-political interventions to extend their rule over almost all of the Muslim world. These empires justified their rule as a “civilizing mission” aiming to bring civilizational progress (including human rights) to Muslims.

The human rights-oriented military-political interventions of the GWOT era resemble those of the Colonial era (Barnett 2011). Moreover, the anti-Muslim discourse of Western right-wing nationalism closely echoes liberal imperialist discourse in the Colonial era (e.g., Muslims violate human rights, Muslims are violent, Muslims are culturally/racially inferior, etc.). Such imperialist discourse was strongly infused with European cultural/racial nationalism.

The military-political interventions of the Colonial and GWOT eras can be framed either as legitimate efforts to realize human rights or as grave violations of human rights (given that they resulted in millions of deaths). Once again, such framings emerge from sociopolitical struggles rather than from any “inner logic” of human rights.

The fact that human rights discourse centers on the notion of progress has great analytic significance. Taken alone, belief in progress does not entail commitment to any specific set of rights. Rather it simply implies a positive attitude towards change over time. This is perfectly consistent with the workings of a distinction strategy. Elites who participate in a distinction strategy are not committed to any rigidly fixed standards. Rather, they are merely committed to the game of changing these standards over time.

This may seem far-fetched given the widespread belief that particular human rights do command absolute commitment. According to such a perspective, if there is change in human rights, it simply consists in adding new rights to those already endorsed as absolutes. UN policy would seem to support this notion. Thus, the UN issued the Universal Declaration of Human Rights (1948), followed by the International Covenant on Civil and Political Rights (1966), followed in turn by the Convention on the Elimination of all Forms of Discrimination against Women (1979). Each new UN convention seems to simply add new rights while maintaining those already in place. Nevertheless, such a view is misguided.

⁸ British, French, Dutch, and Russian empires

Under liberal regimes, elites maintain authority through ostentatious displays of rights giving accompanied by the simultaneous but hidden redefinition of other rights. Jurists have long recognized that every right automatically produces a corresponding duty enforced through state violence. Such a duty, by nature, controls or prohibits particular forms of action, thereby restricting rights to engage in such action (see Hale 1923). For instance, Jane's ownership right in her house means that the state violently enforces a duty upon John not to trespass (i.e., he is denied a right to do so). John's right to free speech means that the state violently enforces a duty upon Jane not to physically assault him while he is speaking (i.e., she is denied a right to do so). Hence, proclaiming one right always comes at a hidden cost to other rights. This fact engenders particular forms of legal behavior in liberal regimes, where the promulgation of new rights comes to serve as a surreptitious means of restricting or outlawing undesired forms of behavior. Hence, law scholar Duncan Kennedy remarks that modern Western legal systems are pervaded by the strategy of "generating a right that supports...what your side wants to stop the other side from doing" (1997:318).

The situation of Muslims in Europe is instructive. When European governments promulgate women's rights, LGBT rights, children's rights, and animal rights, the effect is to progressively outlaw Islamic religious practice. To be sure, in the European case, such rights are not infrequently designed with exactly this aim. Nevertheless, distinction strategies produce the same effects even in the absence of a conscious animus towards any particular group. This is because they operate by creating new patterns of desire and hence new rights. These new rights produce new duties that compel the state to violently restrict or liquidate older lifestyles and the established rights on which they depend.

In Europe, the promulgation of new rights works to eliminate what limited freedom of religion Muslims were granted in the past. This does not mean that Europeans explicitly renounce freedom of religion. On the contrary, they formally retain freedom of religion while simultaneously gutting its content. With this in mind, it is clear that when new human rights come into being, they redefine or negate the scope of older rights. To reiterate, human rights entail commitment to the game of distinction rather than a commitment to particular rights.

From the Colonial era to the GWOT era, Western nations have promoted human rights across the globe because they wish to promulgate duties across the globe, thereby authorizing themselves to exercise violent military authority across the globe (to enforce these duties). This last point undergirds the various critiques of human rights that have proliferated over the 2000s. Hence Zizek remarks that "what the 'human rights of Third World suffering victims' effectively means today, in the predominant discourse, is the right of Western powers themselves to intervene politically, economically, culturally and militarily in the Third World countries of their choice, in the name of defending human rights" (2005:128; also see Hardt and Negri 2000:35–37; Ranciere 2004; Fassin and Pandolfi 2010).

I would add that the violence legitimated by human rights is designed to be perpetual, because the distinction strategy in place functions to ensure that non-Western countries will never be able to catch up to evolving Western human rights norms. In other words, human rights discourse legitimates a perpetual global civilizing mission.

This is illustrated in US decisions to invade Iraq and Afghanistan, as well as more recent Trump administration policies. Thus, Trump has emphatically dismissed human rights concerns associated with refugee immigration, race discrimination, the environment, and Palestinian rights. On the other hand, he has pushed for global LGBT rights as part of an effort to isolate Iran and justify a possible future war against the country (i.e., as Iran does not accept LGBT rights) (see Lederman 2019).

Liberals certainly acknowledge that existing human rights norms are problematic. They readily admit that these norms have been abused for violent purposes and unfairly exclude particular disempowered groups. For liberals, the way to solve these problems is by developing new more satisfactory and inclusive norms. Recall that for Hunt, the “inner logic” of human rights naturally leads to the evolution of such norms over time. On this view, Muslims in Europe and the Middle East should deal with the shortcomings of existing human rights norms by encouraging human rights activists to develop better ones. Notice then that when liberals concede the shortcomings of existing human right norms, this is only done to defend and entrench a distinction strategy which consists in perpetually cycling through these norms.

It should be emphasized that the aspiration to develop human rights norms capacious enough to accommodate all groups is incoherent. It would only be possible to issue unlimited rights to protect all conceivable lifestyles if such rights did not automatically generate duties restricting and negating these same lifestyles. The fantasy of a future time when an all-inclusive rights standard will be developed functions as a means to permanently defer ever confronting the logical incoherence of human rights ideals. Making a related point, Elizabeth Povinelli observes that under liberal regimes, the imagined promise of an all-inclusive standard is “an essential part of the means by which the practice of social violence [in the present]” is justified. The targets of this violence are asked to bear it on the assumption that it is a temporary shortcoming which is in the process of being corrected, rather than a permanent structural feature of the political system (Povinelli 2001:328). Hence, it can be said that what distinguishes liberal governance is not an absence of violence, but a faith in somehow overcoming violence through progress.

A further related point can be made about Muslim reform projects. From the early nineteenth century until today, Muslim reform movements across the globe have sought to reinterpret scriptural texts in order to legitimate various human rights as consistent with Islam’s Sharia norms (see, e.g., An-Na’im 1996; Asad 2003; Mahmood 2005; Osanloo 2009; Abu-Lughod 2013). The aim of this process has been to produce a “reformed Islam” which does not conflict with human rights, and which will win Muslims the respect of Western liberals. Notably, many of the most influential Muslim reformist religious scholars/intellectuals explicitly advocated liberal imperial rule by Europeans, seeing this as a means of bringing progress and human rights to “backwards” and “uncivilized” Muslim lands (e.g., Sayyid Ahmad Khan, Muhammad ‘Abduh, Sayyid Shaykh al-Hadi).

I suggest that the prospect of Islamic reform is actually illusory. No matter how much Islam’s Sharia norms are reformed, they can never catch up to evolving human rights norms. In other words, human rights as a distinction strategy renders Islam/Sharia inescapably “backwards,” “uncivilized,” and “barbaric.”

In taking such a position, I do not deny that Muslim reformers are generally well-intentioned. I also do not deny that there exist some genuine and significant similarities

between Sharia norms and standard human rights norms (even if these exist at a fairly abstract level).

Section (V): Human Rights and the Distinction between Orient and Occident

The work of Edward Said is useful for exploring the global dynamics of human rights as a distinction strategy. Said (1978) focuses on the distinction between Occident and Orient. He argues that Western discourses posit that the Occident is essentially characterized by rapid progress over time. Meanwhile, it is posited that the Orient is essentially characterized by minimal progress or stagnation. As such it inherently resists progress, remaining in a state of civilizational “backwardness.” Because these differences are ones of essence, they are eternal and cannot be altered. In other words, the Orient will always be backwards in comparison to the Occident.

Said himself rejects the notion of an eternal distinction between progressive Occident and backwards Orient. He argues that this is a faulty *representation* of reality – one produced by the Occident to justify its hegemonic control of the Orient (as in the Colonial era) (1978:204, 273).

I agree with Said that Western nations justify their hegemonic control of the Orient on the basis of an eternal distinction between Occident and Orient. However, unlike Said, I do not wish to theorize this distinction as a faulty representation. Rather I suggest that it can be usefully understood as the sociological product of a global distinction strategy.

On this view, the “subversive” behavior of liberal elites ensures that Western lifestyles are constantly evolving and that Western citizens are constantly acquiring new forms of habitus. Within Western countries themselves, this leads to an internal distinction between elites and non-elites. Elites enjoy authority and power, while non-elites are disparaged and marginalized because of their backwardness. Meanwhile, non-elites futilely attempt to escape their marginal status by imitating elites.

The same social dynamics evident within Western countries are reproduced on a global scale. Although Occidental non-elites are backwards in comparison to Occidental elites, they are still regarded as more advanced than Orientals. This leads to a global division between progressive Occidental countries and their backwards Oriental counterparts. Notably, these Oriental countries are likewise divided between advanced elites and backwards non-elites. In this system, Oriental non-elites strive to imitate Oriental elites.⁹ Meanwhile, Oriental elites strive to imitate Occidentals.

Such a schema requires a number of clarifications. Hence, I use the term “elites” to refer to groups which have large amounts of status and power in comparison to other groups. At present, some attributes associated with elite groups include racial “whiteness,” cultural “Westernness,” and bourgeois class status. However, I recognize that elite and non-elite attributes “intersect” with one other in complex and sometimes contradictory ways (Grabham et al. 2009; Hancock 2016). I also recognize that the term “elite” is relational and depends upon context. However, all things being equal, white

⁹ Given linguistic and cultural barriers, Oriental non-elites must have Occidental cultural production “translated” for them through Oriental elites.

Occidentals have an elite status vis-à-vis nonwhite Orientals. Moreover, all things being equal, wealthy and/or Western-educated Orientals have an elite status vis-à-vis Orientals who are not wealthy and Western-educated. Appreciating the relational character of elite status helps in assessing right-wing nationalist movements (e.g., support for Trump, Brexit). Such movements consist largely in Occidental non-elites, who oppose Occidental elites (e.g., establishment neoliberals). These Occidental non-elites also seek to preserve the general power and elite status of (white) Occidentals vis-à-vis nonwhites (e.g., immigrant Muslim Orientals, whose increasing numbers erode the power of whites and purportedly open the door to a “European Caliphate”).

Admittedly, any hierarchical Occidental-Oriental schema is highly simplistic. Given increasingly complex global patterns of migration, education, and employment, a small percentage of Orientals may (if sufficiently assimilated) achieve a status comparable to Occidental elites. To be clear, human rights as a distinction strategy can operate perfectly well in a borderless world divided along class and/or racial lines between a cosmopolitan global elite and a mass underclass. But while borders may melt away in the future, the present world is still characterized by enormous imbalances in socio-economic power between different geographical regions. Moreover, even with the proliferation of hybrid identities, “Westernness” remains a dominant ideal. Populations across the globe consciously aspire to this geography-linked ideal, investing immense resources to assimilate cultural practices which they identify with the Occident (Asad 1993; also see Fanon 2008[1967]; Dabashi 2011). Finally, and most importantly, no matter how reductionist and ahistorical the Oriental-Occidental distinction is, it nevertheless structures political policy and cultural production in Western countries. As a consequence, it also structures life in the real world.

In acknowledging inequalities in socioeconomic power between the Orient and Occident, I do not deny that Orientals exercise some measure of influence and agency over the political sphere as well as human rights discourse (e.g., some Muslim reformers champion particular human rights, some Muslim states contributed to the UDHR; see An-Na'im 1996; Waltz 2001). I also recognize that, going back to the Colonial era (and into the present), Muslim populations (especially reformers)¹⁰ have expressed positive views on many of the human rights championed by the West (albeit with reservations in matters related to religion, gender, and sexuality). I further recognize that, going back the Colonial era (and into the present), Muslim populations (especially reformers)¹¹ have associated human rights with desirable forms of progress/development and have appealed to human rights discourse to protest oppression (see, e.g., Thornton et al. 2017; Gorman and Seguin 2018). This is not surprising, given that human rights discourse is regularly employed by well-intentioned and compassionate individuals (both Muslim and non-Muslim) to counter the stigmatization/disempowerment of Muslims. Nevertheless, as mentioned earlier, I would argue that hegemonic political projects (e.g., liberal imperialism, the GWOT) have used human rights discourse in a manner which results in the net stigmatization/disempowerment of Muslims. I would also suggest that most Muslims do not view such uses of human rights discourse in a favorable light, regardless of how they might view human rights discourse in the abstract.

¹⁰ For example, Sayyid Ahmad Khan, Muhammad ‘Abduh, and Sayyid Shaykh al-Hadi

¹¹ For example, Sayyid Ahmad Khan, Muhammad ‘Abduh, and Sayyid Shaykh al-Hadi

The framework I have proposed explains how a global sociological process operates to perpetually produce and reproduce the Occident and the Orient as distinguishable populations with distinguishable forms of habitus. These forms of habitus evolve in a coordinated manner such that dynamic change originates in the Occident followed by failed attempts to catch up in the Orient. Hence, the notion of a dynamic Occident opposed to a backwards Orient is rooted in a concrete sociological reality rather than a faulty representation. I do not wish to suggest that the distinction between Occident and Orient is *only* rooted in habitus difference. On the contrary, persistent disparities in technology and economic organization are very important in maintaining this distinction. I am simply arguing that habitus differences likewise play a central role.

The model put forth extends scholarship which emphasizes that modern global politics cannot simply be conceived in terms of overarching economic systems or interacting states, but must also account for dynamic integrated global cultural processes that run across state borders, and which involve daily habits and lifestyle choices (see, e.g., Meyer et al. 1997; Thornton 2005:133–248).

That the distinction strategy at issue produces distinguishable populations is important to understanding human rights discourses. Human rights activism includes sociological testing and data collection as a key element. Thus, the “Muslim test” used for immigration purposes aims at collecting data on the habitus of participants (e.g., do they experience offense at the sight of topless women?) (see Ewing 2008:180–199). If it is discovered that a Muslim habitus is present, the state takes action to defend human rights by denying permission to immigrate.

On a global level, a similar phenomenon is reflected in the human rights “indicators”¹² published by the UN and various NGOs. Such indicators seek to measure the extent to which different countries conform to human rights ideals. In other words, they seek to measure each country’s level of “development.” Measuring “development” involves collecting detailed sociological data on various areas of social life (e.g., kinship, schooling, and labor patterns). The data is then processed to assign each country a numeric score or rank with respect to various human rights concerns (e.g., education levels, gender equality, etc.). Although assigned scores/ranks reflect myriad political and economic factors, they are also an assessment of sociocultural practices as well as associated forms of habitus. This means that human rights indicators allow a relational ranking of the world by habitus. Unsurprisingly, Western countries occupy the top rankings, whereas non-Western countries (particularly Muslim countries) rank below. Indicator scores thus provide confirmation that the Occident is distinguished from the Orient in terms of the level of progress/development that it has achieved.

Sally Engle Merry (2016) observes that, in recent decades, indicators have become increasingly central to liberal projects of global governance. Countries with low scores are targeted for various types of economic, social, political, and military intervention. An illustrative example is provided by the famous “Arab Human Development Reports” (ADHRs) issued by the UN over the past 2000s. Each report has a different focus. Thus, the 2002 report focuses on “opportunities,” while others focus on “knowledge” (2003), “freedom” (2004), “gender” (2005) and “human security” (2009) (United Nations Development Programme n.d.). Criticizing the 2005 report on gender, Abu-

¹² Although I address human rights indicators, there are other types of indicators as well (e.g., economic, health-related).

Lughod remarks that documents of this type offer “confirmation of the backwardness of the Arab World.” In doing so, they legitimate, even if unwittingly, the hegemonic policies of Western states (Abu-Lughod 2009: 83–85, 98). It is possible to see the ADHRs as a sort of global Muslim test. Here indicators derived from sociological data are used to assess the forms of habitus found among Muslim Arabs. Upon confirming the existence of Muslim forms of habitus, Western governments and NGOs spring into action and intervene to protect human rights. Once again, such intervention is not simply based on faulty representations of the Orient. On the contrary, it is based on statistically observable differences in habitus produced through a global distinction strategy.

It should likewise be emphasized that real sociological differences (as opposed to mere representations) are essential to producing an identity and sense of self-worth for Occidental populations. Occidentals are convinced of their status as embodiments of progress by seeing palpable proof that there do indeed exist differences distinguishing them from Orientals. Things like human rights indicators and media-circulated photos of veiled women serve this purpose. For while these are representations, they are representations linked to a sociological reality.

Conclusion

In this paper, I have argued for conceptualizing human rights discourse as a distinction strategy. Doing so provides a new perspective on policies targeting the world’s Muslims, from the Colonial era to the GWOT era. It likewise provides a new perspective on the much-theorized distinction between Orient and Occident. The analysis I have put forth suggests that any understanding of how and why new human rights come into being is only possible once it is recognized that they are at the heart of a distinction strategy geared towards preserving a hegemonic Occidental world order.

In elaborating my argument, I have sought to foreground abstract and general social-historical patterns shaped by global inequalities in power. This has necessarily entailed an overly simplistic account of the relationship between Orient and Occident. It has likewise entailed an incomplete treatment of the complex ways that Muslims and non-Muslims promote, contest, and adjust human rights discourse in specific contexts. Any future research on human rights as a distinction strategy must grapple with these issues.

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Human Rights, Sovereignty and the Responsibility to Protect

Cristina Lafont

Introduction

At the 2005 High-level Plenary Meeting of the General Assembly, world leaders reached a consensus on the responsibility to protect vulnerable populations from genocide, war crimes, ethnic cleansing and crimes against humanity.¹ The basis for this development was the 2001 *Report of the International Commission on Intervention and State Sovereignty* in which the innovative concept of the responsibility to protect was first introduced, its elements articulated, and its scope of application delimited.² Without denying the path-breaking character of this development, the international community's explicit acknowledgement of a responsibility to protect human rights seems to be a natural step in the development of contemporary human rights practice. Human rights were conceived from the beginning as part of an international regime whose aim — as explicitly stated in the Universal Declaration of Human Rights (UDHR) and the UN Charter — was to secure the protection of human rights worldwide.³ In contrast to declarations of rights such as the 1789 French Declaration, the main innovation brought about by the post-World War II human rights regime is precisely that it framed human rights as international norms whose violation is a matter of international concern.⁴ The fact that the responsibility-to-protect (R2P) principle was unanimously endorsed by the UN General Assembly indicates that the international community's responsibility to protect human rights is no longer merely an aspiration, but an emergent norm of customary international law.⁵

Since this is a recent development, the precise nature, scope and implications of this emergent norm are still quite unclear. However, the same cannot be said of the reactions that it has generated so far. They tend to be clearly divided between those who strongly support this development⁶ and those who are skeptical or even deeply concerned by it. Within the latter camp, the main worry among those who have principled reasons against the idea of international intervention is that it is a direct threat to the sovereignty and equality of states.⁷ Their fear is that the linkage of human rights law and humanitarian intervention that began after the end of the Cold War may open the door to (neo-imperialist) invasions of weak states by powerful ones for any reason whatsoever. A quick look at the demanding list of rights included in international human rights conventions and treaties reinforces this fear. If, as Article 25 of the IC-CPR suggests,⁸ there is a human right to democracy, for

instance, the international community's responsibility to protect human rights may seem to open the door for not just humanitarian, but for pro-democratic interventions as well, that is, military interventions to promote or to bring about democracy in other countries.⁹ The same basic concern could arise with respect to any of the noble goals contained in the core human rights conventions.

However, the attempt to harmonize human rights and state sovereignty as equally valid principles of international law seems to lead to a dilemma. In order to give an account of the international function of human rights that is compatible with respecting state sovereignty it seems that the content of human rights needs to be restricted so that it fits into the scope of legitimate intervention by external agents against sovereign states.¹⁰ This strategy exerts pressure towards narrowing the list of human rights down to rights to life and bodily integrity, so that only interventions to prevent grave rights violations through criminal acts such as genocide or ethnic cleansing show up as legitimate. However, once the content of human rights is reduced to such a minimum, it becomes too easy to provide a meaningful "standard of achievement" for respecting human rights.¹¹ As a consequence, human rights norms can no longer fulfill any of their other functions. They would become useless as standards for criticism and political struggles against all other forms of rights violations that do not involve mass killings: from abuses of power to discrimination, to a lack of political representation, freedom of speech, access to essential medicines, and so on.

Yet the converse of this approach also seems to have problems. The principle of equal sovereignty of states seems seriously threatened if, in order to give a plausible account of the critical and aspirational function of human rights, one accepts the demanding list of rights contained in current human rights conventions. Respecting human rights would now become too difficult. It could be claimed that any insufficiency or deviation in meeting such demanding human rights standards would provide a justified excuse for external intervention against sovereign states.

As a way out of this dilemma, a variety of authors follow a strategy of both minimizing and de-internationalizing current human rights standards within their proposals for a new international order (for some examples, see notes 10 and 13). According to these proposals, at the international level we should embrace human rights minimalism such that only a

narrow subset of the rights currently within the core human rights conventions and treaties can legitimately trigger international action, and then reinterpret all the other more demanding rights as domestic standards that are not matters of international concern. In spite of many differences, these proposals all seem to assume that we can have international enforcement of minimal standards and domestic enforcement of demanding standards, but that we cannot have international enforcement of demanding standards without simultaneously undermining the sovereign equality of states.

Against this assumption, I defend the view that human rights and sovereignty are not antithetical values, but must be seen as mutually reinforcing principles of international law. My argument is built in four steps. First, I examine the detailed proposal for bifurcating human rights standards that Jean Cohen offers in her book *Globalization and Sovereignty* in order to show that this type of argumentative strategy faces internal difficulties (section I). I then shift the focus of analysis from the narrow context of humanitarian intervention to contexts concerning the global economic order and the protection of economic and social rights. With the help of some examples I show how demanding international human rights standards can play an essential role in strengthening the sovereign equality of states in the context of global economic institutions such as the World Trade Organization (WTO) or in their dealings with powerful private actors such as transnational corporation (TNCs) (section II). In light of these examples, I offer an account of the international community's responsibility to protect human rights that is much broader and more demanding than the currently acknowledged account (section III). However, I also show how my more ambitious account does not have to be purchased at the price of undermining the sovereign equality of states (section IV).

I. Sovereignty and Human Rights: Can the Circle Be Squared?

In her book *Globalization and Sovereignty*, Jean Cohen argues that human rights standards should be divided in two separate categories with clearly differentiated functions. On the one hand, we have the set of what she calls "human security rights" whose violation could warrant international action, even coercive intervention against a state. Those are the rights violated by criminal acts such as genocide or ethnic cleansing. On the other hand, we have the full catalog of rights contained in the core human rights conventions whose function should be seen as merely domestic. Indeed, in order to ensure that the full catalog of rights does not become a potential trigger of the international community's R2P as human security rights do, they must be removed from the proper

subset of institutionalized and enforceable international human rights¹² and re-interpreted as standards that are entirely internal to a domestic political practice and that are therefore primarily directed to a domestic audience. As Cohen indicates:

while international human rights have been articulated as global public standards and aspirations, their main function is not to serve as norms to which the international community of states hold each country's government accountable through reciprocity mechanisms. Rather they function as public standards of critique to which citizens and residents, domestic rights activists and social movement actors can refer *in order to hold their own governments accountable*. (p. 216, my italics)

Consequently:

[R]ights advocates should shift the focus back to the domestic arena and the empowering and emancipatory role that human rights discourses still have to play *therein* when invoked by local actors, that is, those whose rights are at issue, even though today these discourses reference international norms. (p. 165; my italics)

This strategy of bifurcating and de-internationalizing human rights seems problematic in several respects.¹³ First of all, without further clarification and justification of the conceptual and normative grounds for the proposed bifurcation in human rights, the proposal seems arbitrary. According to Jean Cohen's proposal, the bifurcation tracks the threshold below which a state loses all legitimacy by denying some sector of its population the right to political membership. Following Joshua Cohen's proposal,¹⁴ she interprets human rights "as entitlements that ensure the bases of membership or inclusion into organized political society."¹⁵ However, she finds his interpretation of the principle too demanding, to the extent that it includes political rights such as meaningful political participation, freedom of speech, and so forth. Accordingly, she claims that the substantive criterion for identifying the proper subset of human security rights, that is, those that can trigger the international community's R2P is "not the absence of political participation, dissent, or concern and respect, but rather absolute non-belonging."¹⁶ A state that engages in criminal practices such as mass extermination, expulsion, ethnic cleansing and enslavement is not simply violating some moral rights of its victims but destroying the very conditions of possibility for the political agency of the targeted groups. In so doing, it "forfeits the claim to be representing the groups it oppresses in these radical ways and thus violates the membership principle."¹⁷ Now, even if one assumes, for the sake of argument, that the membership principle provides the right substantive criterion for identifying the proper subset of human rights whose violation

should trigger the international community's R2P and even if, also for the sake of argument, one agrees with this ultra-minimalist interpretation of the membership principle, it is still not clear why massive starvation due merely to state neglect, as opposed to the same starvation caused by a deliberate criminal intent (that is, the deliberate attempt to bring about what she calls "the political death of a segment of the political community") should not count as a violation of the principle.¹⁸ It is even less clear why such massive starvation would not count as a threat to human security that appropriately triggers the international community's R2P.¹⁹ Seen from this perspective, the cogency of the proposed bifurcation among human rights norms would seem to depend on the truth of a quite implausible empirical claim, namely, that what Cohen refers to as "the four E's" (mass extermination, expulsion, ethnic cleansing, and enslavement) are the only current threats to the security of the person. Responding that they are the only threats that can legitimately trigger external intervention would simply beg the question.

Thus, in order to dispel the impression that this is all rather ad hoc, the distinction would need to be justified against plausible alternative views, such as the UN human security approach that explicitly emphasizes the multidimensional nature of threats to human security and the need for integrated responses that take into account all the relevant structural conditions at the local, national, and international levels.²⁰ Restrictively reinterpreting the relevant threats to human security rights as the four Es would be clearly retrogressive vis-à-vis current UN doctrine, which is based on recognition of the fact that

the lives of millions of people [are] being threatened not only by international war and internal conflicts but also by chronic and persistent poverty, climate-related disasters, organized crime, human trafficking, health pandemics, and sudden economic and financial downturns.²¹

But whether one accepts a multidimensional view of human security threats or sticks to the narrower set of the four Es favored by Cohen, the problems associated with attempts to bifurcate human rights into two separate categories still remain. Cohen seems to assume that the specific subset of rights that belong to the category of human security rights can be discerned from the rights that are threatened in situations such as the four Es. However, as she herself indicates, these are not situations in which some specific rights are violated. Instead, these are situations in which the very right to have rights is violated. Indeed, populations under the threat of genocide or ethnic cleansing do not lack secure access to some narrow set of rights. They lack secure access to any rights at all. Thus, focusing on threats like genocide

or ethnic cleansing is not particularly helpful for demarcating a specific subset of human rights, since this would require drawing a line between the rights that are threatened in such situations and the rights that are not.²² It is precisely because victims in such situations lack protection of any of their rights that coercive interventions to prevent or mitigate such massive human rights violations can garner support among human rights minimalists and non-minimalists alike. Agreement on the need to prevent such threats neither requires nor depends upon drawing a categorical distinction among types of human rights.²³

But beyond the questionability of the proposal to bifurcate human rights, the proposal to de-internationalize them also seems retrogressive regarding the responsibilities of the international community. Removing the bulk of human rights that fall outside the putative subset of human security rights from the list of enforceable international rights would rule out not only military interventions against sovereign states in response to their violation but it would also presumably rule out all other forms of external action such as legal interventions by international courts (for example, the International Court of Justice), those undertaken by regional, human rights bodies (for example, the European Convention of Human Rights [ECHR] or the Inter-American Commission on Human Rights), and the activities of the UN treaty-monitoring bodies that supervise the main human rights conventions. Certainly, the rulings of such supranational institutions limit the margin of appreciation of state parties and thereby infringe their sovereignty. In fact, the potential for infringing, not just state but also popular sovereignty is unavoidable, since — as Cohen acknowledges — "human rights conventions tend to take on autonomous international meaning and weight that is not simply at the disposal of individual signatory states" (p. 161). Needless to say, it is because the interpretation of the international human rights treaties is not at the disposal of individual states that their enforcement by supranational courts can provide potential victims some effective legal remedy against violations by their own states. From this perspective, removing the quite demanding political, social, and economic rights included in the core human rights conventions from the proper subset of institutionalized and enforceable international rights would be a clear regression in the legal development of the international human rights regime. Indeed, the widespread recognition that human rights are interdependent has led to the expansion, rather than the narrowing down, of the list of enforceable international rights. As recently as May 2013 the Optional Protocol of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) has entered into force. It includes an individual complaints mechanism that allows the UN

Committee on Economic, Social and Cultural Rights to consider complaints from individuals or groups who claim that their rights under the Covenant have been violated. It also contains an inquiry mechanism that allows the Committee to investigate, report upon and make recommendations over “grave or systematic violations” of the Convention. This is a slow but steady trend in the legal development of the international human rights regime. In fact, an individual complaint mechanism has already entered into force for seven of the nine core international human rights treaties.²⁴

Now, this answer may suggest that we are once again facing a tragic conflict between the incompatible values of state sovereignty and individual human rights. Interestingly enough, Cohen’s own discussion of the development of the international human rights regime throughout the twentieth century provides some cues that question this diagnosis. As Cohen rightly indicates, in contrast to the 1948 UDHR, the regional ECHR that was established under the auspices of the Council of Europe was designed to be enforceable from the beginning. This convention includes a demanding set of civil and political rights for all people within the jurisdiction of its member states, and it also established a Commission that could investigate a case, attempt a settlement or refer it to the ECHR, whose decisions are binding upon member states. Against this backdrop Cohen raises the obvious question:

But why would executives of democratic states delegate some of their sovereign powers to a strong regional regime and court (which acquired compulsory jurisdiction)? The answer is that they were executives of newly (re-)established democracies who sought to create supranational mechanisms to help lock in domestic constitutionalist and democratic institutions against the re-emergence of anti-democratic political threats. [...] The possible enforcement of human rights by the ECHR could serve as a mechanism helping to strengthen domestic courts and institutions of judicial review, parliamentary legislation, and public action. Indeed the idea of signing on to a strong regional human rights regime was a way to *supplement and reinforce*, not substitute for, the *domestic institutions of constitutional democracy*.²⁵

Now, if Cohen is right and a supranational human rights regime with binding authority to adjudicate on civil and political rights can reinforce instead of undermine sovereignty, then it is not at all clear why excluding those rights from the subset of institutionalized and enforceable international rights would be a welcome development of the international human rights regime. It would certainly leave the victims of violations of such rights without any protection. But, even more importantly, leaving citizens without protection from violations of their political rights at the hands of their own state would

undermine rather than strengthen sovereignty — at least if we understand sovereignty in a normatively demanding sense, as Cohen does.²⁶ It seems to me that the citizens of any country in the world have just as good reasons today as the Europeans of fifty years ago to try to “lock in domestic constitutionalist and democratic institutions against the re-emergence of anti-democratic political threats” by maintaining international mechanisms for strengthening their constitutional rights. If so, they would have good reasons to resist the exclusion of the full range of human rights (from civil to political, social, and economic rights) from the domain of institutionalized and enforceable international rights.

Still, this answer does not address the main worry that motivates Cohen’s proposal. Taking into account the power differentials among states, any international enforcement of the full range of human rights contained in the core human rights conventions is doomed to be bent towards the self-serving interests of the powerful states and to thus undermine the equal sovereignty of states as a fundamental organizing principle of international law. It is this worry that motivates proposals to deflate the international community’s R2P human rights, so as to restrict it to the protection against egregious violations such as genocide or ethnic cleansing. Here we finally face the central issue; namely, whether human rights and sovereign equality are necessarily in conflict.

II. Human Rights and Sovereignty Revisited

Although Cohen herself warns of the danger of constructing state sovereignty and human rights as antithetical principles, in the end her proposal succumbs to that very danger. Limiting the domain of institutionalized and enforceable international human rights to the subset of so-called human security rights can count as an improvement upon the status quo only if the international enforcement of human rights is seen as a process that necessarily weakens the sovereignty and equality of states. International action to enforce human rights is, at best, undertaken for the sake of protecting vulnerable individuals and, at its worst, pursued as a pretext for actions that serve the self-serving purposes of powerful states. Either way, sovereignty is the price we pay. If this is right, then any attempt to promote the human rights project faces a dilemma. We can have international enforcement of minimal standards and we also can have demanding standards that are merely domestic aspirations, but we cannot have international enforcement of demanding standards without simultaneously undermining the sovereignty and equality of states. However, as I show in what follows, what is missing from this picture is the many ways in which institutionalized and enforceable international human rights can be a crucial

tool for *strengthening* the sovereignty and equality of states against the undue influence of powerful actors in the international arena.²⁷ Let's take a look at some examples.

II.1 Global Governance Institutions and Human Rights

Global governance institutions such as the WTO, the International Monetary Fund (IMF) and the World Bank are particularly relevant institutional contexts where the power differentials between member states can have a very negative impact upon the sovereignty of weak states, not to mention upon the protection of human rights in these states. A recent case that has drawn a lot of public attention concerns WTO regulations on patents for pharmaceuticals and their impact upon access to essential medicines. In 1995 members of the WTO signed the Agreement on Trade-Related Intellectual Property Rights (TRIPS).²⁸ Among other things, this agreement grants pharmaceutical companies patent protection for a period of twenty years in which they have the exclusive rights to market and sell their products. Prior to the TRIPS agreement, each country had its own legislation on intellectual property; in many cases patents were exclusively applied to processes but not to products, or they did not apply to pharmaceuticals at all. It was therefore possible to produce cheaper generic versions of expensive medications. However, the TRIPS agreement introduced drastic changes by significantly increasing the property rights privileges of pharmaceutical companies and shielding them from competition from companies that produce generic versions. Since ratification of the TRIPS agreement is a compulsory requirement for membership in the WTO, countries such as Brazil, South Africa, India or Thailand were required to change their domestic legislation accordingly. This was problematic because such countries had previously been the main producers of generic pharmaceutical products and had supplied affordable, essential medicines to most of the developing world.

The issue gained public attention in light of the severe negative impact that this agreement had upon the access that citizens of poor countries had to essential medicines, particularly their access to antiretroviral treatments for HIV/AIDS. Taking into account the pandemic proportions of the HIV/AIDS crisis in sub-Saharan Africa it is not surprising that the implementation of the TRIPS agreement produced public outrage.²⁹ Two interesting cases in this fight were Brazil and South Africa. The constitutions of both countries explicitly recognize the right to health, the right to access essential medicines, and the obligation of the state to guarantee those rights. In the case of Brazil, its legislation provides access to essential medicines free of charge. So the changes in domestic legislation required by the TRIPS agreement would have made it impossible

for those states to protect an essential component of the right to health that their citizens were already supposed to have. This, in turn, would have been in direct breach of their international human rights obligations. All states that have ratified the ICESCR have accepted the principle of non-retrogression that prohibits deliberately retrogressive measures through law or policy, that is, legislative measures that jeopardize existing achievements in the enjoyment of social and economic rights.

In October 2001 a group of more than twenty developing countries, which included South Africa, Brasil, India, and Thailand, prepared a draft for a ministerial declaration to be discussed at the Doha round of trade negotiations. In that declaration they explicitly appealed to the member states' international obligation to protect the human rights of their populations as a justification for the need to amend the TRIPS agreement. In particular, they appealed to their

obligation to protect and promote the fundamental human rights to life and the enjoyment of the highest attainable standard of physical and mental health, including the prevention, treatment and control of epidemic, endemic, occupational and other diseases and the creation of conditions which would assure to all medical service and medical attention in the event of sickness, as affirmed in the International Covenant on Economic, Social and Cultural Rights.³⁰

In December of 2001, the UN Committee on Economic, Social and Cultural Rights that supervises the implementation of the ICESCR by state parties issued a statement on human rights and intellectual property affirming that national and international intellectual property regimes must be consistent with the human rights obligations of states.³¹ The final Doha declaration did not mention human rights directly to justify the amendment. The international legal obligation of states to protect their citizens' right to health was rendered as "the WTO Members' right to protect public health and, in particular, to promote access to medicines for all."³²

There are several features of this development that are of interest. Regarding the potential conflict between international human rights law and trade law, it is very significant that, for the first time, an amendment to a WTO trade regulation was introduced that explicitly recognized the priority of protecting fundamental rights (such as the right to health and to access essential medicines) over other trade goals and agreements.

As for the sovereignty and equality of the states participating in global governance institutions, this was a clear case in which an appeal to international human rights law by weak states — with the decisive additional support of non-governmental organizations (NGOs), global public opinion, and the UN human rights machinery — actually strengthened the sovereignty and

equality of developing countries against the strong economic interests of the most powerful states. It did so in spite of the disproportional bargaining power that the latter have in global governance institutions. The issue is far from resolved and there are many reasons to be pessimistic about the whole process.³³ But what I find interesting about this development is that it calls into question the claim that the distinctive international function of human rights norms is to limit the sovereignty of states.

This claim might be true in cases in which human rights violations are due to the fact that states are unable or unwilling to protect the human rights of their populations. However, the example we have been considering presents a totally different case. What we have in cases like the TRIPS agreement are states that are able and willing to protect the human rights in question, but that are prevented from doing so by economic obligations imposed by global governance institutions. In these cases, the appropriate form of international action (for example, the amendment of the TRIPS agreement), far from limiting sovereignty, consists precisely in strengthening the sovereignty of the states in question. It is because global economic regulations such as the TRIPS agreement threaten to limit the sovereignty of member states, that is, their authority to decide how to best meet their obligations to protect the basic rights of their populations, that the 2005 amendment needed to explicitly affirm “the Members’ right to protect public health and promote access to essential medicines for all.” This problem is not an isolated case but one of the major challenges confronting contemporary human rights practice.

Global economic institutions such as the WTO, the IMF or the World Bank establish regulations, policies, and agreements based on the rationale and principles underlying their respective legal mandates (for example, trade liberalization, financial stability, and so on). Protecting human rights is not part of their legal mandates, so their regulations, policies, and agreements are guided by considerations of economics rather than human rights. However, these regulations and agreements (on trade, investment, patents, and so on) require changes in domestic law that can have a tremendous impact on the ability of states to protect the human rights of their members. This can lead to conflicts among the international obligations of member states (for example, their human rights obligations versus their trade obligations). However, member states are not at liberty to unilaterally decide how to best resolve potential conflicts among their international obligations. In the case of the WTO, for example, this is due to its single undertaking structure: (i) all WTO members must participate in all WTO treaty regimes; (ii) as a default, all WTO rules apply to all members; (iii) individual WTO members may not

reverse or adjust their obligations. Moreover, member states are subject to enforceable sanctions imposed by these global economic institutions if they breach their agreements. Since withdrawing from the agreements is not a feasible option for most states (it would only worsen their situation), it is clear that, unless these institutions develop legal mechanisms to ensure that conflicts between the economic obligations they impose on member states and the international human rights obligations of those states can be avoided, states may be forced to breach the latter in order to fulfill the former.

II.2 Human Rights: Demanding and International

The articulation and defense of an appropriate international response to this structural problem lies behind the long-standing efforts of UN human rights agencies and other transnational actors — from NGOs to organizations of legal scholars and even some countries — to entrench international human rights law in the operational mechanisms of international organizations such as the World Bank, the IMF, or the WTO. The aim is to provide legal standards of operation as well as remedies in cases where such standards are violated, so that the actions of these institutions do not infringe human rights and do not constrain the ability of governments to protect the human rights of their populations.³⁴ Specific proposals have been worked out in recent years by Special Rapporteurs commissioned by the Human Rights Council (HRC) and the Office of the High Commissioner for Human Rights (OHCHR). Many of them rely on the human rights due diligence standard that was developed by John Ruggie in order to specify the scope and content of the responsibilities that transnational corporations (TNCs) have to respect human rights. In Ruggie’s Report to the HRC in April 2009, this responsibility is interpreted as requiring “an ongoing process of human rights due diligence, whereby companies become aware of, prevent, and mitigate adverse human rights impacts.” This process should include four elements:

adopting a human rights policy, undertaking — and acting upon — a human rights impact assessment, integrating the human rights policy throughout the company, across all functions, and tracking human rights performance by monitoring and auditing processes to ensure continuous improvement.³⁵

These four ways of operationalizing the standard of due diligence seem easily applicable to global economic institutions. An interesting development in that direction are the Maastricht Principles articulated in 2011 by a group of leading experts in international law and human rights.³⁶

Admittedly, efforts to make international human rights norms legally binding upon the actions of global governance institutions still have a long way to go

before they succeed. However, it is hard to see how minimizing and de-internationalizing human rights could be helpful in addressing these problems. Suppose that the protection of some basic human rights in a state is hampered by some trade regulation imposed by the WTO or some policies imposed by the IMF or the World Bank. It seems that the appropriate action to be taken by member states would be to change such policies or regulations. But this sensible course of action seems hard to fit within the framework of Cohen's proposals. Once demanding social, economic and political rights are excluded from the set of institutionalized and enforceable international human rights the normative basis to justify an international responsibility for undertaking such action would be eliminated. Shifting the focus of rights activists back to the domestic arena would not only leave these violations in place, it would also divert international attention from the actual lack of state sovereignty and equality within global governance institutions. Inciting citizens to hold their own government accountable for policies that are imposed on them by global governance institutions would simply add insult to injury. These difficulties bring us back to our initial question. Under current conditions of globalization, how should the international community conceptualize the appropriate scope, content, and implications of the R2P as an emergent norm of international law?

III. A Demanding Interpretation of R2P

Since the international community's default responsibility for human rights protections is triggered only when states are unable or unwilling to discharge their primary responsibilities, analyzing the scope and content of the responsibilities held by the latter should be helpful in determining those held by the former. Following the standard tripartite model of human rights obligations, states are required to respect, protect, and fulfill human rights within their jurisdiction.³⁷ The duty to respect human rights is an obligation that states have to refrain from actions, carried out through the organs of the state, that would infringe the rights of individuals or groups. The duty to protect human rights extends beyond the state's own conduct to include an obligation to exercise the state's jurisdiction to prevent violations by third parties. The state must prevent violations even if they originate in the actions of other states that fail to respect the human rights of people outside their jurisdiction. States must also prevent violations of rights by private actors, for example by passing legislation in order to prevent, prosecute, and punish domestic violence against women or to prevent corporations from putting the health and safety of their workers at risk.³⁸ In addition, states have the obligation to fulfill human rights by providing the institutional means and

arrangements needed for the effective enjoyment of human rights.

If we take the threefold structure of state human rights obligations as a starting point, we can analyze the various ways in which states can fail to discharge their primary responsibilities under current conditions and thereby discern the scope and content of the international community's default responsibility to protect human rights whenever states are unable or unwilling to do so. Since the international R2P aims at restoring the ability of states to discharge their primary responsibility, international action must address all salient threats to human rights protection at any given time; namely:

1. states that fail to respect human rights within their jurisdiction.
2. states that fail to protect human rights from violations by third parties that escape their effective control, such as
 - a) private actors (for example, individuals, TNCs)
 - b) states that fail to respect the human rights of persons outside their jurisdiction
 - c) international organizations (for example, the WTO, IMF, and World Bank)
3. states that fail to fulfill human rights within their jurisdiction.

The standard interpretation of the international community's human rights responsibilities limits international action to cases (1) and (3) and neglects (2). Thus, it is assumed that the international community's R2P must be discharged either in the form of coercive actions against states that are unwilling to respect human rights, for example through economic sanctions or military intervention (1) or in the form of humanitarian assistance if states are unable to fulfill the rights of their populations for a lack of resources, for example (3). But what is mostly neglected is cases of states that are unable to protect human rights from violations by third parties that escape their effective control. Conceiving R2P in this way leaves the actions of global economic institutions and TNCs free from scrutiny regarding the negative impact they might have upon the ability of states to protect the human rights of their populations. Therefore, if we take the aim of securing the protection of human rights worldwide seriously, there is no reason why we should adopt a restrictive interpretation whereupon international action can only consist in interventions against the states whose members suffer human rights violations. The proper intervention may need to be against other states, international organizations, TNCs, and so on. In addition, the need to extend the international community's R2P from the narrow domain of international criminal law to other

domains of international human rights law seems just a logical consequence of the practice's own aim.

Although this process is in its early stages, some legal scholars cite the UN General Assembly Declaration on the Right to Development from 1986 as evidence that human rights practice is evolving in that direction. Among the many salient features of this human rights declaration, the most interesting feature for present purposes is that it involves adopting a structural approach to human rights protections.³⁹ In addition, the Declaration establishes a direct link between the right to development and the existence of an international economic order in which all human rights can be fully realized. On this basis, the structural approach to human rights protections is not limited to the specification of actions that states must take in order to discharge their primary responsibility to protect the human rights of their populations. The structural approach is also taken in order to specify the kinds of actions that members of the international community must undertake in order to discharge their own responsibility towards human rights protections which, in this Declaration, is designated as a duty to co-operate in order to ensure development and eliminate obstacles to development. The duty to co-operate includes direct assistance from developed to developing countries (Article 4.2). In addition, members of the international community are required to establish a new international economic order "based on sovereign equality, interdependence, mutual interest and co-operation among all states." (Article 3.3)

Needless to say, the seriousness of members of the international community in discharging any of the self-imposed obligations expressed in this Declaration is questionable, to put it mildly. However, the question we are addressing here is not how realistic it is to expect that members of the international community will discharge any of their obligations, but rather whether the most plausible reconstruction of the norms underlying contemporary human rights practice reveals an inherent tension between human rights and the sovereign equality of states. Since the Declaration to the Right to Development explicitly affirms the opposite, reconstructing its rationale can be helpful for answering that question.

If the international community's default R2P is triggered whenever states are unable or unwilling to protect human rights, it seems obvious that international action geared towards enabling states to fulfill their primary responsibility for human rights protections must be seen as essential to properly discharging the R2P. However, it is not possible to enable states to discharge their responsibility to protect human rights without strengthening their ability to meet that responsibility, for example, by strengthening their ability to prevent violations by third parties. Since one of the standard circumstances in which international action is called for

is when states are not able to effectively prevent such violations on their own, two salient cases that call for international action under current conditions of globalization are the actions of global economic institutions and of powerful private entities such as TNCs that are, in fact, beyond the control of states, especially of weak states.⁴⁰ As mentioned above, many international efforts have been developed in recent years to address these problems: from the UN Global Compact initiative⁴¹ that encourages TNCs to integrate corporate social responsibility into their business models to the Maastricht Principles that specify the obligations of states as members of international organizations to refrain from actions that impair the ability of other states to protect the human rights of their populations (see note 36).

Whether or not these efforts are likely to succeed, what matters in our context is that this type of international action does not seem to present us with a dilemma between the values of state sovereignty and the international protection of human rights. In fact, it is just the opposite. Strengthening the power of the state vis-à-vis the actions of TNCs is not a by-product of the international efforts to protect human rights, but a necessary condition for enabling the state to discharge its primary responsibility for human rights protections. Similarly, international action geared towards entrenching human rights standards within the operational mechanisms of global economic institutions would enhance the sovereign equality of weak states in order to enable them to meet their human rights obligations. Strengthening the sovereign equality of states that are willing to protect the human rights of their populations is not simply an independently valuable political goal that may or may not be compatible with pursuing the goal of protecting human rights. Rather, it is a necessary condition for enabling states to discharge their primary responsibility of protecting the human rights of their populations.

IV. Conclusion: Coercive Intervention Revisited

So long as the international community expects states to bear the very demanding primary responsibility of protecting the human rights of their populations it must see to it that they are, in fact, able to bear such responsibility. This is a straightforward reason why human rights protection and state sovereignty cannot be seen as antithetical to one another, but must instead be understood as mutually reinforcing political values. It also indicates an additional reason internal to human rights practice to be deeply concerned by coercive interventions against sovereign states.

Beyond the fact that such interventions themselves lead to additional human rights violations and are often unable to effectively prevent violations by third

parties,⁴² a major additional problem with coercive interventions against sovereign states, from a point of view internal to human rights practice, is that they disable the agent that has the primary responsibility to protect and fulfill the human rights of its population without providing an alternative agent that is able and willing to perform this crucial function. Indeed, after recent experiences with the aftermath of military interventions it is becoming increasingly clear that when international agents intervene militarily against a state, they might do so in the name of the international community's default R2P. But by disabling the actor who has the primary responsibility to protect and to fulfill human rights, they inherit that primary responsibility in the occupied areas for as long as they exercise effective control over them.⁴³ This is a very demanding responsibility that few states (or "coalitions of the willing") are likely to be willing to bear. In the context of justifying a limited military strike in Syria, President Obama made this point crystal clear when he said in a recent speech: "I don't think we should remove another dictator with force — we learned from Iraq that doing so makes us responsible for all that comes next."⁴⁴

Perhaps, in light of the disastrous results of recent "transformative" military occupations, the danger that keeping human rights standards both demanding and internationally binding might lead to a lot of pro-democratic military interventions against sovereign states is no longer as high as it might have been before those experiences. But regardless of how high or low that danger may be at any given time, it is still important to see why lowering human rights standards and minimizing the international community's R2P are not the right strategies for addressing such a danger. On the one hand, there is simply no need to lower human rights standards in order to have a very strong reason to restrict coercive intervention against sovereign states to situations of gross and systematic violations of human rights. But the reason is not that the rights violated in such cases exhaust some putative set of human rights proper, or that they are the only ones that are a matter of international concern and therefore should trigger the international community's default R2P. Indeed, one needs to change the focus from the object of the rights in question to the allocation of the obligations to protect them in order to identify the strongest reason. As suggested above, the crucial problem from a human rights perspective is that forceful interventions against sovereign states disable the actor who bears the primary responsibility to protect and fulfill human rights without having any effective replacement to offer. Thus, it is because this type of international action is a very poor means to effectively protect the human rights of the affected populations that it should be used only as a last resort when other means for preventing

imminent and massive human rights violations have failed.

On the other hand, since the sovereignty and equality of states is increasingly threatened by globalization, we actually need to increase rather than decrease the international community's default R2P. As we have seen in the examples analyzed above, discharging this responsibility effectively requires, among other things, finding ways to strengthen the sovereignty of those states that are willing to protect the human rights of their populations but that might be unable to do so as a consequence of actions that are beyond their control — such as those undertaken by TNCs or global economic institutions. What is hard to see in light of this situation is how proposals to lower the demanding and internationally binding standards contained in the core human rights conventions and treaties could help strengthen the sovereignty and equality of those states, let alone the protection of human rights within them.

NOTES

1. See UN General Assembly, 'World Summit Outcome,' A/60/1, 24 October 2005, at paras 138–40.

2. See International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect: Report of ICISS*, International Development Research Centre, Ottawa, 2001, <http://responsibilitytoprotect.org/ICISS%20Report.pdf>, accessed January 21, 2015.

3. See Article 1.3 of the UN Charter and Preamble of the UDHR, <http://www.un.org/en/documents/udhr/>, accessed January 21, 2015.

4. On this crucial difference between contemporary human rights practice and prior declarations of rights see Samuel Moyn, *The Last Utopia* (Harvard University Press, 2010).

5. See Report of the High-Level Panel On Threats, Challenges and Change, a More Secure World: Our Shared Responsibility, UN Doc. A/59/565, 2, December 2004, para. 203, <http://www1.umn.edu/humanrts/instrct/report.pdf>, accessed January 21, 2015. For more skeptical analyses see Carsten Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?" *American Journal of International Law* 101 (2007), 99–120; N. J. Wheeler and F. Egerton "The Responsibility to Protect: 'Precious Commitment or a Promise Unfulfilled?'" *Global Responsibility to Protect* 1 (2009): 114–32. For an excellent historical reconstruction of the emerging R2P doctrine as an expression of existing practices see Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011).

6. Among those who welcome this development there is nonetheless widespread concern with the current institutional structure of the UN and, in particular, the Security Council, that in most cases leads to gridlock and prevents international action. For an example, see Allan Buchanan and Robert Keohane "Precommitment Regimes for Intervention: Supplementing the Security Council," *Ethics & International Affairs* 25 (2011): 41–63.

7. See Noam Chomsky, "Statement to the United Nations General Assembly Thematic Dialogue on the Responsibility to Protect," United Nations, New York, July 23, 2009, <http://www.un.org/ga/president/63/interactive/protect/noam.pdf>, accessed January 15, 2015. For a more recent example

see Jean Cohen, *Globalization and Sovereignty* (Cambridge: Cambridge University Press, 2012). I discuss her claims and proposals in the next section. For a defense of the contrary view of R2P as an international tool that can undermine unilateral (self-serving) interventions see Orford, *International Authority*.

8. See also UDHR, Art. 21 (<http://www.un.org/en/documents/udhr/index.shtml#a21>); European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol I, Art. 3 (<http://www.hri.org/docs/ECHR50.html#P1.Art3>); American Convention on Human Rights, Art. 23 (http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm).

9. For an overview of this debate see Gregory Fox and Brad Roth, eds. *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000). For recent defenses of a human right to democracy see Seyla Benhabib, "Is there a Human Right to Democracy? Beyond Interventionism and Indifference." In Seyla Benhabib, *Dignity in Adversity* (Polity Press, 2011), 77–93, and Thomas Christiano, "An Instrumental Argument for a Human Right to Democracy," *Philosophy & Public Affairs* 39 (2011): 142–76. For arguments against the existence of a human right to democracy see Jean Cohen, "Rethinking Human Rights, Democracy and Sovereignty in the Age of Globalization," *Political Theory* 36 (2008), 578–606; Joshua Cohen, "Is there a human right to democracy?" In C. Sypnowich ed. *The Egalitarian Conscience* (Oxford: Oxford University Press, 2006), 226–48; John Rawls *The Law of Peoples* (Cambridge: Harvard University Press, 1999).

10. A prominent example of a functionalist approach to human rights that leads to minimalism is offered by Rawls in *The Law of Peoples*. According to Rawls, a distinctive function of human rights norms is to "specify limits to a regime's internal autonomy," such that the regime's fulfillment of the rights of its citizens "is sufficient to exclude justified and forceful intervention by other peoples, for example, by diplomatic and economic sanctions or by military force." (pp. 79–80) This interpretation leads Rawls to claim that the proper subset of genuine human rights is limited to rights such as the right to life, to liberty, to property and to formal equality, whereas rights to political participation, to an education or to full equality and non-discrimination are excluded. However, if Rawls is right in claiming that one of the functions of human rights is that they trigger coercive intervention against states then his list seems to be too expansive. As many critics have pointed out, the main problem with Rawls's approach is that it tries to identify a single subset of rights that is supposed to serve too many disparate functions: drawing the limits of acceptable pluralism, acting as a trigger for coercive intervention, setting necessary conditions for the legitimacy of any government, determining the upper limit of international assistance to burdened societies, and so on. There is no obvious reason to assume that one and the same list of rights may plausibly fulfill all these disparate functions. As I will argue in section IV, it is a mistake to think that we could specify triggers for different kinds of international actions simply by looking at the objects of various rights. Instead, it is essential to look at the proper allocation of (primary and default) obligations for their protection among different actors.

11. In its Preamble, the UDHR is categorized as "a common standard of achievement for all peoples and all nations." (See UDHR, Preamble, <http://www.un.org/en/documents/udhr/>, accessed January 21, 2015.)

12. Jean Cohen, *Globalization and Sovereignty*, 221.

13. Jürgen Habermas follows a similar strategy in his proposal for a new international order. He circumscribes

the international protection of human rights (by a reformed world organization) to cases of violations of international criminal law (such as genocide, crimes against humanity, and so on) and ascribes the protection of all other human rights standards exclusively to the national level. See his "A Political Constitution for the Pluralist World Society?" *Between Naturalism and Religion* (Cambridge: MIT Press, 2008), 312–52. However, in his most recent writings he seems to have abandoned that strategy. See his "From the International to the Cosmopolitan Community." In Jürgen Habermas, *The Crisis of the European Union. A Response* (Cambridge: Polity Press, 2012), 53–70, and especially 60, 65, and 69.

14. Joshua Cohen, "Minimalism about Human Rights: the Most We Can Hope For?" *Journal of Political Philosophy* 12 (2004), 190–213.

15. Ibid. p. 197.

16. Jean Cohen, *Globalization and Sovereignty*, 196.

17. Ibid. p. 587.

18. If we took massive starvation through state neglect to be a violation of the membership principle, then this would suggest that the subset of human security rights includes rights to food, health, and so forth. Since Cohen does not offer a list of human security rights it is hard to know the precise rights she has in mind. On the one hand, it is unlikely that she means to include all rights standardly considered part of the right to security of the person, such as the right to a fair trial or to reproductive control. For that would imply that a lack of secure access to the latter rights could justify coercive intervention. On the other hand, she cannot justify their exclusion by claiming that these rights are not threatened when the membership principle is violated. For it is patently false that populations threatened by the four Es could nonetheless enjoy secure access to these rights. I address the difficulties of trying to single out a specific subset of rights on the basis of the four Es below. See also note 22.

19. The international outrage produced by the refusal of Myanmar's military junta to accept international relief aid to help the victims of Cyclone Nargis offers some strong evidence against this view.

20. See United Nations Trust Fund for Human Security, "Human Security Approach," <http://www.unocha.org/human-security/human-security-unit/human-security-approach>, accessed January 21, 2015.

21. Ibid.

22. Rawls's argumentative strategy in *The Law of Peoples* is instructive in this context. In order to demarcate the subset of human rights proper whose violation might trigger coercive intervention by external agents he does not appeal to situations of massive human rights violations like genocide or ethnic cleansing. Instead, he appeals to his hypothetical thought experiment of decent hierarchical societies and he contends that subjects in such societies could have their human rights properly effectively protected even if other rights he targets for exclusion (for example, rights to democratic participation, to an education, and so on) were not. Cohen rejects this argumentative strategy but does not offer an alternative upon which to base the bifurcation she proposes.

23. It is worth noting that the R2P doctrine does not postulate any bifurcation among types of human rights nor does it call their interdependence into question. See ICISS Report.

24. For the Committee on Migrant Workers, and the Committee on the Rights of the Child the individual complaint mechanisms have not yet entered into force. For up-to-date information see Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx>, accessed January 21, 2015.

25. Jean Cohen, *Globalization and Sovereignty*, 168; my italics. She follows here the interpretation offered by Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe." *International Organizations* 54 (2000): 217–52.

26. See Cohen, "Rethinking Human Rights," 593, and *Globalization and Sovereignty*, 15, 163, 205.

27. In what follows I focus on cases in which the appeal to international human rights law by weak states may strengthen their sovereignty and equality as participants in global economic institutions. For examples of how the use of international law by national courts can similarly strengthen state sovereignty see Eyal Benvenisti "Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts," *American Journal of International Law* 102 (2008): 241–74. For an argument based on historical examples of how the enforcement of social and economic rights by national courts can strengthen the sovereignty of weak states, as against internationally determined austerity measures, structural adjustment or developmental conditionality, see Kim Scheppelle "A Realpolitik Defense of Social Rights," *Texas Law Review* 82 (2004): 1921–59. For a similar line of argument see also Katherine Young in *Constituting Economic and Social Rights* (Oxford: Oxford University Press, 2012), 192–223.

28. The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994, WTO, http://www.wto.org/english/docs_e/legal_e/legal_e.htm#TRIPs, accessed January 21, 2015.

29. For an overview of the events leading to the 2005 "Amendment to the TRIPS Agreement" see Holger Herstermeyer, *Human Rights and the WTO: The Case of Patents and Access to Medicines* (Oxford: Oxford University Press, 2007), 1–18.

30. WTO, "Draft Ministerial Declaration. Proposal from a Group of Developing Countries," http://www.wto.org/english/tratop_e/trips_e/mindecdraft_w312_e.htm, accessed January 21, 2015.

31. See United Nations 2001 (Document E/C.12/2001/15). Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, <http://www2.ohchr.org/english/bodies/cescr/docs/statements/E.C.12.2001.15HRIntel-property.pdf>.

32. See WTO, "Doha Declaration on the TRIPS Agreement and Public Health," http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm, accessed January 21, 2015.

33. For an excellent analysis of the difficulties see Herstermeyer, *Human Rights and the WTO*.

34. See Adam McBeth, "What Do Human Rights Require of the Global Economy? Beyond a Narrow Legal View." In Cindy Holder and David Reidy eds. *Human Rights: The Hard Questions* (Cambridge University Press, 2010), 162.

35. See "Report to the Human Rights Council of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (A/HRC/11/13)." The official text of the final resolution adopted by the Human Rights Council on July 2011, <http://www.business-humanrights.org/media/documents/un-human-rights-council-resolution-re-human-rights-transnational-corps-eng-6-jul-2011.pdf>, accessed January 21, 2015.

See also the most recent "Guiding Principles on Business and Human Rights" (2013), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf, accessed January 21, 2015.

36. See "The Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social

and Cultural Rights," <http://www.maastrichtuniversity.nl/web/Institutes/MaastrichtCentreForHumanRights/Maastricht-ETOPrinciples.htm>, accessed January 21, 2015.

37. See International Commission of Jurists "Maastricht Guidelines on Violations of Economic, Social and Cultural Rights," 26 January 1997, <http://www.refworld.org/docid/48abd5730.html>, accessed January 21, 2015.

38. The concept of due diligence regarding state responsibility for non-state acts was first developed in *Velasquez Rodriguez v. Honduras*, a case heard by the Inter-American Court of Human Rights in 1988. Since then, it has been applied by other regional human rights courts and extended to cover human rights violations committed by private actors such as cases of domestic violence against women. For a good overview of this development see Lee Hasselbacher, "State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection," *Northwestern Journal of International Human Rights*, 8 (2010): 190–215. See also Monica Hakimi, "State Bystander Responsibility," *European Journal of International Law* 21 (2010): 341–85.

39. See Margot Salomon, *Global Responsibility for Human Rights* (Oxford: Oxford University Press, 2007), 50–64.

40. For some in-depth analyses of the problem see Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006); Margot Salomon, *Global Responsibility*; James Harrison, *The Human Rights Impact of the World Trade Organization* (Oxford: Hart, 2007), Adam McBeth, "What Do Human Rights Require of the Global Economy?"

41. See United Nations Global Compact, <http://www.unglobalcompact.org>, accessed January 21, 2015.

42. This is why such interventions are constrained by stringent precautionary normative criteria such as seriousness of threat, proper purpose, last resort, proportional means, balance of consequences, reasonable prospects, proper authority, and so on. See ICISS Report.

43. On this central element of the R2P doctrine see the section on "Post-Intervention Obligations" of the ICISS Report, 39–45.

44. See "President Obama's Syria Speech Transcript Text," September 10, 2013, <http://www.christianpost.com/news/president-obama-syria-speech-transcript-text-september-10--2013-obama-makes-case-for-military-strike-on-syria-104254/#Lqg9HMJsWAszGxG.99>, accessed January 21, 2015.

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LECTURE

THAT “S” WORD: SOVEREIGNTY, AND GLOBALIZATION, AND HUMAN RIGHTS, ET CETERA.*

*Louis Henkin***

In an academic lecture it is the subtitle that counts. After you get past “That ‘S’ Word,” I offer the principal themes, globalization and human rights, and that mysterious “et cetera,” in which I will pack a few tidbits.

I don’t like the “S word.” Its birth is illegitimate, and it has not aged well. The meaning of “sovereignty” is confused and its uses are various, some of them unworthy, some even destructive of human values.

Not all of the uses are unworthy. During the past half-century, many cheered the yearning for sovereignty by peoples that did not have it: sovereignty was the watchcry for the principle of self-determination¹ and for the end of empires—the British, the French, the Soviet. Some also cheered the disintegration of other once-

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1. See Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age*, 32 Stan. J. Int’l L. 255, 262 (1996).

sovereign countries, such as the U.S.S.R. and Yugoslavia.²

I will not talk about that. I address the sovereignty of states. It is part of my thesis that the sovereignty of states in international relations is essentially a mistake, an illegitimate offspring. Sovereignty began as a domestic term in a domestic context. It referred to relations between rulers and those they ruled, between the "Sovereign" and his or her subjects. Its application to modern states—a state is not a person, but an abstraction—and its relation to other abstractions, such as the governments which represent states, has inevitably brought distortion and confusion.

When Queen Elizabeth I was sovereign to her British subjects, she carried her majesty, her sovereignty and her sovereign perquisites with her when she dealt with other kings and queens. But what did her sovereignty have to do with the insistence of governments today, say of Iraq, that they cannot be held answerable for violating human rights within their own territory? Or with Augusto Pinochet's claim to some kind of sovereign immunity from being tried for horrible crimes against humanity?³ Why does the sovereignty of Queen Elizabeth I render the world helpless to deter, prevent, or judge genocide, or to establish an international criminal court to bring to justice those whom "sovereign" states cannot, will not, or do not bring to justice?

What has state sovereignty meant in our expiring century? In simpler days, state sovereignty implied several key elements. Primarily, it meant political independence.⁴ It also meant territorial integrity⁵ and virtually exclusive control and jurisdiction within that territory.⁶ By extension, we also developed the concept of nationality,⁷ perhaps harking back to the days when sovereignty involved a Sovereign and a Subject. We sometimes refer to state

2. See generally Urs W. Saxer, *The Transformation of the Soviet Union: From a Socialist Federation to a Commonwealth of Independent States*, 14 Loy. L.A. Int'l & Comp. L.J. 581 (1992) (analyzing the dissolution of the Soviet Union); John F. Burns, *Confirming Split, Last 2 Republics Proclaim a Small New Yugoslavia*, N.Y. Times, Apr. 28, 1992, at A1 (reporting the formal separation of former republics from Yugoslavia); Chuck Sudetic, *Yugoslav Groups Reach an Accord*, N.Y. Times, Mar. 19, 1992, at A9 (reporting moves toward an independent Bosnia and Herzegovina).

3. See Tim Golden, *Pinochet in the Dock; Arresting a Dictator Is One Thing. Then It Gets Tough*, N.Y. Times, Oct. 25, 1998, § 4, at 5.

4. See Anthony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 Harv. Int'l L.J. 1, 67 (1999); Celia R. Taylor, *A Modest Proposal: Statehood and Sovereignty in a Global Age*, 18 U. Pa. J. Int'l Econ. L. 745, 757-58 (1997); cf. U.N. Charter art. 2, para. 4 (prohibiting members from infringing upon the "territorial integrity or political independence" of any state).

5. See U.N. Charter art. 2, para. 4; Taylor, *supra* note 4, at 757-59.

6. See U.N. Charter art. 2, para. 4; Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 Mich. L. Rev. 843, 898-99 (1999).

7. See Louis Henkin, "Nationality" at the Turn of the Century, in *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht 89 passim* (Ulrich Beyerlin et al. eds., 1995) (discussing the evolution of national identity and its effect on international politics).

sovereignty in relation to the “nationality” even of corporations, and state authority and jurisdiction over them.

That much has been agreed, and was agreed upon in the early part of the century, and it is what professors of international law and politics have long taught. But something happened to that “S word” in the twentieth century. I address what one might call “transformative” developments.

The first, perhaps the most important, came after two world wars, after the sacrifice of several human generations and millions and millions of human lives. After the defeat of Hitler, sovereignty began to mean “let’s leave each other alone—no war, no use of force.” That was the law that was established in the United Nations Charter and at Nuremberg.⁸ War became illegal,⁹ then nuclear weapons made world war unthinkable, and world war was in fact kept “cold” for thirty years. We may not appreciate how remarkable that was, that transformative development in the middle of the twentieth century: “sovereign states” gave up their “sovereign” right to go to war.

Another development, less dramatic, also followed the end of the Second World War. At mid-century, states had to learn to pursue “cooperation.”¹⁰ Cooperation by “sovereign” states did not come easily, and it continues to be difficult. I blame the delusions and mythology of sovereignty for the failure of states to collaborate more extensively. Sovereignty does not encourage cooperation; it breeds “going it alone.”

We have had some cooperation, but it has been limited in the name of sovereignty. We pursued a quest for world order, but a limited world order. We created a United Nations, but it is a limited United Nations.¹¹ We have a World Bank and an International Monetary Fund and other specialized agencies, and they are all limited by the concept of sovereignty. They are limited, not only in achievement but even in aspiration, by a persistent addiction to this notion of sovereignty.

The international human rights movement is a third transformation. Until 1945, sovereignty, political independence and territorial

8. See U.N. Charter art. 2, paras. 1-4; Principles of International Law Recognized in the Charter and Judgement of the Nuremberg Tribunal, Report of the International Law Comm., U.N. GAOR, 5th Sess., Supp. No. 12, at 11, U.N. Doc. A/1316 (1950) [hereinafter Nuremberg Principles].

9. See U.N. Charter arts. 1, 2, paras. 4, 33; Nuremberg Principles, *supra* note 8, Principle VI(a).

10. See U.N. Charter preamble; Treaty Establishing the European Economic Community, preamble, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome]; North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 (establishing the North Atlantic Treaty Organization (NATO)).

11. See U.N. Charter art. 10 (providing the General Assembly the power to make nonbinding recommendations); *id.* art. 27, para. 3 (requiring an affirmative vote of nine members of the Security Council, as well as unanimous consent of the permanent members, before a binding resolution may be issued).

impermeability meant that how a state treated its own inhabitants was not a subject of international concern.¹² How a state treated its own inhabitants was nobody else's business.

That was Hitler. The world stood by, and had nothing to say about it. International law said nothing about it. What went on behind territorial frontiers was cloaked by an iron curtain of sovereignty.

The international human rights movement, born during the Second World War, has represented a significant erosion of state sovereignty. And it took Hitler and the Holocaust to achieve that. Since 1945, how a state treats its own citizens, how it behaves even in its own territory, has no longer been its own business; it has become a matter of international concern, of international politics, and of international law.¹³

I need not say that sovereign states did not rush to embrace international human rights, to welcome that gaping gap in their sovereignty. But, slowly, they have accommodated. They have agreed to human rights treaties. Even big, powerful sovereign states, such as the U.S.S.R. and China, and the big-power sovereigns of Europe, France and Great Britain, and the United States, became parties to human rights treaties.¹⁴ They accepted international human rights standards, as expressed in the Universal Declaration of Human Rights,¹⁵ specific, particular international standards¹⁶ to replace their own once-sovereign standards (or lack of standards). They imposed international standards on other sovereign states—at Nuremberg, on Germany;¹⁷ and all the sovereign states had no difficulty flouting the sovereignty of South Africa when they voted for sanctions against apartheid.¹⁸

So a major rent developed in the cloak of sovereignty, due to this

12. See *supra* note 4 and accompanying text.

13. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), reprinted in 23 I.L.M. 1027 (1984) [hereinafter Convention Against Torture]; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1980), reprinted in 19 I.L.M. 33 (1980) [hereinafter CEDAW]; International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter ICERD]; International Convention on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Convention on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810, at 71 (1948) [hereinafter UDHR].

14. See ICCPR, *supra* note 13, at 256-301; ICESCR, *supra* note 13, at 52-106.

15. UDHR, *supra* note 13.

16. See *supra* note 14 and accompanying text.

17. See Nuremberg Principles, *supra* note 8.

18. See *infra* note 31 and accompanying text.

idea of human rights. Sovereign states have not done this eagerly, but some 150 states out of fewer than 200 have adhered to the major covenants, in which they undertake legal obligations as to how they will treat their own inhabitants. One hundred and twenty-five states have adhered to the Genocide Convention.¹⁹ One hundred ninety—nearly every state except the United States of America—have adhered to the Convention on the Rights of the Child.²⁰ One hundred fifteen are party to the Convention Against Torture,²¹ 160 to the Convention on the Elimination of Racial Discrimination,²² and 160 to the Convention on the Elimination of Discrimination Against Women.²³

I do not wish to paint a rosy human rights picture—or, if you prefer, to paint a dark picture of the condition of state sovereignty. The banner of sovereignty still waves ominously over all human rights issues; the mantra of sovereignty is still intoned against human rights. Sovereign states accept international human rights standards, if they wish to, when they wish to, to the extent they wish to. They submit to monitoring, to judgment by international human rights courts and commissions, if they wish, to the extent they wish.

And so, state sovereignty at the end of the twentieth century—and at the beginning of the twenty-first—can be summarized as: “Sovereignty means ‘leave us alone.’” Sovereignty is: “We will engage in a minimal amount of cooperation, if we as sovereign states consent.” Sovereignty is subject to some “creeping” international human rights, to the extent sovereign nations consent. In general, I fear sovereignty as we have known it is alive and well.

That would have been my conclusion if asked to speak five years ago. Now, however, as we face a new century, a new millennium, one hears that “S word” again. We hear it invoked, proclaimed, protested, perhaps protested too much—as if the concept is under siege. I have noted three contexts in which we hear the cry of sovereignty, cries of joy or of anguish, but surely of confusion.

The first is “globalization”—a new word, a new development, a new phenomenon, that has become almost a buzzword. State socialism is gone, and state capitalism, too, is giving way to privatization.²⁴ A global economy is largely replacing and overwhelming national and regional economies.²⁵ Companies created in one country are

19. See Genocide Convention, *supra* note 13.

20. See Convention on the Rights of the Child, Nov. 20, 1989, reprinted at 28 I.L.M. 1448 (1989).

21. See Convention Against Torture, *supra* note 13.

22. See ICERD, *supra* note 13.

23. See CEDAW, *supra* note 13.

24. See Wolfgang Freiherr Von Marschall, *Creating the Necessary Instruments for a Market Economy in the Post-Communist Countries of Eastern Europe: Policies and Problems*, 39 St. Louis U. L.J. 951, 951 (1995).

25. See Alfred C. Aman, Jr., *The Globalizing State: A Future-Oriented Perspective*

headquartered in another with branches and subsidiaries, or mines and factories, in third or fourth or fifth or more countries.²⁶ Multinational companies are swallowing up national companies, and finding themselves subject to the confusion and inefficiency of competing sovereignties.²⁷

What is globalization doing, or what has it done, to that concept of sovereignty, the oldest idea in international relations? Giant companies have become largely independent of states, of the states that created them, of the states in which they operate. Some of them are replacing, or at least jostling, the states themselves in the state system. So we have the phenomenon of globalization and everybody thinks it is doing something to sovereignty (I think it is, too, although I'm not sure exactly what).

The "international market" is a related concept. We read and hear about "the Market." Where is the Market? Where is it physically or geographically? Under whose laws and under whose control? Who is sovereign in regard to the Market, or perhaps is the Market sovereign?

There are other terms, or concepts, out there, some of which I don't understand.

Cyberspace—where is cyberspace? Is it subject to state sovereignty? To the same state sovereignty? Is cyberspace sovereign?

And perhaps a different, earlier "globalization," slowly recognized, still barely attended to, is "the environment."²⁸ Where is the environment? Is it sovereign? Is it subject to some state's sovereignty, or perhaps to the sovereignty of several states, or to the sovereignty of all states?

In theory, in very theoretical theory, every state can try to subject these global phenomena, or some pieces of them, to its sovereign jurisdiction. In theory, in theoretical theory at least, sovereign states can get together and agree to laws and create institutions. But no sovereign state, and not all state sovereignties together, seem to be sovereign enough to solve the problems that these developments have brought to our human society at the end of the twentieth century.

There is growing, though grudging, realization that world economic

on the Public/Private Distinction, Federalism, and Democracy, 31 Vand. J. Transnat'l L. 769, 815 (1998); Eleanor M. Fox, *Vision of Europe: Lessons for the World*, 18 Fordham Int'l L.J. 379, 385 (1994).

26. See Lan Cao, *Law and Economic Development: A New Beginning?*, 32 Tex. Int'l L.J. 545, 558 (1997) (book review).

27. See Paul B. Stephan, III et al., International Business and Economics: Law and Policy 302 (1993).

28. See, e.g., Neil A. F. Popovic, *In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment*, 27 Colum. Hum. Rts. L. Rev. 487, 487-96 (1996) (describing the international recognition of the importance of global environmental issues).

affairs, world communications, and inevitably, therefore, world politics, are no longer cabined within the state system. And suddenly, or perhaps slowly, the realization is sinking in that sovereignty has lost its nerve, and sovereign states have realized that they are losing their control, that the state system is losing control.

I would devote a few minutes to ponder the effects of globalization in all of its forms in relation to the other phenomenon of our time, the law and politics of the international human rights movement.

The contemporary human rights movement, I have suggested, represents a significant deviation from pre-Second World War conceptions of sovereignty. In fact, some have seen sovereignty as threatened by the very idea and ideology of human rights, by the whole of what we call international human rights, by the ever-growing body of covenants and conventions and international and regional institutions. And, as some see it, sovereignty is also threatened by busybody governments and busybody nongovernmental organizations—Amnesty International, Human Rights Watch, the Lawyers Committee—and by professors, by litigious lawyers who are after Karadzic and Pinochet, and some day perhaps Milosevic, and many still anonymous in many parts of the world.

Sovereignty continues to raise its head against monitoring, against the efforts to shame governments, efforts by their own citizens, by other governments, by international bodies, by nongovernmental organizations, by the media, and by professors.

Now, if state sovereignty has resisted the human rights movement, and if globalization has begun to threaten state sovereignty, that may sound promising for the human rights movement. But I do not find comfort for human rights in the various forms of globalization. The fact is that human rights and the human rights movement depend on governments and on the state system. With a nod—or, if you will, a thumb of the nose—to the shade of Karl Marx, I do not see the withering away of the state as a result of globalization. If Marx's ideology did not end the state, and with it the state system, neither will globalization in its various forms, singly or together. In any event, if the state is going to wither away, the time has not come, and will not come soon.

Rather, for those who care about human rights, the need is to work to make the state system more human rights-friendly, even in the age of globalization, even taking globalization into account. Human rights advocates must learn to use the state system against threats posed by various forms of globalization (in addition to those presented by governmental abuses). I do not consider globalization to be beyond or outside the state system. Some sovereign states singly, several of them together, or all of them together through international institutions, can bend the globals to their will, and they can do so for human rights purposes. Globalization does not relieve states of

responsibility for the human rights of people subject to their jurisdiction. The state is required to ensure those human rights which it is able to protect. It cannot encourage or condone violations. It cannot encourage or condone violations even by globals, if it can regulate or control them.

Those of us who work these two fields, globalization and human rights, have to rethink what we taught for fifty years, and persuade others that our rethinking is necessary, desirable, and good.

For example, sovereignty used to mean that only states—not individuals, not companies—were subject to international law and to national laws purporting to implement international obligations. But if globalization is changing that, if we no longer say, as we have for almost fifty years now, that only states are subject to international law, we may be able to create a new set of “responsibles,” of “persons” responsible for human rights violations under international law. It is not only the states that are responsible. When giant-tentacled companies become substitutes for governments, can they perhaps be held responsible for human rights violations? The obligations of states to respect and to ensure rights need to be cast so as to include the activities and violations, of global companies wherever and whoever, they are.

International law and national law can, and do, address human rights violations or complicity in violations by multi-faceted companies in far-flung places, including big companies with big names. If they are charged with complicity in human rights violations—for example, child labor—they can be sued, as they are now in U.S. courts,²⁹ as once only government officials could be. They can be targeted in Nigeria and Burma,³⁰ as once they were in South Africa.³¹ The ILO³² has awakened from a reasonably deep slumber. NGOs,³³ shareholders, consumers, the media, and the academy are joining forces against human rights violations by the globals.

The market too, sovereign or not, is open to regulation by governments, by a few governments singly, by several who cooperate,

29. See Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens on U.S. Human Rights Litigation*, 39 Va. J. Int'l L. 41, 55-56 (1998).

30. See *id.* at 56.

31. See, e.g., Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§ 5001-5111 (1988) (imposing prohibitions against a broad scope of economic relations with South African business and government agencies, to be lifted upon “substantial progress” toward eliminating apartheid); Security Council Res. 418, U.N. SCOR, 32d Sess., 2046th mtg., U.N. Doc. S/RES/418 (1977) (imposing mandatory sanctions against South Africa, constituting the first mandatory sanctions against a U.N. member state); Julie Fairchild Grey, Note, *The Passage of the Federal Anti-Apartheid Act: The Culmination of Anti-Apartheid Efforts Within the United States*, 11 Suffolk Transnat'l L. Rev. 387, 409-413 (1987) (discussing the development of United States foreign policy toward South Africa).

32. International Labor Organization.

33. Non-Governmental Organizations.

and by those who cooperate institutionally through IFIs, international financial institutions.

Cyberspace also impinges on human rights. It is not sovereign, whatever that means, but it relies upon physical, legal, and political points of contact in one or more states, and depends on the consent of its participants; all are subject to state law and the state system. The environment, of course, also comes into every sovereign state, and some states, many of them, can regulate it if they are willing.

Our job, therefore, as academics, as citizens, as actors in the human rights movement, is to take the human rights idea of fifty years ago and apply it to a globalized world. We cannot take for granted that the answers are obvious or easy; we certainly should not take negative answers.

And then "et cetera." It is a useful basket in which to put other issues related to sovereignty. Some of them are unhappy examples.

Who is sovereign in a "failed state?"³⁴ A distinct sovereignty does not exist in these, for example in Liberia a few years ago. Some states are failed even though they may be members of the UN.

Who is sovereign when the state is helpless against local terrorists, or against suicide bombers? Who is sovereign, or what can sovereignty do, against ethnic conflict within or across state borders, against civil war, whether it spills over into other territories? And how sovereign is a state if it cannot prevent genocide? And then, there are other kinds of terrible things: what can sovereignty do for (or against) floods of refugees or internally displaced people?

If the state system is losing control, if it is exploding, is state sovereignty perhaps also imploding? If a government no longer has control within a state's territorial boundaries, who does? Can there be a sovereign state with nobody in control? If what happens inside a state's territory is no longer subject to effective internal control, who is in charge? Who in the state system is responsible for genocide within the former Yugoslavia? Who is responsible for ethnic cleansing, for crimes against humanity, for war crimes, for internal wars, and for terrorism, whether internal, transnational, or international?

Or—helplessly—who is responsible for the devastating consequences of natural disasters—floods, hurricanes, and earthquakes that have devastated economies and blighted hopes for economic and social development, and economic and social rights for hundreds of millions of people seeking human dignity? Who is responsible for the recurrent problem of terrorism, transnational or

34. In a failed state, "the central authority in a country has collapsed and there no longer exists a functioning government to maintain order." Charles W. Kegley, Jr. et al., *The Rise and Fall of the Nonintervention Norm: Some Correlates and Potential Consequences*, 22 Fletcher F. World Aff., Winter-Spring 1998, at 81, 89.

international, or for drug smuggling and people smuggling, and various other forms of international crime, or for internal crimes which states cannot or will not address, or may even promote or condone?

“Et cetera” also provides an opportunity to look generally at the responsibility of sovereign states and of their citizens in the state system at the end of our century. This sub-sub-sub heading includes the problem of external intervention. Until recently, the state system, the system of sovereign states, was committed to territorial integrity, which excluded all forms of external intervention, even for noble purposes.³⁵ It meant that even international law generally did not apply and international bodies had no authority within some state’s territory. We called it “domestic jurisdiction.”³⁶

Therefore, international law and international bodies could not intervene in internal wars; they could not intervene to address atrocities, even genocide, inside a state’s territory. We have made a little progress in bringing the laws of international war to internal wars, but it came hard and it is hardly complete. And we have had to learn, slowly, to address various forms of humanitarian intervention—that is, intervention for humanitarian purposes, but intervention under law. Unilateral humanitarian intervention at the will or whim of some state is too dangerous to contemplate. Group intervention—NATO³⁷—has raised its own objections, and it does not work very well. It depends on volunteers, and volunteers are few and reluctant. In Yugoslavia and Rwanda, the system recognized that internal hostilities and gross human rights violations—apartheid or genocide or other crimes against humanity—create threats to international peace and security.³⁸ There has not been too much objection to the Security Council asserting that it has a right to intervene in such

35. See *supra* note 4 and accompanying text.

36. See John P. Humphrey, *The International Law of Human Rights in the Middle Twentieth Century*, in *The Present State of International Law and Other Essays* (International Law Association 1973) 75, 75 (describing the traditional view that human rights fell “within domestic jurisdiction and hence beyond the reach of international law”).

37. North Atlantic Treaty Organization.

38. In the aftermath of human rights violations in Rwanda and the former Yugoslavia, the United Nations established international criminal tribunals to identify and punish the perpetrators of the atrocities. See Security Council Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994) (establishing an international tribunal for human rights abuses in Rwanda); Security Council Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993) (implementing an international human rights tribunal for the former Yugoslavia). Whereas resolutions of the U.N. General Assembly are not binding upon U.N. members, the U.N. Charter obligates members to obey Security Council Resolutions. See U.N. Charter art. 25. The Security Council is authorized only to issue a binding resolution to combat a threat to international peace and security. See *id.* art. 39. In order to mandate international action against human rights violations, the Security Council must first find that the violations threaten peace and security across national boundaries.

internal matters on the theory that they present threats to international peace and security.³⁹

The U.N. Security Council, however, is not a perfect body. It is hampered by the veto.⁴⁰ It is embarrassed by its slanted membership, dominated by the big powers.⁴¹ It does not have troops at its disposal; it depends on voluntary contributions of armies and monies, not always forthcoming, or sometimes forthcoming only from unacceptable sources on unacceptable terms.

So we have a problem. If sovereignty has imploded sufficiently, so that the human community feels responsible for what goes on inside territories, we have to find ways of addressing problems occurring in other states, ways that are legally, morally, and politically acceptable.

There are ways. Sovereign states may have to extend their own jurisdiction to matters that are internal in other states. We may have to extend the reach of the international mantle inside states. We may have to persuade states to attend to what their companies do, for which the state has jurisdiction, whether based on nationality or some other link. We may have at least to assert "universal jurisdiction," the premise that all states have jurisdiction over crimes against humanity.⁴²

Bemoaning the disappearance or erosion of sovereignty, or asking where it is, are not productive approaches to these problems. Solutions require the attention and cooperation by all who are affected by them, and today that still means governance by those who have jurisdiction and law-making authority, not only under their own national systems but also under international law.

If the global community and the market are not easily ruled by any one state, and if we consider controlling them important, one or more states can govern them, and several can combine to do that more effectively, whether for the cause of human rights or otherwise. When sovereign states are helpless or unwilling, we need international bodies, such as the tribunals in Yugoslavia or Rwanda, such as the proposed International Criminal Court, happening around us.⁴³

Finally, "et cetera" leads me to reopen a quixotic campaign to try to decompose the concept of sovereignty. Gradually, I would stop using the word. I use the word only to stop using it.

More important than the word, I would abandon some of its questionable assumptions and its undesirable accretions. I would identify the elements that have legitimate claims and the values which each of those elements is supposed to serve. Consider state

39. See U.N. Charter art. 24.

40. See *id.* art. 27, para. 3.

41. See *id.* art. 23, para. 1.

42. See U.N. Rome Statute of the International Criminal Court, *adopted* July 17, 1998, U.N. Doc. No. A/CONF. 183/9, art. 7 (defining crimes against humanity).

43. See *id.* art. 1 (establishing the International Criminal Court).

autonomy; it is comparable to the autonomy of individuals within societies. But the autonomy of states is not intrinsically a human value, though it has important indirect consequences for human values.

Consider the parallel, individual autonomy. When in the course of human events we began to talk about the rights of man, we emphasized that "all men are created equal,"⁴⁴ and that they are endowed by their Creator with certain unalienable rights, among them life, liberty, and the pursuit of happiness.⁴⁵ States can also be said to have rights to life, liberty, and the pursuit of happiness. But, Mr. Jefferson went on to say, "to secure these rights, Governments are instituted among Men."⁴⁶ That is the point. The sovereignty of the individual in the state of nature did not prevent a social contract, and it would not have survived if we did not have a social contract. The international system of states also needs a social contract. Sovereignty should not mean anarchy. It should not mean refusal by states to be governed. Because sovereignty and sovereign states are sometimes, often, ineffectual, some seek to build new international institutions, new institutions of governance, but states continue to set up sovereignty as an argument for frustrating their efforts.

We need to back, to shore up, the international systems we have created. There are many ratifications of human rights agreements, but with many sovereign reservations, and those who are concerned to do something about them have not yet seriously begun to resist reservations. We have not begun the struggle to withdraw existing reservations—for example, to the Convention on Women,⁴⁷ or even to the ICCPR⁴⁸—reservations imposed in the name of sovereignty (and sometimes a special kind of sovereignty, religion, which is a subject for another lecture).

In sum, sovereignty should not mean isolationism. It should not mean resistance to cooperation. It should not mean indifference to, or forfeiture of responsibility for, what happens elsewhere. It should not mean refusal to assume obligations. It should not mean failure to comply with obligations we have assumed. Sovereign states, one has to remind governments, can adhere to human rights treaties, and they can do so without reservations. And they can cancel reservations they have entered.

And the easy ones: sovereignty means territorial impermeability, but it does not immunize genocide and it does not immunize rape from external communal concern, judgment, and intervention.

Above all, we have to avoid the temptations of traditional

44. The Declaration of Independence para. 2 (U.S. 1776).

45. *See id.*

46. *Id.*

47. *See CEDAW, supra* note 13.

48. *See ICCPR, supra* note 13.

sovereignty. The autonomy—the “privacy” of states—is an important value, but not as an iron curtain. We cannot insist that what we do at home is no one else’s business, even if we do it in the name of religion or in the name of some other value. A decent respect for the opinions of mankind, you will remember, was our undertaking from our nation’s birth,⁴⁹ and we have to honor that as part of our sovereignty.

Sovereignty as a right to do as one pleases is part of the concept, but not sovereignty as anarchy, not sovereignty as resistance to cooperation. And not sovereignty as immunity. The most common use of the word “sovereignty” may be in sovereign immunity—immunity from law, immunity from scrutiny, immunity from justice. General Pinochet gets no votes from me.

What shall we do about the “S word?” I have tipped my hand. We need to address what has happened to traditional notions of sovereignty as a result of forces we have identified, and others, globalization, the market, and cyberspace.

But, to sum up, if the state system has lost control, single states still have jurisdiction over pieces of that global activity which can be localized in its territory or with which it has links of nationality and of money—and some states have quite a lot of links of nationality and money. States, for example the United States, have power in their law and power in fact to ensure that companies respect human rights, companies with which they are affiliated, and that these companies do not themselves, or in complicity with others, including foreign governments, violate human rights.⁵⁰

What single states cannot themselves control, they can control by cooperation—as to the market, cyberspace, and the environment. If globalization has given private entities power to impinge on human rights, states can still exercise their sovereign power to induce compliance with the international obligation of the state to ensure, as well as to respect, human rights.

If states do not act, sovereign companies can be induced by shaming,⁵¹ by NGOs,⁵² the responsible press, by stockholders, by consumers, by codes more or less voluntary, codes of the kind that we learned to use in connection with South Africa.⁵³

But I do not want to leave the impression that it is easy. Globalization, in its various components or aspects, bespeaks the helplessness of human institutions. Sometimes the framework in

49. See U.S. Const. amend. I; The Declaration of Independence *passim* (U.S. 1776).

50. See *supra* note 31 and accompanying text.

51. See Taylor, *supra* note 4, at 807.

52. Non-Governmental Organizations.

53. See *supra* note 31 (describing mandatory codes); G.A. Res. 41/35F, 41 U.N. GAOR Supp. No. 53, at 28, U.N. Doc. A/41/53 (1987) (implementing a voluntary code).

which we have learned to see problems and pursue solutions, the framework of sovereignty and sovereign states, does not help us even see where to begin.

So I offer no magic formula, no guarantee of success in vindicating human values. But we would do better than we are doing, if we saw in the tatters of our sovereignty not obstacles, not as pretext for indifference, for isolationism, but responsibility and opportunities to secure human values.

Theories of Compliance

I believe the decision by totalitarian states to formally (if not practically) recognize these shared values results in part from the international program of support for human rights movements around the world. These legal commitments serve both as the encouraging fruit of efforts to force observance of human rights and as a useful tool by which to transform totalitarian governments into more democratic ones.

Leonid Romanov, member of the St. Petersburg Legislative Assembly and chairman of the parliament's Commission on Education, Culture, and Science¹

Human rights have been one of the most powerful normative concepts of the past half century. They have been championed by groups and individuals disgusted by the oppression of which some governments have shown themselves capable. They have been supported by governments genuinely eager to set a pro-rights example as well as by cynical governments for purposes of international posturing. Cynical ratification was theorized to be rational only under certain narrow conditions – for instance, when information is thin and autocratic leaders' time horizons are short. Much of the evidence presented in the previous chapter followed patterns consistent with these expectations. Democracies have tended to be at the forefront in the process of ratification, while nondemocratic regimes have fairly consistently lagged behind. There is also evidence of strategic ratification in the form of social camouflage, but really only during the Cold War years, where the news media were under the governments' tight control, and in regions with wider dispersions in actual rights practices. In these cases, governments with little intention of actually improving their practices might rationally have assumed that they could avoid criticism while enjoying the approval of the international community in the short run.

¹ Power and Allison 2000:64.

But what happens after the making of a formal commitment? Improved behavior is far from an instant or even a consistent result of treaty ratification. A ratifying government may have intended to comply, but an election could inaugurate leadership with differing priorities. Coups, sectarian or class violence, and civil wars have even more serious consequences for rights protections. Unanticipated events – from terrorist attacks to serious economic crises – could further disrupt progress toward the implementation and observance of agreements. Nor is it a foregone conclusion that governments that were essentially false positives at the time of ratification will never reform or be replaced. Pinochet did not anticipate that the CAT, which his own government ratified, would be used by future governments to hold him accountable a generation later. The totalitarian states referred to in the quote by Leonid Romanov may have underestimated in the 1970s and 1980s the extent to which formal agreements might become a “useful tool” of political liberalization.

This chapter continues the argument developed in [Chapter 3](#). One of the major themes developed there is that some governments ratify human rights agreements sincerely, fully intending to comply with their commitments, while others ratify strategically, hoping for credit or relief from criticism at least in the short run. Certainly, we should expect the former group to have better rights practices than the latter. But in order to argue that the ratification of international treaties affects policy and rights practices, we need a theory of how treaties might matter in the politics of both willing and resistant states. In both cases, treaties potentially influence domestic politics. Even among the sincere ratifiers, treaties can change the priorities of governing leaders, the reasoning of courts, and the demands of groups of potential rights beneficiaries. Among the more resistant ratifiers (plausibly among the false positives discussed in [Chapter 3](#)), treaties will have their most important influences through the effects they may have on political mobilization. Mobilization, in turn, is a function of both the *value* that potential rights claimants place on the rights in question and the *likelihood* that mobilization will succeed in realizing them. The central argument developed here is that ratified treaties can influence agendas, litigation, and mobilization in ways that should be observable in government policies post-ratification. *Treaties change politics* – in particular, the domestic politics of the ratifying country. While their enforcement internationally tends to create collective action problems that state actors have few incentives to overcome, the consequences locally can be profound.

This chapter begins by justifying a theoretical focus on the domestic consequences of treaty ratification. Despite the fact that governments toward the end of the twentieth century have accepted a higher degree of peer accountability than ever before, they are still largely reluctant to enforce international human rights agreements in all but the most egregious cases, and only when it

serves their broader political purposes. Moreover, in stark contrast to agreements based on mutual gain and state-to-state reciprocity, international human rights agreements are essentially not self-enforcing. So, how should we construct a robust theory of compliance? By thinking about the influence of treaties on domestic politics. Treaties influence the national policy agenda, they influence legal decisions, and they influence the propensity of groups to mobilize. These three mechanisms in the aggregate should lead us to expect at least some positive impact to the making of a treaty commitment on human rights outcomes – a proposition that is tested in the following four chapters.

INTERNATIONAL TREATIES AND INTERNATIONAL POLITICS

Scholars of international relations are often pessimistic about the ability of international law to influence human rights practices because they are largely looking in the wrong direction: *outward* at interstate relations rather than *inward* at state-society relations. The interstate vantage point does not provide a lot of reason for optimism. The international legal system – while improving – is still one of the most underdeveloped legal systems in the world. Despite the proliferation of treaties and monitoring mechanisms, there is no central lawmaking body, no international tribunal broadly accepted as a legitimate interpreter of legal obligations, and no global “law enforcement” corps to enforce the rules. Many commentators have even wondered whether we should speak of the international legal system as such. What (if anything) drives compliance in such an effete legal environment?

The Common Wisdom

The most common answer is simply state power and state interests. Treaties reflect the power and the interests of the states that take part in their negotiations and add little to an understanding of why governments behave the way they do post-ratification. Governments may comply with agreements only because the treaty does not engage a national interest, or if it does, only if the treaty is consistent with that interest. Compliance against the grain of interests is interpreted as the result of coercion on the part of more powerful states or other actors.

These views are well represented among academic realists.² Even as Eleanor Roosevelt and the new UN Human Rights Commission sought to elaborate international rights principles, a spate of extended critiques of international law appeared in response to the legal idealism perceived to have pervaded the interwar years. The decentralized nature of the international legal system was typically presented as its prime defect. International agreements lacked restraining power, as Hans Morgenthau argued, since governments generally retain the

² See, for example, Bork 1989/90; Boyle 1980; Mearsheimer 1994–5.

right to interpret and apply the provisions of international agreements selectively. While Morgenthau was ready to admit that “during the four hundred years of its existence international law ha[d] in most instances been scrupulously observed,” he thought that this could be attributed either to convergent interests or prevailing power relations.³ Governments make legal commitments cynically and “are always anxious to shake off the restraining influence that international law might have upon their foreign policies, to use international law instead for the promotion of their national interests. . . .”⁴ The suggestion of the British school – that all law rested ineluctably on politics and international law on the balance of power – did little to encourage inquiry into the role of law in ordering international politics.⁵ The analytical move by neo-realists to strip the essential political structure down to the bare bones of power relationships among states⁶ set the study of international law and institutions back a further decade. Certainly, neo-realism has done much to fuel skepticism that international institutions have much influence on important international policy decisions and outcomes.⁷

Realists have primarily provided a critique of international law as a way to enhance international peace and stability, but their arguments have a direct parallel in the human rights area: *Governments will not honor international human rights treaties when it is not in their interest to do so.* Some domestic settings approximate international anarchy: competitive and brutal, with little but power to back government policies. Governments have no incentive under these conditions to hand rights to their political or cultural opponents. And in the absence of an international will to enforce these rights, the domestic balance of power – with whatever regime of repression that implies – will hold sway. For most rights violations, international enforcement simply will not be forthcoming. Foreign governments face severe collective action problems when it comes to paying the military, economic, or diplomatic costs of enforcement. Each government will be driven by its own political agenda, firmly tethered to its particular understanding of its nation’s interest.⁸ In most cases, such an

³ Morgenthau 1985:295.

⁴ Morgenthau 1985:299. In the realm of high politics, realists have been especially skeptical about the rule of law and legal processes in international relations (see Bulterman and Kuijjer 1996; Diehl 1996; Fischer 1982; Fisher 1981). Raymond Aron (1981:109) put it succinctly: “International law can merely ratify the fate of arms and the arbitration of force.” For the most part, realist perspectives have focused on the fundamental variables of power and interest, rarely feeling compelled to inquire further into states’ compliance with international agreements.

⁵ Bull 1977; Carr 1964.

⁶ Waltz 1979.

⁷ Mearsheimer 1994–5.

⁸ George F. Kennan (1951) and other “applied” realists made the normative case that this was the only way to properly formulate foreign policy, as have current government officials. John Bolton (2000:9), for a short time George W. Bush’s ambassador to the UN, has written that any claims that international law had binding and authoritative force ultimately ring either hollow or unacceptable to a free people.

understanding will not include pressing for the prosecution of paramilitary personnel for extrajudicial killings in Colombia, ridding the Sudanese military of children, or intervening to improve the treatment of prisoners and detainees in Turkey.

The key realist insight comes down to this: Treaties have little purchase over government behavior because they are not likely to be meaningfully enforced. “High compliance rates” should not be mistaken for important treaty effects, since most treaties just reflect the easy commitments governments were willing to implement even in the treaty’s absence.⁹ Treaties “screen” but they do not constrain;¹⁰ they separate willing compliers from resistors, without much effect on either. Or alternatively, they are signed symbolically or even cynically in the anticipation that external enforcement will not be forthcoming,¹¹ often resulting in “radical decoupling” of principle and practice.¹² Jack Goldsmith and Eric Posner represent the mainstream realist view: “Most human rights practices are explained by coercion or coincidence of interest.”¹³ If we are looking for empathetic enforcement from other countries, we will be looking in vain for a long time.

Self-Enforcing Agreements

If the key explanation for compliance is enforcement, it raises the question of *how* and *when* agreements are enforced. The lack of central authority or the fickle application of brute power is not the end of the story. Many international agreements are self-enforcing: They rely on the interests of the parties themselves or the international community to keep the cooperation coming.

A self-enforcing agreement is one in which two or more parties adhere to the agreement as long as each gains more from continuing the agreement than from abrogating it. These types of agreements are not without sanctions; rather, the sanctions they do involve flow from the nature of the agents’ interaction itself. Self-enforcing agreements do not depend on third parties to enforce their terms: The nature of the agreement itself provides incentives for the actors to stick to it even in the absence of external enforcement mechanisms. The expected long-term benefits outweigh the present value of violating the agreement. The agreement is “enforced” by shutting down or reducing that future flow of benefits.

The most obvious mechanism of self-enforcement is for a treaty partner to quit the agreement and refuse future cooperation in that issue area. *Reciprocity* is thus a key aspect of self-enforcing agreements. The risk that another player or players will exit the agreement rather than tolerate cheating can deter a

⁹ Downs et al. 1996.

¹⁰ Von Stein 2005.

¹¹ Hathaway 2002.

¹² Hafner-Burton and Tsutsui 2005.

¹³ Goldsmith and Posner 2005:134.

would-be violator from cashing in on the short-term benefits of defection if that actor places enough value on future interactions. *Reputation* is an additional mechanism for self-enforcing agreements. Quite aside from the specific issue and party involved in a given incident, a reputation as an unreliable treaty partner can potentially influence the willingness of others to negotiate mutually beneficial agreements in a broader range of issue areas. Self-enforcing agreements can be bolstered by community sanctioning, which would raise even further the costs of noncompliance. Enforceable levels of cooperation may vary over time, but they can be altered by the possibilities for reciprocity and the importance of reputation.

Much of the early thinking of cooperation theorists relied on the logic of self-enforcing agreements. The transactions costs literature explains the demand for cooperative international arrangements, but once in place, these rules were theorized as largely self-enforcing. In Robert Keohane's formulation, governments comply with their agreements because they want to benefit from ongoing cooperation. Accordingly, he cites "reasons of reputation, as well as fear of retaliation and concern about the effects of precedents" as the major reason egoistic governments follow the rules and principles of international regimes, even when it is in their short-term interest to renege.¹⁴ As long as the parties expect the cooperative arrangement to extend long enough into the future (the discount factor is low), self-interest can result in a high degree of agreement compliance.¹⁵

Self-enforcing agreements are stable over time because they imply costs of abrogation that counterbalance any short-term temptation to deviate unilaterally from the terms of the agreement. The rules regarding trade provide a good example. The market access rules of the WTO are largely respected, arguably, even in the absence of WTO enforcement power, because the parties basically have an ongoing interest in free trade. Reciprocity means that a government's violation or compliance will be returned in kind. The prospect of being denied market access by a trade partner lessens the temptation to defect now. The risk that others will infer from the observed infraction that a state is an unreliable trade partner strengthens the self-enforcing nature of the contract.

There are limits, of course, to the ability of reputational considerations to support self-enforcing agreements. Reputational considerations will not be very important among parties that barely interact with each other and within communities that the would-be violator does not much value. A reputation is difficult to establish in those cases where the behavior in question is difficult to observe. Reputations may be somewhat easier to establish where behaviors are transparent and in more homogeneous communities where the behavior of

¹⁴ Keohane 1984:106.

¹⁵ Telser 1987.

individuals is common knowledge.¹⁶ Moreover, the ability of actors to regulate the exact message they want others to infer from their behavior may be limited, as governments often cultivate multiple reputations.¹⁷ In trade, for example, a government may want to cultivate a domestic reputation for responsiveness to constituency interests but an international reputation for cooperativeness. Finally, “reputational sanctions,” like any other kind of sanction, may be sub-optimal if the community does not find a way to overcome collective action problems in its supply.¹⁸ There is simply no guarantee that non-third-party enforcement can generate reputational costs that exceed the present value of opportunism.

Compliance with agreements is explained in this approach by the ability to structure incentives in such a way as to make noncompliance too costly to consider *in the absence of third-party enforcement*. Hence the attractiveness of this approach: Self-enforcing agreements would seem to be the only stable agreements in an anarchic setting. Many people who have never uttered the word “realism” would come to conclusions similar to those outlined previously: In the absence of external enforcement, an agreement must be self-enforcing – neither party has any incentive to defect – if it is to have any credibility. Compliance with self-enforcing agreements – unsurprisingly – should be high. Compliance with all other agreements will be problematic.

Treaties as Commitment Devices

What most discussions of self-enforcing agreements do not do, however, is to answer the question, *why treaties?* International treaties are one of the oldest forms of communication among sovereigns, and some 3,000 multilateral and 27,000 bilateral treaties are in effect today.¹⁹ It is hard to imagine why this is the case if they do not perform some kind of useful function among sovereign governments that is difficult to achieve in some other way. What do formal legal agreements add to the calculus to defect that we have been exploring? Why do states use this kind of instrument to support their international cooperation, and what difference – if any – does it make to outcomes we might care about?

One possibility is that treaties support higher levels of international cooperation by enhancing states’ ability to make credible commitments to one another, even if they have incentives to misrepresent their true intentions. If states are able to send costly signals of their intentions, the messages they send should ultimately be far more credible. Two kinds of costs are distinguished in the literature: *ex ante* (or “sunk”) costs that have the effect of credibly

¹⁶ Landa 1981.

¹⁷ Keohane 1997.

¹⁸ Guzman 2002.

¹⁹ John Gamble, based on Wiktor’s Calendars, Rohn’s indices, and *Treaties in Force*.

distinguishing a sincere government from an opportunistic one and ex post costs that are paid if a violation takes place.²⁰ High ex ante costs send a credible signal of intentions: No rational government would pay a high “down payment” on a cooperative enterprise if it did not intend to abide by the agreement. When a government pays high ex ante costs, others can reasonably draw the conclusion that this government will follow through with its agreement. High ex ante costs screen governments by type, revealing their true nature. Their interest in ex post compliance does not change; rather, they signal how much the government values compliant behavior in the first place.

Costs paid ex post work in a different way. If ex ante costs can screen, then ex post costs can *constrain*. Ex post costs are simply the consequences of non-compliance, which can range from trivial to monumental. When ex post costs are high enough, they can effectively tie a government’s hands; noncompliance can in some cases be too costly to contemplate. The seriousness of these consequences has the effect of *changing* a government’s interest in compliance. In the absence of consequences, the government might have preferred to defect; ex post costs make defection much less attractive. Essentially, we are back in the world of enforcement, broadly understood. Credible commitments that involve ex post costs increase the range of self-enforcing agreements with which the parties have an incentive to apply.

How do *treaties* assist governments in making credible commitments to behave – or refrain from behaving – in particular ways? Let’s begin with the sunk costs that allow a government to signal credibly its intent to comply. In many polities, treaties are unique among interstate agreements in that they require domestic ratification. In contrast to other forms of international agreement – memoranda of understanding, executive agreements, or other political announcements – treaty ratification generally involves the assent of a legislative or at least a cabinet-level body. As discussed in Chapter 3, ratification procedures are usually spelled out in a country’s constitution, and can range from executive approval to legislative majority to legislative supermajority to national referendum.²¹ These procedures require varying levels of government effort to secure domestic political support for the agreement in question. In some countries, there is practically no political difference between ratifying a treaty and signing an executive agreement. But in a great many others, the government has to expend significant political capital to assemble a coalition in favor of treaty ratification. The more hawkish the legislature in these cases, the greater the political resistance the government can expect to ratification and the less likely such a government would be to pay these ex ante ratification costs.²²

²⁰ Fearon 1997.

²¹ See my Web site at <http://scholar.iq.harvard.edu/bsimmons/mobilizing-for-human-rights>.

²² Evans et al. 1993; Milner 1997.

The ratification process helps governments to send a credible signal primarily because of the screening effects of relatively high ratification hurdles. In the face of high up-front domestic political costs, the willingness of a government to expend political capital on ratification sends a credible signal that the government in question attaches a high value to the contents of the treaty.²³ Committed types are likely to secure ratification, while uncommitted types are not. In these cases, treaty ratification can be thought of as a separating equilibrium, in which only the committed are likely to pay the steep political costs of ratification.

Ratification is the only clear *ex ante* cost associated with treaty making. A much more varied set of arguments has been developed that treaties – in comparison to other kinds of international agreements – impose significant *ex post* costs in the event of breach. All of these arguments are consistent with viewing treaties as enhancing the self-enforcing qualities of the agreement. Moreover, practically all of these arguments extend the reputational analysis of self-enforcing agreements discussed previously. Andrew Guzman captures the logic of all of these arguments very well when he writes that treaties “represent the complete pledge of a nation’s reputational capital.”²⁴ Treaties somehow *put it all on the line in the diplomatic world*. The *ex ante* cost of violation, in this context, is a severe loss of diplomatic stature and credibility as a contracting party.

The first reason many offer for the credibility of a treaty commitment is its status as law. Among all forms of international agreement-making, treaties have a fairly unique feature: They are clearly embedded in a broader system of interstate rule-making, normatively linked by the principle of *pacta sunt servanda* – the idea that agreements of a legally obligatory nature must be observed. Unlike political or other kinds of agreements, treaties are not free-standing; they gain status from their mutual recognition as legally binding. The link to the underlying principle of good faith fulfillment leverages the commitment made in any one case by linking it with other agreements of a similarly obligatory stature. By embedding an agreement in a broader principle of good-faith compliance, treaties allow actors to draw better inferences about the law-abiding nature of other governments. Normative linkage justifies the inferential round trip from specific violations to the broader reputation for legality back to expectations about future compliance with otherwise unrelated treaty commitments. Violating a legal agreement, in this view, provides information on both the government’s attitude toward the contents of the treaty and respect for law itself.

The notion that treaties are embedded in the broader international legal system (weak though that system may be) informs a good deal of legal thinking

²³ Martin 2000. Lisa Martin tests this argument for the United States by comparing treaties with executive agreements. She finds that U.S. presidents typically choose the treaty form for high-value agreements, which is necessary to assure other countries that the United States intends to comply. See <http://www.wcfia.harvard.edu/node/815> (accessed 12 August 2008).

²⁴ Guzman 2002:65.

on the compliance question. This linkage implies that a country can develop a good reputation for law-abiding behavior that has value and meaning across issue areas. Oscar Schachter, for example, has written about a country's "reputation for legality" and suggests that treaty violations are costly to this reputation, even for powerful states.²⁵ Roger Fisher uses a similar logic to argue that treaty violations are generally deterred by governments "engaged in an expensive effort to create a favorable opinion."²⁶

Arguably, treaties also allow for a more complete reputational commitment because of their capacity for clarity. They can be used as a mechanism to enhance the precision of a commitment, making it clearer just what compliance requires. Treaties are well suited to focusing expectations by reducing ambiguity about what behavior is required, permitted, or proscribed. Precision reduces the scope for plausible deniability of violation; it "narrows the scope for reasonable interpretation" of the parties' intentions.²⁷ Of course, when drafting a treaty, governments are faced with familiar problems of incomplete contracting, or the difficulty of foreseeing and clarifying every conceivable contingency. This is why there has been a strong move to codify rules for treaty interpretation,²⁸ which further narrow the range of agreed-upon responses when governments disagree over the substance of their treaty obligations. Although precision is neither inherent in nor unique to treaty agreements, when governments want to be precise about the nature of their obligations, treaties are typically the instrument of choice.²⁹

Normative as well as rational theorists have explored the quality of law precision as an influence on compliance. In a normative vein, Thomas Franck has theorized that precision, or "coherence," increases the legitimacy of a rule and increases its "compliance pull."³⁰ In James Morrow's rationalist interpretation of the laws of war, the relative precision of treaty arrangements supports reciprocity between warring states by clarifying prescribed and proscribed behaviors and by limiting the permitted range of responses to violation.³¹ In both accounts, compliance is enhanced, *ceteris paribus*, by rules that are clear – or can readily be clarified – to all parties concerned.

Human Rights Treaties: A Continuing Theoretical Puzzle

None of these theoretical approaches are very satisfying for understanding treaty compliance in the human rights area. Many of the realist insights are

²⁵ Schachter 1991:7.

²⁶ Fisher 1981:133.

²⁷ Abbott et al. 2000.

²⁸ Vienna Convention of the Law of Treaties. Part III, section 3, Arts. 31–33.

²⁹ Lipson 1991.

³⁰ Franck 1990.

³¹ Morrow 2002.

correct (although, as I will argue, they reach the wrong conclusion): Governments are quite unlikely to comply with their international treaty obligations with respect to human rights if it is not in their interest to do so. Governments are likely to repress political opposition when opponents pose a challenge to national “peace and stability” (or, more likely, the ruling coalition’s hold on political power). Governments are likely to engage in various forms of coercive interrogation if they want intelligence from individuals who are considered threats. They are likely to turn a blind eye to the use of child soldiers if that is what it takes to raise a fighting force during wartime.

Furthermore, skeptics are right that peer enforcement is likely to be weak.³² Foreign governments simply do not have the incentives to expend political, military, and economic resources systematically to enforce human rights treaties around the globe. Even if they value respect for the international legal system and human integrity, states face tremendous collective action problems in organizing potential enforcement efforts. Governments would face these collective action problems even if enforcing international human rights were their top foreign policy priority, but, of course, in most cases it simply is not. Punishing foreign governments for their human rights violations is likely to come into conflict with other foreign policy objectives. For a number of reasons, international punishment is quite likely to be underprovided compared to some optimal level of enforcement.

Governments will have especially weak incentives to enforce international human rights agreements involving their important trade partners, allies, or other strategically, politically, or economically important states. Empirical studies of U.S. foreign policy, especially during the Cold War period, support the point that U.S. administrations have tended to provide aid on the basis of foreign policy exigencies rather than human rights performance.³³ A few studies have drawn similar conclusions for the United Kingdom.³⁴ The targets of these enforcement efforts are generally small countries whose sanctioning imposes no important costs for the would-be enforcer. For example, countries that are the target of trade–human rights linkage are typically *much* smaller markets than those that are not: Countries with preferential agreements including human rights clauses in 2000 were on average less than a quarter of the size of those

³² See, for example, Dai 2005.

³³ In an early study, Schoultz (1981) found that U.S. aid was disproportionately distributed to countries with repressive governments. Carleton and Stohl (1985) similarly found that human rights were ignored by policymakers during the Cold War. Blanton (2005) has found that the amount of military assistance the United States provided during the Cold War was unrelated to political rights, though there is some evidence that this situation has changed since the end of the Cold War.

³⁴ Barratt (2004:59) found that “When all potential recipients were examined together, states with worse human rights records were actually more likely to receive aid than the ones with better human rights records. . . . UK policymakers only take human rights into account in the case of potential recipients with which they will not be endangering and [sic] important export market.”

without such linkage clauses.³⁵ Multilateral institutions also have serious political biases when it comes to the enforcement of human rights standards. The UN Human Rights Commission, for example, has traditionally been one of the most politicized institutions with the authority to officially denounce a government's human rights policy. In terms of the supply of external enforcement, then, we should expect it to be undersupplied as well as "inappropriately" (that is, highly politically) supplied.

Whether theories of self-enforcing agreements and credible commitments greatly increase our understanding of international human rights compliance is also doubtful. In crucial ways, this family of theories is simply an uncomfortable fit for explaining human rights compliance. We can begin with the opening assumption of contracting for *mutual gain*.³⁶ In the human rights area, of course, a country can generally realize its desired level of rights without the cooperation of any other state. Why contract at all?³⁷ In fact, from the government's point of view, it would be most efficient to determine the optimal level and type of rights unilaterally. Joint gains from this perspective would predict a conspiracy to mutual silence. The contracting approach is misplaced from the outset: If a government places a high value on the protection of its citizens' rights, it is hardly necessary to contract with other states to do so.

The external enforcement mechanisms implied by rationalist theories are also an awkward fit for the human rights area. The most common mechanism of self-enforcement that these theories posit is responding to violation by terminating the treaty – a mechanism that is not realistically available in this context. Human rights regimes do not involve *reciprocal* compliance (as is the case with trade agreements).³⁸ No government is likely to alter its own rights practices to reciprocate for abuses elsewhere. Short of a policy of linkage (better rights for economic aid, for example), reciprocity is difficult to invoke.

³⁵ Based on data provided by Emilie Hafner-Burton. See Hafner-Burton 2005. The 125 countries that had some form of human rights linkage built into their preferential trade agreements in 2000 had an average GDP of only about \$102 billion, while the 44 countries that had no such riders in their trade agreements had an average GDP of \$469 billion. The difference in mean GDP is highly statistically significant ($p = .007$).

³⁶ Mutual gain is an assumption made by all functional theories of international regimes and international law that credit the value governments place on reciprocal compliance by other governments and the expected future stream of benefits with overcoming the temptation to defect from an international agreement in the short run (Keohane 1984).

³⁷ One possibility is that poor rights elsewhere create negative externalities via refugee flows, as in the case of Haitian flows to the United States in the early 1990s.

³⁸ Canada respects its North American Free Trade Agreement (NAFTA) trade commitments with the United States because the expected value of future cooperation between these two countries is so high. Were Canada to repeatedly violate the agreement, it would risk the United States doing the same, and potentially would make it more difficult to conclude other potentially valuable agreements with the United States and possibly trade agreements with other countries.

Nor is it as straightforward to identify the consequences of a bad reputation with respect to human rights treaty compliance as it is in other areas of interstate contracting.³⁹ First, compliance with human rights treaties takes place domestically, and despite the widespread development of the accountability mechanisms discussed in Chapter 2, many violations are truly difficult to detect, to observe, and even more difficult to verify. In all but the most headline-grabbing cases, it is likely to be too costly for outside actors to collect, assess, and disseminate the kind of information that can inform strong reputational judgments.

Second, even if it is possible to get the right kind of information, it is not obvious why a government would be too concerned to develop a positive international reputation in the human rights area in the first place. What is the instrumental value of such a reputation? What do governments infer from a state's compliance or noncompliance with international human rights treaties? Does noncompliance in human rights make a government an unreliable trade partner or military ally? George Downs and Michael Jones argue that unless whatever compliance costs have led to noncompliance in one issue area are correlated with noncompliance in another issue area, there is no good reason for other countries to draw reputational inferences for other issue areas.⁴⁰ There is no reason to suspect that a country that violates a human rights agreement will break out of an arms control treaty. Downs and Jones view the costs of complying with human rights agreements as very weakly correlated with the costs associated with compliance in other issue areas. From this they conclude that, “reputation promotes compliance with international law most in trade and security and least in environmental regulation and human rights.”⁴¹ In practice, reputations are highly segmented; a reputation for respect for law is difficult, if not impossible, to develop across issue areas with very different logics of cooperation.

Third, enforcing reputational consequences is subject to collective action problems in the same way (though possibly not to the same degree) as are other kinds of sanctions.⁴² States may disagree in their assessment of the gravity of the violation; they may also differ in the value they place on a positive relationship with the alleged violator. On the one hand, if official criticism is publicly issued, it is likely to inject some resentment into two countries' relationship. On the other hand, costless criticism cannot provide effective enforcement. Costly criticism is just that, and many governments will wait for others to step up and provide it.

³⁹ In the monetary area, see Simmons 2000.

⁴⁰ Downs and Jones 2002.

⁴¹ Downs and Jones 2002:SII2.

⁴² On collective action problems in sanctioning, see Martin 1992. Andrew Guzman (2002) argues that for this reason, reputational sanctions are likely to be undersupplied.

“Joint gains” and “reciprocity” (as these terms are usually understood) are fairly beside the point for interstate interactions in the human rights area. Reputation works – at best – very weakly in this area as well. For these reasons, “signaling” theories are also orthogonal to the analysis of human rights compliance. Signaling theories are interesting only because they allow actors to realize joint gains that they cannot easily reach because of the risk of defection by the other party. International human rights agreements, I have argued, do not produce such joint gains. Hence, there is no reason to send a signal of one’s type to other governments in the first place. Moreover, signaling theories predict but do not explain compliance. Ratification procedures, for example, may impose ex ante costs that only a compliance-prone government would pay. But if we observe such a government refraining from torture, we are likely to agree with George Downs and others that it was likely to have complied anyway. Signaling is superfluous to an understanding of human rights treaty effects. In the absence of joint gains, there is simply no reason to send a signal in the first place.

For a number of reasons, a theory of compliance with international human rights treaties is difficult to develop purely in the context of international politics. States (and their agents, intergovernmental organizations) have very little interest in enforcing these agreements, which tend to impose costs on the enforcers without hope of commensurate gains. Many of our theories of international cooperation – self-enforcing agreements, credible commitments – fall flat because these agreements do not involve either joint gains or reciprocity. Reputations are difficult to develop because information is largely internal (although this is changing), because it remains difficult to draw useful behavioral inferences across issue areas, and because even reputational punishment is fraught with collective action problems.

This does not mean that international human rights treaties are useless. It just means that international relations theorists have been analyzing their effects with the wrong analytical tools.

A DOMESTIC POLITICS THEORY OF TREATY COMPLIANCE

If international human rights treaties have an important influence on the rights practices of governments that commit to them, it is because they have predictable and important effects on domestic politics.⁴³ Like other formal institutions, *treaties are causally meaningful to the extent that they empower individuals, groups, or parts of the state with different rights preferences that were not empowered to the same extent in the absence of the treaties*. I have argued that external enforcement mechanisms – whether material or reputational – are likely to be undersupplied and quite weak in securing compliance with

⁴³ For an excellent study that privileges domestic international law enforcement primarily through electoral mechanisms, see Dai 2005.

international human rights accords. Peers cannot act as reliable enforcers of the regime. They have incentives to ignore violations, either because they are essentially unaffected by practice elsewhere, or because other foreign policy objectives swamp the concerns they have in a particular case, or because they hope that someone else will pay the costs of enforcement. *The real politics of change is likely to occur at the domestic level.*

International human rights treaties have a singularly unusual property: They are negotiated internationally but create stakeholders almost exclusively domestically. In the human rights area, intergovernmental agreements are designed to give individuals rights largely to be guaranteed and respected by their governments. Treaties of this kind have a potentially dramatic impact on the relationship between citizens and their own government, creating a huge pool of potential beneficiaries if the treaty is given effect. State–society relations, or “the relationship between governments and the domestic and transnational social context in which they are embedded,”⁴⁴ should be the most important context for shaping compliance. By sharp contrast, international human rights treaties engage practically no important interests among states *in their mutual relationships with each other*. Most of these agreements simply do not have the capacity to alter international politics in important and predictable ways. The same is not true of politics at home.

This section suggests three theoretical mechanisms through which treaties can influence domestic politics in very positive ways. These are theories that privilege domestic political actors as agents in their own political fate. External actors can certainly facilitate some of these processes, but in principle, they are all possible without the contributions and the interference of outside actors. This approach is an important complement to many others that have emphasized transnational actors as primary change agents.⁴⁵ The mechanisms to be discussed view local actors not as voiceless victims to be rescued by altruistic external political actors, but as agents with some power selectively to choose tools that will help them achieve their rights goals. My argument is that for each of the mechanisms to be discussed, an official commitment to a specific body of international law helps local actors set priorities, define meaning, make rights demands, and bargain from a position of greater strength than would have been the case in the absence of their government’s treaty commitment. Treaties are potentially empowering, and both those who would use them to repress and to achieve liberation should be assumed to have a good appreciation of this potential.

The following discussion is organized from the perspective of actors who may want change in rights policies and practices. I consider the role of the executive, the judiciary, and citizens.

⁴⁴ Moravcsik 1997:abstract.

⁴⁵ Keck and Sikkink 1998.

Executive Powers: Treaties and Agenda-Setting Influences

Treaties can have important influences in countries even when governments are basically supportive of their purposes. Some might object that these are the conditions under which treaty-consistent behavior cannot be attributed to the treaty itself, but rather to underlying preferences. To the extent that governments adopt policies that are treaty consistent, some would conclude that such behavior would easily have occurred in the absence of an external commitment.⁴⁶ The conclusion often drawn is that positively disposed governments would have complied in the absence of the treaty. The treaty itself has no independent effects on behavioral outcomes.

As a general rule, this conclusion is too hasty. It ignores the power of an internationally negotiated treaty to alter the domestic agenda and to empower particular branches of national policymaking.⁴⁷ Even when treaties reflect the preferences of particular governments, they can be independent influences on outcomes (laws and practices) by influencing a country's policy agenda.

For most countries, an internationally negotiated treaty is an exogenous event in the flow of national policymaking and legislation. Very few countries have both the political power and the will to fashion an international human rights agenda that matches exactly their own legislative agenda. Not only are concessions made to other countries, but as the following chapters demonstrate, priorities are critically shaped by international bodies and nonstate actors with an interest in the substance of particular human rights agreements. It would be an amazing coincidence were a treaty that emerged from global political processes to match exactly the legislative agenda of any particular government. This is not to say that these governments oppose the treaty; rather, it is to appreciate the extent to which the timing and precise content of global treaties are exogenous to most individual countries' policy agendas.

The need to consider ratification can therefore rearrange a country's priorities, if not its preferences.⁴⁸ A sympathetic government might not have wanted to spend the political capital to raise the issue of the death penalty, but the existence of the second optional protocol of the ICCPR raises the question of whether the government wants to go on record in this regard. A government might wish to join in an international ban on the use of children in the military, but would not have made this a high priority were the CRC's Optional Protocol Relating to

⁴⁶ Downs et al. 1996.

⁴⁷ Christina Davis (2004) argues that treaty negotiations have largely empowered foreign relations officials over special interest groups that otherwise might dominate trade talks. She argues that this has had an important effect on the agenda of the international trade regime.

⁴⁸ While this is an elite-focused argument, it differs significantly from more constructivist arguments about the conditions under which elites become persuaded and change their preferences; see Checkel 2001. I am not arguing, of course, that elites cannot be persuaded to change their minds about the value of rights protections. Rather, this argument focuses on how the institution of treaty-making can empower an executive to initiate reform given constant preferences.

Children in Armed Conflict (OPCAC) not presented for consideration by the international community. One way to think about this issue is by considering the costs associated with delayed rights reform. Arguably, these costs are higher on the margin when a treaty that the government has participated in negotiating is on the table than when it is not. It is one thing not to *initiate* policy change on the national level and quite another not to *respond* once a particular right is made salient through international negotiations. Silence is ambiguous in the absence of a particular proposal, but it can easily be interpreted as opposition in the presence of a specific accord. The ratification decision affects the set of policy options facing a government, potentially shifting rights reform to a higher position on the national agenda than it might otherwise have occupied.

Treaties can influence national legislative priorities in both parliamentary and presidential systems. In the former, a prime minister may be encouraged by international negotiations (and externally generated expectations) to ratify and implement the agreement in good faith. The party in power might simply decide to insert the item into the normal flow of legislative business, over which the government has fairly clear institutional control. In presidential systems, treaties can have even more significant independent agenda-setting effects. As other scholars have noted in very different substantive contexts, in presidential systems in which legislatures have more power to initiate the lawmaking process, treaty-making uniquely empowers an executive vis-à-vis the legislature.⁴⁹ Practically every constitution in the world gives the prerogative to negotiate international treaties to the executive branch of government.⁵⁰ This gives an executive an important way to take the initiative with respect to the legislative agenda. Where legislatures have strong institutional agenda-setting powers – the United States, for example – the ability of an executive to insert an externally generated agenda item can be especially significant.

Treaties also influence the national agenda by creating a focal point to minimize the problem of legislative cycling. A particular political party might have a general preference for rights reform but might be hampered in making legislative progress by multiple proposals over which legislators have intransitive preferences. A treaty gives the executive a fairly clear proposal to discuss as an alternative to the status quo. Despite the fact that most treaties can be implemented in a number of ways, the existence of an authoritative text reduces the range of options and reduces the possibility of cycling through votes on a number of reform programs – none of which may gain a legislative majority – by

⁴⁹ See, for example, Rachel Brewster, who argues in the U.S. context that one important thing international law does is to give significant agenda control to the executive: “The executive can oversee the development of substantive rules internationally and then use international organization decisions to constrain subsequent legislative action and oversight” (2003:4). She develops this argument for the case of trade policy liberalization.

⁵⁰ For example, U.S. Constitution Article II(2). See <http://www.law.cornell.edu/constitution/constitution.articleii.html#section2> (accessed 13 August 2008).

giving the executive a clear set of guidelines for proposing policy changes. The treaty itself reinforces the executive's ability to set the agenda under such circumstances.

If treaties really do influence national politics through their agenda-setting capacity, then we should expect the strongest positive treaty effects in domestic institutional settings that tend to privilege legislatures. This argument implies that treaties should have their greatest impact where governments are otherwise constrained in their ability to initiate legislative reforms to protect rights. Note that this is not an argument that executives have stronger preferences for rights than do legislatures. Rather, it is an argument that because the conduct of foreign policy (including the ratification of treaties) typically resides in the executive branch of government, treaty ratification provides a unique opportunity for the executive branch of government to place what otherwise might have been a legislative item on the national policy agenda. To be sure, legislatures could decide to legislate rights protections, and many, of course, do. In such cases, the influence of the treaty *per se* may be minimal. But the more constrained a national executive is in proposing legal innovations, the more important the agenda-setting power associated with the foreign policy prerogative implied by the power to conclude treaties is likely to be.

The ability of treaties to impact national agendas is a highly conditional claim. It operates on the margins within some states with a proclivity to embrace rights anyway. This is a mechanism that is available only within the sincere ratifiers. It is also only a claim that international treaties can change national *legislative* agendas; it does not speak as such to deeper problems of implementation or enforcement on the ground. Still, it is not trivial. It implies that pro-rights legislative changes may be taken that would not have been in the absence of the exogenously generated legislative agenda shuffle.

If the agenda-setting function of treaties is important, then some observable implications should follow. It should be possible to turn up cases in which the rights issue was not otherwise on the national agenda, but a legislative debate to change national law was prompted by the need to consider treaty ratification. Furthermore, it might be possible to infer that treaty effects are related to shifts in agenda control if positive change in rights legislation is greater in systems where the executive tends to be more constrained vis-à-vis the legislature. We might, for example, expect more legislative innovation upon ratification in presidential systems than in parliamentary ones. It is in the former that treaties significantly enhance the power of the executive to propose legislative rights reforms.

Courts: The Leverage of Litigation

The potential agenda-setting influence of treaties has a subtle influence on relationships between the executive and legislative branches of government, redistributing the power of initiating legislation to the former. Ratified treaties also have implications for the role of the judiciary. In many instances,

international legal obligations form an important part of the body of law on which judicial decisions may (or must) be based.

Litigation based on international law is certainly nothing new. “[L]awyers have been trying for over a century and a half to utilize international law material in human rights cases,” according to Roger Clark.⁵¹ In the United States, in the early nineteenth century, Francis Scott Key appealed to foreign and customary international law to free the humans imported aboard the *Antelope* (1820); John Quincy Adams did likewise in the *Amistad* case (1841). The rise of explicit treaty law has made awkward appeals to customary international law and foreign practice much less necessary.⁵² Increasingly, individuals and groups who use the courts and explicit treaty commitments to leverage their rights claims are holding governments accountable for their human rights behavior. The possibility of litigation changes a government’s calculation with respect to compliance. Interfering with or ignoring a ruling of a duly constituted national tribunal greatly raises the political costs of noncompliance. Subject to several important caveats, treaties raise the costs of noncompliance when the international legal system is used to authenticate an individual’s complaint.

Treaties make litigation possible because they are (or they give rise to) domestically enforceable legal obligations. In monist legal systems – those that do not distinguish between international and domestic law – ratified treaties are an integral part of the domestic legal system. In such systems, international law has a primary place in a unitary legal system, whether or not national lawmakers take steps to implement international law through specific domestic legislation. In such systems, international legal obligations are directly enforceable in domestic courts. The constitution of the Netherlands, for example, not only recognizes treaties as part of national law; it also states that whenever a statute conflicts with a treaty obligation, the former is void.⁵³ There is a good deal of variance across countries, but in systems that are monist in conception, there is a strong presumption that international law is directly enforceable in national courts.⁵⁴ Many postcommunist countries’ constitutions, for example, include provisions incorporating treaties as enforceable domestic law and as superior in constitutional status to statutory and administrative law.⁵⁵ In other legal

⁵¹ Clark 2000:191.

⁵² In common law systems, customary international law has typically been assumed to have direct effects on national law (consistent with the evolutionary approach to law that these systems evince; see Chapter 3; see the discussion in Ginsburg et al. 2006). The awkwardness in common law systems is not the status of international rules but, as always, determining precisely the content of international custom itself.

⁵³ See the discussion in Ginsburg et al. 2006:4–7. Possibly for this reason, the Netherlands tends to enter a lot of reservations to its treaty ratification. See also Goodman 2002:547.

⁵⁴ Ginsberg, Elkins, and Chernykh (2006) note that systems can vary in their treatment of treaty law versus customary international law and have developed a number of approaches to conflict-of-law issues.

⁵⁵ Ryan Goodman (2002:541) lists Armenia, Bulgaria, the Czech Republic, Estonia, Georgia, Kazakhstan, Moldova, Poland, Romania, Russia, Slovakia, and Tajikistan as examples.

systems, typically referred to as “dualist,” the influence of international law on the legal system involves the additional step of passing implementing legislation. In these countries – often, though not exclusively, common law countries concerned to preserved parliamentary supremacy and the development of localized legal precedent, as discussed in Chapter 3 – international legal obligations must be “translated” into domestic law in order for their provisions to be enforced in domestic courts.⁵⁶ Whenever treaties have direct effects or give rise to implementing legislation, they can provide new tools for litigation that might not have existed in the absence of treaty ratification.

Litigation in national courts is one of the best strategies available for creating homegrown pro-rights jurisprudence.⁵⁷ Treaties can be an especially helpful element in this regard. If treaties are cited in a legal case, judges have to think about how they are to be interpreted. One place they may look for interpretive guidance is the reports of the UN implementing committee designed to oversee treaty implementation. Another is decisions of other countries whose courts have already cited the treaty in their decisions. Litigation over rights contained in international treaties increases the opportunity for national courts to engage in the (rather elite) process of transjudicial dialog described by several international legal scholars.⁵⁸ Cases with international legal components provide opportunities for judges to import international norms into domestic jurisprudence. In the United States, for example, courts have made a concerted effort to interpret federal statutes in a fashion consistent with U.S. international treaty obligations.⁵⁹

The existence of a tool does not guarantee that it will be used, of course. The availability of treaty law certainly does not ensure that litigation will take place.

⁵⁶ Local implementation does not, however, affect the nature of the *international* legal obligation (the obligation to other states to observe treaty commitments). Some countries are neither monist nor dualist, but have more complicated rules that specify whether a treaty is automatically incorporated into the domestic legal system or whether, to be enforceable in domestic courts, it must be implemented through domestic law. In the United States, for example, some treaties are considered self-executing, and hence enforceable in U.S. courts, while others are considered non-self-executing and requiring implementing legislation to be enforceable in this way. For a discussion of U.S. law in this area see Stone 2005:332. In some cases, the United States has explicitly tried to reduce the possibility of domestic enforcement by entering reservations upon ratification that specify particular articles as non-self-executing. In the case of the ICCPR, the United States stipulated its understanding that Articles 1–27 of the convention were in fact non-self-executing (Article III(1)). U.S. reservations to the ICCPR can be found at <http://www1.umn.edu/humanrts/usdocs/civilres.html> (accessed 12 August 2008). According to some eminent scholars, the monist/dualist distinction does not matter for the way states actually engage international law. Louis Henkin claims that “Differences between monism and dualism, I emphasize, were theoretical, conceptual; they appear not to have inspired significant differences between states in their application of international law” (1995:65).

⁵⁷ Osofsky 1997. On transnational public law litigation generally, see Koh 1991.

⁵⁸ See, for example, Slaughter 1995.

⁵⁹ Brewster (2003:21) discusses in the U.S. context “rules that construe other federal law to be consistent with our treaty obligations,” citing the case of *Murray v. the Schooner Charming Betsy* (1804).

Potential litigants must be aware – or be made aware – of their rights under international law (or under the implementing legislation it has inspired). A certain degree of “legal literacy” is required if individuals are to access the courts. Rights organizations are crucial actors in this regard. Sally Engel Merry has recently documented many efforts of various rights organizations to enhance legal literacy and encourage individuals to cast their complaints in terms of legally enforceable rights. In Fiji, for example, the local women’s rights movement has worked since the early 1990s on legal literacy campaigns, focusing on CEDAW and women’s rights.⁶⁰ Legal literacy has been an important part of certain NGOs’ strategy to encourage women to claim their rights in Africa,⁶¹ suggesting the possibility of converting cultural resistance into a rights framework potentially pursuable in the courts.

The existence of a new legal tool also does not mean that it will be fairly employed. One of the most important conditions for litigation to be a potentially useful strategy to enforce rights is judicial independence. For courts to play an important enforcement role, they must be at least somewhat free from political control.⁶² The government or one of its agencies, representatives, or allies is likely to be the defendant in rights cases, and unless local courts have the necessary insulation from politics, they are unlikely to agree to hear and even less likely to rule against their political benefactors. Anticipating futility, individuals or groups may decide to avoid the courts altogether.⁶³

It is important to put these limitations on litigation in their proper perspective. Certainly, thousands of violations go unlitigated because individuals do not have the resources or the information to mount a court case. Undoubtedly, law operates in its traditional fashion only by institutions prepared to interpret and apply it fairly and independently. But as I will argue, much research suggests that litigation’s power resides not so much in its ability to provide every victim with a decisive win in court. Litigation is also a *political* strategy, with the power to inspire rule revision and further to mobilize political movements. It can often be used strategically not only to win cases, but also to publicize and mobilize a cause.

Examples of litigation involving rights guaranteed by ratified treaties can be found in every region of the globe. Human rights litigation is burgeoning in some parts of the developing world, notably in Latin American countries with fairly recent histories of severe rights abuses.⁶⁴ Several African countries have

⁶⁰ Merry 2006:172.

⁶¹ Hodgson 2003.

⁶² Frank Cross (1999) finds judicial independence to be crucial to the enforcement of domestic human rights, such as freedom from unreasonable search and seizure. La Porta et al. (2004) find that countries with greater judicial independence also have higher levels of freedom.

⁶³ See, for example, the model developed by Powell and Staton 2007.

⁶⁴ Lutz and Sikkink 2001.

used international treaties to shape their own jurisprudence on civil and political rights. Namibian courts have referred to the ICCPR to provide guidance in the determination of national discrimination law.⁶⁵ Botswanian courts have made reference to international instruments to determine reasonable criteria for a fair trial.⁶⁶ The Russian court has used international law to support its decisions in criminal justice cases as well, instructing the rest of the judiciary to apply the ICCPR over domestic legislation in cases involving petitions about the lawfulness of detentions.⁶⁷ In Japan, women have used the courts to realize their right not to be discriminated against in employment, and in Israel, the Supreme Court has ruled that certain interrogation practices do, in fact, constitute torture as understood by the Committee Against Torture.⁶⁸ Cases filed in the Indian Supreme Court in 1994 “asked the Court to order the government to show what steps were being taken to end discrimination in the personal laws consistent with the principles of CEDAW,” thus effectively forcing the government to articulate the extent of its compliance with its 1993 ratification commitment.⁶⁹

Litigation has grown in importance in many countries because of a growing network of “cause lawyers” with the interest and the expertise to push human rights cases through the courts. Cause lawyering – or legal work that is “directed at altering some aspect of the social, economic, and political status quo”⁷⁰ – is traditionally associated with the litigation campaigns of the NAACP in the case of the civil rights movement of the United States. In many parts of the developing world, it has evolved into a broader conception of “alternative lawyering,” which Stephen Ellman describes as legal work emphasizing “working with and organizing community groups rather than simply taking a random set of individual cases,” at times even deemphasizing litigation in favor of working with governmental agencies and using alternative dispute resolution methods, but almost always emphasizing legal literacy at the grassroots level.⁷¹

The question remains whether litigation is an effective way to achieve a real improvement in rights practices. Certainly, a strategy of using courts has its limits. Because it proceeds on a case-by-case basis, the absolute number of cases one could cite to illustrate this mechanism is bound to be small. Even where judiciaries are relatively independent, as in the United States, rules that restrict

⁶⁵ Tshosa 2001:110.

⁶⁶ Tshosa 2001:172.

⁶⁷ Danilenko and Burnham 2000:43.

⁶⁸ These and other examples of successful litigation based on human rights treaties are collected by a variety of NGOs. See, for example, <http://madre.org/articles/int/hrconv.html> (accessed 12 August 2008).

⁶⁹ Merry 2006:167.

⁷⁰ Sarat and Scheingold 1998:4.

⁷¹ Ellmann 1998:359.

access to the courts have been shown to be important barriers to successful legal mobilization.⁷² Courts typically do not have the resources to enforce their decisions against branches of government – including a conservative bureaucracy – determined to resist.⁷³ Gerald Rosenberg views litigation as a “hollow hope” for furthering social change, even in the United States, where courts tend to be independent and legal resources relatively plentiful.⁷⁴ He argues that litigation contributed marginally to the civil rights movement in the United States. The movement was succeeding in any case, Rosenberg argues; winning in court was not decisive in influencing rights outcomes.⁷⁵ Some researchers conclude that litigation is such a cumbersome way to proceed that some social movements are better off pursuing other, less status quo-preserving tactics.⁷⁶

A spate of research (largely centered on litigation in the U.S. civil rights case) has hotly contested Rosenberg’s conclusion, noting that litigation influences the way issues are “conceived, expressed, argued about, and struggled over.”⁷⁷ By mechanisms familiar to constructivist theorists, litigation contributes to the reframing of political demands in the legitimizing framework of rights. Moreover, litigation can be mounted with relatively few participants, thus helping to overcome the collective action problems⁷⁸ that often make it difficult to mobilize a broad coalition for “justice.” Thus, Robert Glennon’s analysis of the history of the U.S. civil rights movement concludes that successful litigation provided a “shot of adrenaline” during the Montgomery, Alabama, bus boycott that helped to consolidate the gains resulting from direct protest.⁷⁹ Alan Hunt holds out the “possibility that [even] litigation ‘failure’ may, paradoxically, provide the conditions of ‘success’ that compel a movement forward.”⁸⁰ Social movement leaders often choose to litigate strategically,⁸¹ and often *after* favorable laws have been passed, precisely in order to sustain the movement and to ensure favorable interpretation and enforcement.⁸²

⁷² Frymer 2003:486–8. On the potential for human rights litigation in the United States, see Tolley 1991. The point is that the potential exists, but it is relatively limited. Individuals’ access to courts varies greatly. The Supreme Court of India, for example, has decided that cases can be taken up on behalf of those in poverty who are unable to file for themselves and that such cases can be initiated simply by letter. See Ellman 1998:358.

⁷³ James Spriggs (1996) finds, for example, that a number of parameters influence the ability and willingness of administrative agencies effectively to overturn U.S. Supreme Court decisions.

⁷⁴ Rosenberg 1991.

⁷⁵ See also Rosenberg’s response to his critics (1992). With a similarly skeptical view that “legal mobilization” has a decisive impact on social movements or the rights they have espoused, see Brown-Nagin 2005.

⁷⁶ On the case of the environmental movement, see Coglianese 2001–2.

⁷⁷ Hunt 1990:320.

⁷⁸ Zemans 1983:698.

⁷⁹ Glennon 1991:61–2.

⁸⁰ Hunt 1990:320.

⁸¹ Including somewhat “fringe” groups, such as animal rights groups in the United States. See Silverstein 1996:227.

⁸² Burstein 1991; Burstein and Monaghan 1986.

International treaties, as part of domestic law, provide another opportunity for individuals (usually in cooperation with activist legal advisers) to claim, define, and struggle over a right that might not have a well-defined or well-tested counterpart in domestic law. The risk, of course, is that litigation risks loss and potential delegitimation, but even a loss can be useful publicity to a movement under some circumstances. A favorable ruling by an authoritative judicial body carries a great deal of weight in many countries. Such decisions can be ignored, but at a greater political cost than would be the case in their absence. Legislatures can often craft or recraft rules that denigrate the rights treaties are designed to protect, but this comes at a price as well. The Israeli Supreme Court, for example, ruled that interrogation practices allowing for moderate physical pressure contravened that country's obligations under the CAT, but the court also held that the Knesset was free to legislate a specific intent to override those obligations. Were it to do so, however, the Knesset would have to endure criticism for making Israel, in Stanley Cohen's words, "the only country in the world to legislate torture."⁸³ Bureaucracies, too, may resist. No one believes that a court victory alone produces permanent rights changes. Rather, the point is that availability of litigation – and the crucial role of a *treaty commitment* rather than customary international law (which is harder to establish empirically) or a mere norm – is a crucial legitimating lever and can interact positively with political mobilization generally. Especially when treaties have direct effects in countries with independent judicial systems and broad respect for the rule of law, litigation is potentially an important mechanism for compliance.

Group Demands: Rights and Mobilization

A third mechanism by which international human rights treaties can influence rights outcomes is through their strategic use as a tool to support political mobilization. This section begins with a discussion of the mobilization process and then argues that ratified treaties can interact with such processes to enhance the likelihood that individuals will mobilize to claim the rights the treaties contain. I first consider the social mobilization process itself and ask, under what conditions can citizens be expected to mobilize to claim a set of human rights from their political leaders? Second, I argue that international treaties influence the probability of mobilization. They do this in two principal ways. International human rights treaties influence the value individuals place on the right in question (the value of succeeding), and they raise the likelihood of success. Given the proper political opening, international human rights treaties can have a significant impact on domestic politics at the mass level.

⁸³ The quote can be found in an interview located at <http://www.abbc2.com/historia/zionism/torture.html> (accessed 12 August 2008).

Why Mobilize? Theories of Social Mobilization

Before discussing the role of international human rights law, it is useful to discuss why it is that individuals form or join groups to demand social or political change at all. The underlying issues are complex, but for individuals, we can think of mobilization as a function of two basic assessments: the *value* they place on the rights in question and the *probability that they will be successful* in their demands. The willingness to mobilize – to formulate a set of demands and to organize to press for them – can be thought of in terms of an individual’s “expected utility,” or the value of the outcome scaled by the likelihood that it can be realized. Individuals are much more likely to demand their rights when there is a perceived “rights gap” (there is much, potentially, to be gained), as well as a reasonable likelihood of success (a political and social environment that is relatively tolerant to such demands). The expected value of mobilization is highest when *the interaction* of these conditions is at its maximum.⁸⁴ People can hardly be expected to make a rights demand when there is practically no chance of succeeding, as in the case of immediate, harsh government repression. On the other hand, the motivation to demand is also low when the perceived value of the right demanded is marginal. Where rights are already well supplied and protected, the motive to demand more is fairly weak.

One reason people organize to demand political or social change is the sense that something is seriously wrong or unjust in their society. The concept of “grievance” has long been a central part of sociological theories of mobilization and plays a central role in many, if not most, accounts of social movements. Grievances can have many sources, depending on the nature of the society in question. Traditional explanations for grievances have emphasized sudden “structural strains” caused, in turn, by rapid social or economic change, by changes in power relations, or by structural conflicts of interest.⁸⁵ On the other hand, more “entrepreneurial” accounts suggest that given a basic latent discontent based on major interest cleavages, it is possible for energetic movement entrepreneurs to act without the rise of a significant new grievance. The point is not that grievances are manufactured *de novo* by such entrepreneurs but that they are able to tap into existing discontent, raising the chances of mobilization even in the absence of an abrupt structural upheaval.⁸⁶ To a large extent, we can

⁸⁴ Cost–benefit calculations of this kind are a central theme in what some scholars have dubbed the “second wave” of social movement theory. See, for example, Zirakzadeh 2006:235–6. The logic advanced in this section is related to the logic discussed in the literature on political violence and repression. This literature emphasizes that mild political openings in a formerly repressive regime can lead some groups to make their political demands violently and for the government to counter with redoubled political repression. See, for example, Buena de Mesquita et al. 2005; Fein 1995; Gurr 1986; Muller 1985.

⁸⁵ See, respectively, Gusfield 1968; Korpi 1974; plus McCarthy and Zald 1977 and Zald and McCarthy 1979.

⁸⁶ McCarthy and Zald 1977.

think of discontent as structural, arising from the existing political, social, and economic relationships within a given society. In some cases, of course, grievances may be sharpened and focused by leaders who may have their own interest in stimulating the rights demands of aggrieved individuals or groups.

The most significant *variable* – or conditions subject to change and manipulation in the fairly short-term – in explaining mobilization is the probability that demanding a right will, in fact, turn out to be *successful*. The probability of success can turn on exogenous change in the existing political space; mobilization stands a much better chance as authoritarian regimes begin to come under greater challenge generally, for example. The probability of success is also influenced by shifts in the power and influence of the social movement itself. “Resource mobilization theory” emphasizes that movement success is influenced by tangible resources (money, facilities, and means of communication) as well as intangible resources (legitimacy, experience, various forms of human capital or skills, etc.).⁸⁷ One of the most important resources for a movement’s success has been found to be support from actors who are not direct beneficiaries of the movement’s goals. As Alan Hunt has written, “. . . one of the most important features of any such strategic project is the concern to find ways of going beyond the limited expression of the immediate interests of social groups . . . such that they connect up with and find ways of articulating the aspirations of wider constituencies.”⁸⁸ Although there has been a good deal of debate over exactly which resources strengthen a group’s political position, generally the greater a nascent movement’s access to tangible and intangible resources, the better its chances of success.

The question of how such groups overcome collective action problems is still an issue. How do “the aggrieved” form an effective political force, considering that “justice” by definition is a collective good? The problem is compounded if the potential group of aggrieved individuals is geographically dispersed; it is mitigated somewhat if they are in relatively close geographical proximity.⁸⁹ One answer lies in cultivating group solidarity – strengthening group identity so that individuals incorporate outcomes for the groups into

⁸⁷ Freeman 1979.

⁸⁸ Hunt 1990:315–16. The campaign to ban child soldiers, for example, would never have gotten off the ground had it depended on the political voice of the world’s children to express demands for protection. Resource mobilization includes the ability to garner resources and political support from individuals and groups that sometimes end up speaking for rather than working with the aggrieved groups.

⁸⁹ Geography has been important for political mobilization of a broad range of latent political forces. In political economy, Busch and Reinhardt (2000) have found that protection is higher for geographically concentrated industries. In the rights area, studies have found that urbanization provided the geographical proximity helpful in organizing the southern black population in the United States (Wilson 1973). See also Handler (1978:16–18) who emphasizes the distribution (dispersed versus concentrated) of both costs and benefits in the likelihood of social mobilization.

their individual utility function.⁹⁰ Another answer lies in selective incentives. Divisible benefits are traditionally weak in the human rights area, although some have theorized the role that such incentives as career opportunities or individually bestowed moral approval may play for the entrepreneurial leaders themselves.⁹¹ While notions of group solidarity, moral commitment, and intangible rewards can take us some way toward understanding human rights mobilization, it is generally the case that resources for human rights organizations are likely to be undersupplied.

In short, the formation and success of social and political movements are often linked to political, legal, organizational, or social changes that reduce the costs of mobilization and improve the likelihood of success.⁹² International human rights treaties can prove to be an important resource in this regard. Such treaties are potentially important resources in domestic mobilization because, under some conditions, *they raise the expected value of mobilizing* to make a rights demand. As I discuss in the following two sections, they can change the value individuals place on succeeding as well as the probability of success.⁹³ In this way, treaties change the complexion of domestic politics in ways that make a net positive contribution to rights practices in many – though not all – countries around the world.

This is a “bottom-up” account of treaty effects that contrasts state-centered approaches prevalent in the international relations literature. When international relations scholars think of treaty effects, they are far more likely to have in mind the effects of an international agreement on states than on their citizens; on elites rather than on civil society. Martha Finnemore’s work emphasizes international organizations as the normative teachers of *state elites*. Harold Koh’s theory of transnational judicial process stems from transnational interactions among *Judicial elites*, which generate rules for future interactions, which are eventually internalized. Jon Pevehouse’s theory of democratization from the outside in and Iain Johnston’s account of Chinese socialization focus on the role that face-to-face elite interactions in regional organizations can play in sensitizing *bureaucratic elites* to their interests in democratization and regional cooperation.⁹⁴ Possibly for very good reasons, citizens play no role in these accounts. They must play a central role, however, in the diffusion of values for the

⁹⁰ Jenkins 1983.

⁹¹ Jenkins 1983:536.

⁹² Jenkins 1983.

⁹³ This formulation draws on both of the major strands of legal mobilization literature: that of legal behaviorism, which tends to “identify law primarily in instrumental, determinate, positivist terms” and interpretive approaches, which focus on “the intersubjective power of law in constructing meaning.” See the review of these literatures in McCann 2006. (Quotes from page 21.)

⁹⁴ See Finnemore 1993; Johnston 2002; Koh 1999; Pevehouse 2002. See also Checkel 2001, who argues that Ukraine’s elites’ attitudes toward nationality policy were subject to persuasion by European elites.

protection of individual rights. *Rights treaties affect the welfare of individuals.* If there is any international issue area in which socialization at the nonelite level is important, this should be it.⁹⁵

In the politics of social mobilization, law can play an important role. “Legal mobilization” is the term sociologists and other scholars have given to the act of invoking legal norms to regulate behavior. The law can be mobilized quite outside of the litigation processes described in the previous section. The law is mobilized whenever “a desire or want is translated into a demand as an assertion of one’s right.”⁹⁶ The making of claims based on legal rights is an especially effective way of asserting a political or social demand, because it grounds one’s claims in the legitimacy of law, on which most governments claim that their own legitimacy is based. Legal mobilization can be thought of as a form of political participation, not necessarily as a form of conflict containment or resolution. Indeed, scholars of legal mobilization have long recognized that law can be used as a political resource. Agents vie for control of this resource as they would for any other, sometimes leading to conflicts among groups (women and men; gays and straights; ethnic groups; dominant groups and dissidents) and between a group and a government.⁹⁷ Quite aside from the benefits (and risks) associated with litigation, legal mobilization in the broader sense of appealing to legal rights promotes movement organization and claim-making.⁹⁸

International human rights treaties are useful in this mobilization process. I argue that they are useful in two ways. They can be useful in introducing rights claims to potential claimants, helping them to imagine themselves as bearers of such rights and encouraging them to value the substantive content of the treaty in question. Treaties can increase the value that potential rights demanders place on a set of rights. Ratified treaties can also increase the likelihood of a movement’s eventual success in realizing its rights demands. The availability of international treaty law can thus increase agents’ expected value of social/political mobilization, in turn increasing pressure on governments to live up to their legal obligations. These treaty effects are discussed in the following two sections.

Treaties, Rights Demands, and the Value of Succeeding

Legal frameworks are important resources in social mobilization because they have a powerful influence over how individuals and groups understand their identity and define their interests. One of the most powerful treaty effects is the introduction of a new set of rights and a new understanding of rights claimants into the local political setting. Treaties are externally negotiated agreements,

⁹⁵ Jeffrey Checkel (1997) develops a framework in which the role civil society groups play is conditioned by the nature of domestic institutions, whether liberal, corporatist, or statist.

⁹⁶ Zemans 1983:700.

⁹⁷ Turk 1976:284.

⁹⁸ McCann 1994.

which are *potentially* a source of great influence in local polities. They often introduce ideas and conceptions that are foreign, new, or at least not well articulated in a given local setting. This is the source of their potentially radical power but also, ironically, of their irrelevance. The transformative potential of externally negotiated law depends importantly on the success of “translating” external norms for local audiences, a condition I address in greater detail subsequently.

A growing body of research seems to indicate that legal frameworks have a significant impact on how individuals understand their interests and even their identities. Part of the “educative role of law,” according to early work by Frances Zemans, is its ability to “change the citizenry’s perceptions of their interests.”⁹⁹ According to Patricia Ewick and Susan Silbey, legal frameworks are an important source of cultural schemas “that operate to define and pattern social life”¹⁰⁰ and, as such, exert a powerful influence over how people think of their rights and interests. New research on social movements focuses on such identity-formation processes and has found that people’s actions are structured by deeply held beliefs,¹⁰¹ which in turn respond, at least in part, to social conventions as reflected in legal arrangements.

Much of the evidence for these claims comes from studies of the influence of domestic legal frames on how people think about issues that concern them. Anna Maria Marshall’s research shows that women use legal frames as a criterion for understanding their experiences of sexual harassment on the job.¹⁰² Willima Eskridge, Jr.’s, research on equality in the United States found that “law contributed to group consciousness and motivation to seek greater equality by people of color, gay people, women, and people with disabilities. . . .”¹⁰³ He argues that law that discriminates or tries to end discrimination between or among groups is especially influential in hastening group identity formation. The process of using legal rights to enhance political mobilization and identity formation was crucial to identity formation of the U.S. civil rights movement. According to Elizabeth Schneider, civil rights activists “asserted rights not simply to advance [a] legal argument or to win a case, but to express the politics, vision, and demands of a social movement, and to assist in the political self-definition of that movement. We understood that winning legal rights would not be meaningful without political organizing to ensure enforcement of and education concerning those rights.”¹⁰⁴ Drawing on these and other studies, Alan

⁹⁹ Zemans 1983:697.

¹⁰⁰ Ewick and Silbey 1998:43.

¹⁰¹ Zirakzadeh 2006:235.

¹⁰² Marshall 2003.

¹⁰³ Eskridge 2001-2:451.

¹⁰⁴ Schneider 1986:605. See also Francesca Polletta’s (2000) recent study of the civil rights movement in the southern United States. She concludes that legal mobilization, including victories inside and outside of the courtroom, was a significant factor in overcoming the collective action problems of the movement.

Hunt advances a “Gramscian” perspective on rights that highlights their potential to change the discourse and thus to contribute to the political struggle.¹⁰⁵

International human rights agreements have the potential to influence domestic politics because they suggest new ways for individuals to view their relationship with their government and with each other. The ICCPR suggests that individuals have a clear sphere of freedom for participating in political life; the CERD suggests to racial minorities their right to participate equally in the social and political life of their community and country; the CEDAW suggests to women that they are men’s equals and entreats them to start viewing themselves in that light. In some societies, these suggestions will be superfluous (Scandinavian women may already view themselves as men’s equals). In others they will be resisted; no doubt the very act of framing a practice as a right will resonate to differing degrees in different cultures.¹⁰⁶ But in many cases, human rights accords will contain highly attractive principles for a quite receptive mass audience segment.¹⁰⁷ Some citizens may not have thought of a particular practice in rights terms at all. Others may have questioned the appropriateness of thinking that way. When this is the case, international legal agreements are important because they can “condition actors’ self-understandings, references, and behavior. . . .”¹⁰⁸ William Eskridge’s perspective is apt: “A social group defined and penalized by [local] legal stigmas will not have an incentive to organize so long as most of its members view their stigma as justified, acceptable, or inevitable.”¹⁰⁹ International legal standards that explicitly provide otherwise are useful alternative frameworks by which the oppressed gain a sense of political identity, legitimacy, and efficacy.

New research in social anthropology helps us to understand the processes by which international legal rights can influence the way local people form their identity as rights claimants and understand their interests. Sally Engle Merry’s study on translating international human rights into local justice is especially helpful in this regard. Merry focuses on the critical role of local individuals who are deeply rooted in a particular local social and political context but with extensive connections to international and transnational communities in translating human rights from the “universal” to the “local vernacular.” These actors – which in her case study of gender violence include national political elites, human rights lawyers, feminist activists and movement leaders, social workers and other social service providers, and academics – play a crucial role in bringing transnational cultural understandings to local settings.

¹⁰⁵ Hunt 1990.

¹⁰⁶ Cook 1993.

¹⁰⁷ “A social group defined and penalized by legal stigmas will not have an incentive to organize so long as most of its members view their stigma as justified, acceptable, or inevitable” (Eskridge 2001–2:439).

¹⁰⁸ Reus-Smit 2004:3. The influence of international law can be especially significant in this regard in transitioning countries. See, for example, Teitel 2000.

¹⁰⁹ Eskridge 2001–2:439.

Transnational programs and ideas are translated into local cultural terms by these agents, but Merry notes that in doing so, they “retain their fundamental grounding in transnational human rights concepts of autonomy, individualism, and equality.”¹¹⁰ Merry’s study suggests that individuals do not abandon their earlier values/perspectives; they layer new transnational human rights perspectives over them.¹¹¹ With the help of cultural translators, for example, indigenous women in Hong Kong developed a sustained critique of their problems in claiming property rights based on human rights as outlined in the CEDAW, and were much more successful in articulating and realizing their rights when they did compared to a frame that allowed the women’s plight to be interpreted as a mere family squabble.¹¹²

The strategy of using treaties to raise rights consciousness is observable in the activities of many groups and organizations. NGOs have often specifically positioned themselves to educate people about the rights contained in documents their own governments have signed. Relatively new rights organizations, such as those of the disabled rights movement, view treaties as an important way to raise public consciousness about rights issues in this area.¹¹³ The Coalition to Stop the Use of Child Soldiers “campaigns for all governments to adhere to international laws prohibiting the use of children under the age of 18 in armed conflict” in the context of its advocacy and public education functions.¹¹⁴ The newly negotiated International Convention for the Protection of All Persons from Enforced Disappearance (2005) is viewed by transnational rights organizations as “an extremely important development in the fight against forced disappearances and for the protection of victims and their families,”¹¹⁵ and these organizations advocate ratification as a tool for explicitly recognizing and educating people regarding a right not to “be disappeared” as a way to hold governments accountable. Francesca Polletta’s research on the U.S. civil rights movement cautions that such innovative rights framing is most likely to occur and to be effective “. . . in settings where social institutions (legal, religious, familial, economic) enjoy relative autonomy, and when organizers are at some remove from state and movement centers of power.”¹¹⁶ But in many cases, organizations are positioned to advertise the existence and contents of a treaty commitment that, if taken seriously, turns out to be inconvenient for the government and other power brokers, providing identities and rights models that run counter to commonly held conceptions.

¹¹⁰ Merry 2006:177–8.

¹¹¹ Merry 2006:180.

¹¹² Merry 2006:202.

¹¹³ Disability 2002.

¹¹⁴ See the Web site of the coalition at <http://www.child-soldiers.org/coalition/what-we-do> (accessed 12 August 2008).

¹¹⁵ See Human Rights Watch: <http://hrw.org/english/docs/2005/09/26/global11785.htm> (accessed 12 August 2008).

¹¹⁶ Polletta 2000:369.

Human rights treaties, in short, may contain persuasive new information and ideas that can influence the values and beliefs of a public for whose benefit the agreement was ostensibly designed. They can put local cultural or political practices in a more universalistic perspective, suggesting a right to which some might not have previously considered themselves entitled. *Ratified* treaties reveal new information regarding a government's formal complicity in the rights enterprise, signaling for domestic audiences the legitimacy of pursuing rights in this specific cultural and political context. Treaties can inform interests and change values. Admittedly, the meaning of rights contained in international conventions is hardly determinative, and there is much room for contention and struggle over just what it means to be a legitimate rights claimant.¹¹⁷ Nonetheless, treaties express collective intentionality,¹¹⁸ the full meaning of which cannot easily be controlled by local power brokers. The fact that one's own government may have participated in and assented to this collective project legitimates it as an acceptable set of values in the local context. Officially acknowledging a set of rights – publicly and possibly for the first time – can affirm its value in the public consciousness.

This view of law as framing new interests and even identities (as legitimate claimants) stands in contrast to several other perspectives. In contrast to the view of Jack Goldsmith and Eric Posner,¹¹⁹ I argue that moral/legal talk cannot be assumed to be costless, for it risks changing the values, identities, and interests of potential beneficiaries. Now, it could be that for the reasons alluded to in the previous chapter (short time horizons or poor information, which encourage strategic ratification), governments do not expect to bear the cost of new rights demands, but this does not prevent the potential for the educative or framing function of law described previously. This account is also distinct from the information role of international institutions, though information – about the existence of a public obligation, the nature of the rights at stake, and the rectitude of demanding compliance – is relevant. International institutions are not just a source of information in this account, as they are in Xinyuan Dai's analysis of monitoring regimes with weak enforcement; they are a source of new ideas as well.¹²⁰ "Information" in this conception is not exclusively about

¹¹⁷ A lot of new research on legal mobilization emphasizes that "The indeterminate meaning of rights . . . provides the [political or social] movement with space in which to shape its own identity" (Silverstein 1996:232). It also opens up the possibility, even the likelihood, of a conservative effort to delimit new understandings consistent with the interests of the dominant social and political power holders.

¹¹⁸ Collective intentionality is a key concept in much constructivist thought. See the discussion in Ruggie 1998.

¹¹⁹ See the discussion in Goldsmith and Posner 2002. The primary "rational" explanation for moral talk in international relations is that it is costless. Since to refrain from moral (or legal) talk might be interpreted as amoral (or a-legal), Goldsmith and Posner (2002) argue that there may be some benefit but little downside risk to making moral arguments.

¹²⁰ Dai 2005.

objective realities that may be hidden from voting publics. It is also about conceptual frames that may serve to animate the demands of those whose ability, regularly and at low cost, to turn their leaders out of office is much less secure. Treaties matter because they potentially change the ideas that inspire political organization and activity. Ironically, this treaty effect may be stronger – because it is more radical – in repressive regimes than in those that are already quite free.

Mobilization Success

The preceding argument is about the recognition of *values* that people are convinced are worth organizing to demand. This section is about the *resources* a ratified treaty can bring to the fight. As social movement theorists have recently emphasized, legal rules and institutions are themselves a type of political opportunity structure that enables and constrains social movements.¹²¹ Here I argue that a ratified treaty can do four things to improve the chances of successful mobilization. First, it precommits the government to be receptive to the demand; second, it may increase the size of the coalition; third, it enhances the intangible resources available to the coalition; and fourth, it expands the range of strategies the coalition may employ to secure the realization of their demands. Each of these effects will be discussed in turn.

Let us begin with one of the unique features of a ratified treaty compared to a broad international norm. A ratified treaty *precommits* the government to be receptive to rights demands. Ratification is not just a costly signal of intent; it is a process of domestic legitimization that some scholars have shown raises the domestic salience of an international rule.¹²² In most countries, governments are required to submit international treaties to the legislature and to secure at least a majority vote. Some countries have even higher ratification barriers: The United States requires treaties to be ratified with the advice and two-thirds consent of the Senate. In a few countries, ratification requires a majority vote in both of two legislative chambers. Westminster parliamentary systems traditionally have not required a formal vote of the parliament, but have evolved norms that ensure that that body basically approves the treaty before the executive formally ratifies. Obviously, in some countries, ratification is a meaningless political gesture, just as all votes of the legislature are meaningless. But where the legislature has any independent stature at all, ratification engages its reputation for meaningful political activity. This does not mean, of course, that a ratified treaty will be promptly and unproblematically implemented into domestic law. It does mean, however, that individuals or groups with demands consistent with a ratified treaty are more likely to encounter a legislature “primed” – because they are precommitted – seriously to consider their demands. Ratification increases the probability that the legislative body itself may be – or at least contain – important political allies.

¹²¹ Pedriana 2004. See also Gamson and Meyer 1996:289; O’Brien 1996:32.

¹²² Cortell and Davis 1996:456.

Ratification precommitment has a subtle effect on the politics of rule implementation. Precommitment makes it harder for a government that has secured domestic ratification to plausibly deny the importance of rights protection in the local context. Even ratification that could be mere lip service has an important influence on domestic politics. Kathryn Sikkink has written that “The passage from denial to lip service may seem insignificant but suggests an important shift in the shared understandings of states that make certain justifications no longer acceptable.”¹²³ The domestic act of ratification has even clearer implications for domestic understandings. As I have repeatedly argued, a citizenry has an even stronger motive than the international community to demand consistency in their government’s behavior; after all, they live with the consequences of this behavior on a daily basis. Disingenuous governments will face inconsistency costs and thus risk loss of a degree of domestic legitimacy to the extent that their populations expect commitments to correspond at least in a very broad way to policies and practices. Ratification of important human rights treaties has the potential to raise governments’ consistency costs at home and thereby to erode their domestic political support.

Rights demanders and their advocates work assiduously to expose the inconsistencies between precommitment and post-ratification behavior in countries around the world. Advocates for Tibetan rights include in their literature a list of the “relevant” human rights instruments that the People’s Republic of China has signed (and presumably violated) in that country’s treatment of ethnic Tibetans.¹²⁴ The Baha’i International Community refers to the ICCPR as one of “various international covenants on human rights that the government has freely signed” to legitimate its demands for religious freedom for the Baha’i living in Iran.¹²⁵ Groups that allege that the U.S. government has violated the privacy of U.S. citizens frame their complaints in terms of treaty violations for similar reasons.¹²⁶ Governments and even individual legislators who want to avoid apparent inconsistencies in their ratification position and post-ratification program are potential allies of a nascent rights movement.

The availability of legislators as allies leads directly to the next point: Ratified treaties offer opportunities to increase the size of the pro-rights coalitions in ways that would be less available without the ratified treaties. One of the most important insights of resource mobilization theories of social movements has been to point to the importance of out-of-group supporters in joining the initial cause – white students joining the civil rights movements of the 1960s, for

¹²³ Sikkink 1993:415.

¹²⁴ See, for example, Appendix 4 to the 2004 Annual Report of the Tibetan Centre for Human Rights and Democracy at http://www.tchrd.org/publications/annual_reports/2004/appendices/4_ratifi.html (accessed 12 August 2008).

¹²⁵ See their Web site at http://denial.bahai.org/004_5.php (accessed 12 August 2008).

¹²⁶ See, for example, a 21 December 2005 press release of the Meiklejohn Civil Liberties Institute, Berkeley, California; posted at <http://www.uslaboragainstwar.org/article.php?id=9849> (accessed 12 August 2008).

example. The ratification of a treaty has the potential to bring in a broader range of allies to join the core beneficiaries in demanding rights implementation. One group might be individuals who oppose or want to constrain the government for reasons that do not relate explicitly to their own individual current rights struggles. Government opponents might decide to seize on the rights issue – playing up the inconsistency discussed previously – to embarrass or even bring down a government they oppose on other grounds. A ratified treaty could serve as a focal point for tactical support of a pro-rights coalition by a broad range of government opponents.

Second, as a form of law, ratified treaties are more likely than international norms or treaties the government has rejected to engage the interest of the legal profession. The mechanism here may be of two kinds. Legal interest groups may take a new interest in the issues covered by the treaty, debating, publicizing, and interpreting its meaning within the local legal system. Additionally, legally trained individuals – strongly motivated by selective incentives – may decide to lend their professional expertise to the nascent rights movement, providing the legal, technical, and advocacy skills that many students of social movements have noted are critical to their success.¹²⁷

“Internationalists” – individuals or organizations that have strong material interests in maintaining good public relations with the outside world – may also have an incentive to support a local pro-rights movement. After all, treaty ratification is also an international commitment. I have argued that it is an international commitment that is unlikely to be enforced reliably, but even a small probability of enforcement is a serious worry for domestic groups that depend heavily on good political relationships with the outside world. In some countries, the pro-rights group will be supported in their quest by pro-internationalist groups that believe they have more to gain from their government’s rights cooperation than from its intransigence. While they may be only mildly committed to rights per se, internationalists may support their demands *in the presence of a ratified treaty* as an insurance policy against the small probability that to renege could introduce political friction into their external relations – their foreign trade, travel, or investments. In this way, a treaty can change a *pro-rights* coalition into a *pro-compliance* coalition. The latter is almost by definition larger than the former. In short, a ratified (but unimplemented) treaty provides an opening for governmental opponents, actors with legal expertise, and actors with international interests to ally with a nascent rights movements for tactical reasons that may be orthogonal to those of rights claimants themselves.

Third, a ratified treaty provides *intangible resources* to a nascent rights coalition. The most important of these is legitimacy, which in turn can be

¹²⁷ Note, however, that there is a debate in the legal mobilization literature that legal tactics divert movement resources to lawyers and away from grassroots mobilization, to the detriment of the movement. See, for example, Brown-Nagin 2005; McCann 1986; Rosenberg 1992; Scheingold 1974.

parlayed into further political support. Treaties are especially useful in establishing the legitimacy of a claim because they represent global agreement on “best practices” and as such offer a fairly clear statement of the nature (and limits) of the demands the group is making. In the Russian context of the early 1990s, for example, Gennady Danilenko writes that “The legitimacy attributed to international human rights standards was . . . based on the general perception that they expressed ‘universal human values’ shared by the majority of the international community.”¹²⁸ This is particularly important when local rights standards are new, in question, or in flux.¹²⁹ In these cases, treaties play crucial roles in providing benchmarks, focal points, and models. As a benchmark, they provide standards against which both the demands of the populace and the actions of the government can be assessed. The treaty provides reassurance to citizens that their rights demands are not unreasonable, making them more willing to mobilize. As a focal point, a ratified treaty can also help to coordinate and prioritize the efforts of the coalition. In India, for example, the National Commission for Women (NCW) was set up in 1990 to safeguard women’s interests by reviewing legislation, intervening in individual complaints, and undertaking remedial actions, but they seized on India’s 1993 ratification of the CEDAW to pressure the Indian government to implement specific programs.¹³⁰ Finally, ratified treaties provide a resource as models for domestic legislation. Sally Engle Merry’s study of India and China reveals the extent to which the CEDAW has effectively been imported into a number of important legislative protections for women.¹³¹

Finally, treaty ratification increases the range of strategies a social movement can use to secure policy change. To circle back to the point developed previously with respect to litigation, a ratified treaty has in many countries the status of law and thus offers a unique point of entry into an important indigenous branch of local governance – the courts. And to reiterate the point stressed earlier, such cases are politically important for rights movements even if they do not result in a decisive legal win.

Treaty ratification also provides a political opening for rights demanders in polities where the courts are unlikely to be accessible or reliable. The voluntary assent of a government to a legal standard of behavior creates room for strategies of “rightful resistance,” or the ability of individuals and nascent social movements to use officially sanctioned levers in pressing their rights claims. In Kevin O’Brien’s useful formulation, “Rightful resistance is a partly institutionalized

¹²⁸ Danilenko 1994:459.

¹²⁹ These are the conditions under which Jeffrey Checkel (2001) argues that international norms become most “persuasive.”

¹³⁰ Merry 2006:170–1.

¹³¹ Merry cites the Indian 2001 draft domestic violence law, which mentions CEDAW; she also notes that the Law of the People’s Republic of China on the Protection of Women’s Rights and Interests is based on CEDAW (2006:167).

form of popular action that employs laws, policies, and other established values to defy power holders who have failed to live up to some ideal or who have not implemented a popular measure.” The fact that some government official or officials participated in the act of ratification opens the possibility of exploiting divisions among the powerful. As O’Brien notes, “When receptive officials, for instance, champion popular demands to execute laws and policies that have been ignored, unexpected alliances often emerge and simple dominant–subordinate distinctions break down. On these occasions, popular resistance operates partly within (yet in tension with) official norms.”¹³² Rightful resistance employs the rhetoric and commitments of the powerful to curb political or economic power. Treaty ratification contributes to this strategy by providing a lever to critique the government with its own commitment. Whether a government is sensitive to this critique or not depends on its ability to insulate itself from rights-based popular demands.

To summarize: The ratification of international treaties influences the chances of successful social mobilization. I have provided reasons to expect this influence to work in a positive direction – toward more effective mobilization as expectations of success increase. But these claims are about broad tendencies based on expected influences in domestic politics. In common with other mobilization theorists, I recognize that these kinds of claims can stimulate counter-reactions and conservative opposition. There is nothing inevitable about the triumph of treaty commitments over domestic practices, any more than it is inevitable that all rights appeals will prove irresistible.¹³³ On balance, however, ratified treaties provide a political opening for rights demanders that is more favorable than is the case in their absence. In combination with their educative function, ratified treaties tend to enhance the motive as well as the means for group mobilization. They tend to increase the expected value of such mobilization.

EXPECTATIONS

The three mechanisms through which treaties might have effects in domestic politics – altering the national agenda, leveraging litigation, and empowering political mobilization – suggest some fairly precise expectations for empirical research. First of all, they suggest that treaty ratification should *generally* have positive effects on various measures of government behavior associated with the obligations contained in ratified treaties. However, none of these mechanisms suggest that international law has a homogeneous effect across all polities. Each mechanism suggests that treaties can be more or less influential *under particular institutional or political conditions*. The purpose of this section is to make this

¹³² O’Brien 1996:iii and 32.

¹³³ Hunt 1990.

point explicitly for each of the channels through which treaties potentially influence domestic politics (recognizing, of course, that these channels are not at all mutually exclusive).

Altering the National Agenda

I have argued that treaties can have an important influence on national politics simply because they alter the substantive priorities of the legislative agenda compared to what it would have been in the absence of an exogenously presented treaty obligation. This is a modest but not a trivial mechanism. It does not posit a change in the information, preferences, or resources of any domestic political actor. It simply notes that treaty effects – especially legislative changes – can result from a relatively uncontroversial international commitment. Nevertheless, these changes would not have occurred in the absence of the intrusion of international politics into the domestic legislative space.

Agenda effects of the kind described here should be most noticeable in indicators of legislatures output and harder to detect in indicators of changes in actual practice. Moreover, agenda effects should be most noticeable in countries that are most likely to have been among the sincere ratifiers discussed in the previous chapter. The prime candidates for the agenda-setting effects of international legal agreements are expected to be the Western democracies. Finally, agenda-setting effects are likely to be most pronounced in polities in which legislatures tend to have relatively greater control over the national legislative agenda. On the one hand, we might expect greater impact to a treaty negotiated and introduced by the executive if this gives him or her unique agenda-setting power vis-à-vis the legislature. This would lead us to expect a greater treaty agenda-setting impact in presidential systems. If this pattern prevails, we might infer a greater tendency for treaties to empower a president relative to the legislature.

On the other hand, once a treaty has been introduced for ratification (once again, emphasizing that this is a prerogative of the executive), the ability to get legislation passed in compliance with treaty obligations is higher where the government faces no important resistance to placing related legislative reform on the legislature's agenda. If simply altering the national agenda is an important mechanism by which legislative compliance is observed, we might expect ratification to lead to legislative changes more often in systems where legislatures exert fewer effective constraints on the executive. The result in the aggregate is likely to be ambiguous, since agenda changes are likely to be larger but fewer in presidential systems and smaller but more frequent in parliamentary ones, where the government already has a stronger legislative agenda-setting role (making change from the status quo less significant but also more frequent). Overall, *the ideal typical case where we might expect strong agenda-setting effects from treaty ratification is in a highly democratic parliamentary or*

presidential system. These are hardly, of course, difficult cases for human rights treaty compliance, but they may nevertheless constitute evidence of an important mechanism by which international norms are imported into domestic law.

Leveraging Litigation

In many if not most cases, the political consensus for compliance and implementation may not be as strong as in the agenda-altering scenario previously described. Ratified treaties may encounter resistance flowing from incompetence to inattention to downright opposition from the government of the day to the permanent bureaucracy to various societal powerbrokers. But in contrast to norms and even international custom, treaties are explicit statements of a legal obligation to comply with their terms. Treaties are laws in most countries. Under a circumscribed set of conditions, they can be used to litigate in national courts, which, I have argued, can influence the further development of rights jurisprudence, alter the political costs of noncompliance, and, equally important, stimulate the politics of rights mobilization going forward.

Litigation can be expected to enhance treaty compliance only under a limited set of circumstances. Specifically, for litigation to be an important compliance mechanism, treaties have to be enforceable in domestic courts and litigation itself must be meaningful. If litigation – or the potential for meaningful litigation – accounts for changes in rights protection, then we should expect treaties to have their most significant impact where respect for judicial decisions is likely to be highest. *Evidence that treaties have stronger effects in countries with more independent judicial systems would be consistent with the litigation mechanism.* Where courts are relatively free from political interference, treaties as legal instruments should have their greatest potential to influence policy.

Empowering Political Mobilization

Treaties can change values and beliefs and can change the probability of successful political action to achieve the rights they promulgate. I have argued that a ratified treaty can effectively raise the expected value to potential rights holders of mobilizing to demand their government's compliance. For these reasons, we should expect treaty effects to show up in countries' compliance behavior. Consider first the *value* a nascent group is likely to place on the contents of a human rights treaty. A treaty dealing with civil or political rights would likely duplicate a number of existing guarantees in a stable democracy. The treaty itself would likely add very little to the rights already enjoyed in such a polity. The marginal value of an additional right in a rights-rich environment is likely to be small. On the other hand, an individual's welfare gain associated with the realization of even basic civil and political rights in a highly repressive regime or even basic recognition of equality in a highly discriminatory one is potentially

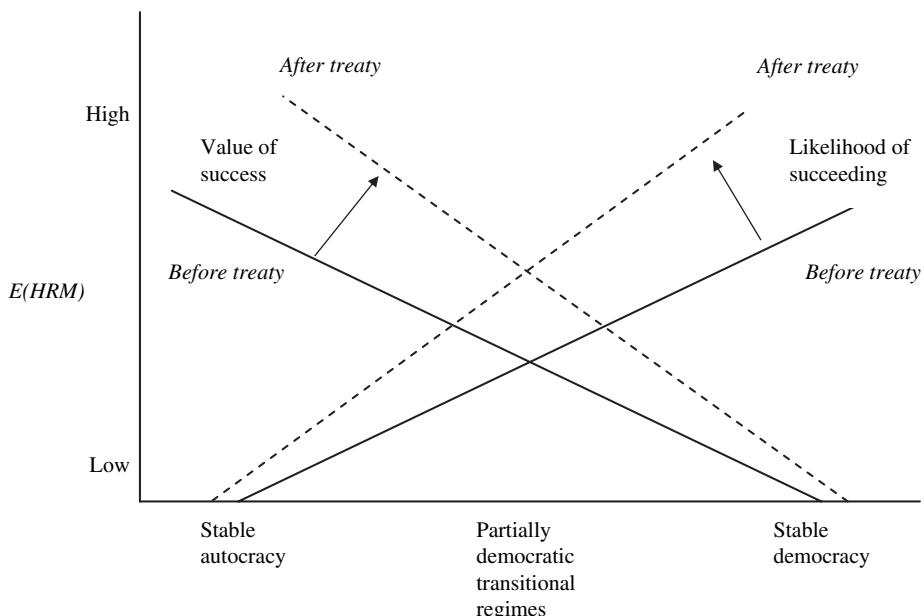


Figure 4.1. Influences on Human Rights Mobilization in Stable Autocracies, Stable Democracies, and Partially Democratic or Transitional Regimes.

very high indeed. The value of securing treaty compliance is much higher in a repressive or discriminatory setting than in a liberal democracy, which has a wide variety of domestic guarantees already in place. This is depicted as a downward-sloping relationship in Figure 4.1.

At the same time, the probability of *successfully* demanding a civil or political right is likely to be low in a highly repressive environment. Such demands are likely to be met with repression in stable autocracies or regimes rooted in discrimination. Democracies tend to be highly responsive to citizens' demands. The presumption is not only that individuals have basic civil and political rights and equality before the law; if they request it, they are also likely to get a ballot in their native language, be able to register to vote when they renew their drivers' licenses, and get a ride to the polls. All the accoutrements of freedom – a free press, free assembly, free speech and expression – increase the likelihood that a demand will be given a fair hearing.¹³⁴ Thus, the probability is relatively high that potential demanders will succeed in their rights claims. The probability of succeeding is depicted as upward-sloping in Figure 4.1.

¹³⁴ Eskridge notes in his study of the civil rights movement in the United States that the broad range of civil and political freedoms contributed to the “massness” of the movement and its ultimate success (2001–2:452).

The treaty effects via social mobilization are illustrated with the dashed lines. A ratified human rights treaty can increase the value an individual places on succeeding in securing a policy change, often by framing the issue itself in rights terms. We should expect treaty effects to be minimal in a stable democracy, where international agreements contribute little to prevailing beliefs and understandings. Citizens in stable democracies are already apprised of their rights and do not need a treaty to shore up these beliefs and values. The situation in autocracies is fundamentally different. Individual civil and political rights are existentially denied, brutally repressed, and delegitimated constantly. Citizens identify much more readily as subjects of the state than as individuals with an autonomous right to participate in the political and social life of the country. The potential for value reorientation is much greater in an autocracy, and a ratified treaty suggests that *even my government agrees – formally and publicly – that I can legitimately claim some individual rights vis-à-vis the state.* When this happens, treaty effects show up as a steepening of the line representing the value an individual places on succeeding in a rights demand.

I have argued that treaties can also influence the expected value of mobilization by increasing the chances of success. But it is very possible that this influence varies across regime types as well, at least for civil and political rights. The mechanisms I have outlined by which treaties increase the likelihood of a successful mobilization are more likely to prevail in a democracy than in an autocracy.¹³⁵ Take the strategy of litigation as one example. The political control typically exerted over the judiciary in autocratic polities forecloses litigation as a realistic alternative. Treaties have played a much more important role in litigation in the highly democratic and newly democratic countries – from Canada to Australia, from Argentina to Israel – than they have in autocracies. As legal instruments, they are a much greater resource in countries where law can be used in the courts to constrain political actors. Treaties have institutional traction in democratic polities (relative to autocracies); the effect is to steepen the line representing the likelihood of success.

When we combine these arguments, some interesting expectations emerge. Figure 4.2 graphs the expected value of mobilizing to demand a right (value of succeeding times probability of success) with and without a ratified treaty obligation. Rights mobilization is low in autocracies because people are afraid of the consequences. Treaties may instill a new identity as a rights holder, but individuals run up against “brute facts” and are deterred from making much of a demand. Rights mobilization is relatively low in democracies as well: Even though democratic governments tend to be responsive (increasing the

¹³⁵ Much of the law and society literature has come to recognize the conditional nature of the power of legal mobilization. According to Michael McCann, “Legal mobilization does not inherently disempower or empower citizens. How law matters depends on the complex, often changing dynamics of the context in which struggles occur” (2004:519).

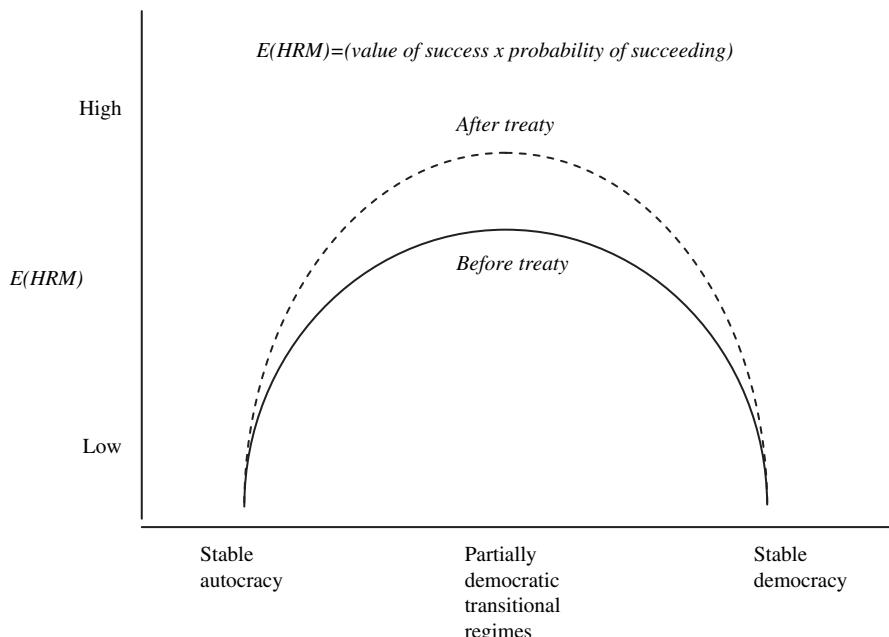


Figure 4.2. The Expected Value of Human Rights Mobilization in Autocracies, Democracies, and Partially Democratic/Transitional Regimes.

probability of success), it is hard to get excited about mobilizing where the n th right is of decreasing marginal utility. International human rights treaties are largely redundant.

Where we are likely to see the most significant treaty effects – at least with respect to civil and political rights – is in the less stable, transitioning “middle ground.” In these countries, individuals have both the motive and the means realistically to press their governments to take international human rights treaties seriously. Treaties can still play a legitimating function, reassuring a nascent coalition that their demands are legitimate and solidifying their identity as individuals with a moral and legal case to make vis-à-vis their government. Mobilizing is meaningful, even exciting, but not nearly as dangerous as in stable autocracies that tolerate no opposition. Treaties create additional political resources for pro-rights coalitions under these circumstances; they resonate well with an embryonic rule of law culture and gather support from groups that not only believe in the *specific* rights at stake, but also believe they must take a stand on rule-governed political behavioral in general. The courts may be somewhat corrupt, inexperienced, or even incompetent, but they are not nearly as likely to execute the government’s will as loyally as in a stable autocracy. International human rights treaties may be in their most fertile soil

under such circumstances. As we shall see, the consequences for rights compliance can be profound.

CONCLUSIONS

To the question “why – or under what conditions – do governments comply with their international human rights treaty commitment?” this chapter has proposed that we look closely at domestic mechanisms. None of the international explanations for international human rights compliance are particularly plausible. Globally centralized enforcement is a chimera; despite the rise in state-to-state accountability chronicled in Chapter 2, states simply do not have a strong and consistent interest in enforcing human rights agreements in other countries. The assumptions underlying theories of self-enforcing agreements are suited for issues involving mutual gains and reciprocity – two assumptions that are a stretch, if not completely inappropriate, in the human rights area. Theorists also underestimate the collective action problems associated with reputational sanctions; governments have typically been reluctant to impose costs of any description on all but the most egregious rights abusers. In the absence of such costs, it is difficult to view international human rights treaties as costly commitments to the international community of states. Nor are international signaling models very helpful. They see treaties as screens but not *constraints* on state action. High *ex ante* costs lead to an interpretation that only the highly committed are likely to sign the treaty in the first place. This is interesting when a costly signal is necessary in order for two or more states to realize a joint gain, but it is less relevant if we are looking for treaty effects on an individual government’s behavior.

I have advocated a theoretical reorientation of the compliance problems premised on the highly plausible stipulation that nobody cares more about human rights than the citizens potentially empowered by these treaties. No external – or even transnational – actor has as much incentive to hold a government to its commitments as do important groups of its own citizens. Citizens mobilize strategically. But these strategic calculations are influenced by what they value (or come to value) as well as the probability of succeeding in realizing these values. An international treaty regime has the potential to influence both the ideational and strategic components of mobilization’s expected value. Treaty ratification will be shown in the next four chapters to improve rights practices and outcomes around the world. As we will see, certain civil rights, women’s equality, the protection of children from exploitation, and the right of individuals to be free from officially sanctioned torture have improved once governments have explicitly made relevant treaty commitments. This chapter has made a case for the power of domestic mechanisms – new agendas, litigation, and especially social mobilization – in harnessing the potential of treaties to influence rights practices. These effects should not always be thought of as

unconditional. At least in the case of civil and political rights, a treaty's greatest impact is likely to be found not in the stable extremes of democracy and autocracy, but in the mass of nations with institutions in flux, where citizens potentially have both the motive and the means to succeed in demanding their rights. The following four chapters examine the data and cases and find a good deal of hard evidence for the positive impact of international law across several indicators of human rights.

Introduction and overview

THOMAS RISSE AND STEPHEN C. ROPP

More than ten years ago, Thomas Risse, Stephen Ropp, and Kathryn Sikkink co-edited *The Power of Human Rights: International Norms and Domestic Change*, a volume whose centerpiece was a spiral model of human rights change (PoHR in the following, see Risse *et al.* 1999). PoHR was published on the occasion of the fiftieth anniversary of the Universal Declaration of Human Rights and ten years after the peaceful revolutions in Central Eastern Europe which then ended the Cold War. More than a decade later, dictators are on the run in the Middle East. These political changes in Tunisia, Egypt, Libya, and elsewhere are having profound effects on this region of the world, including the human rights situation there (see Chapter 10).

Over the past ten years, human rights policies have also changed considerably: First, we witness the gradual emergence of a new model of criminal accountability used by states acting collectively through the International Criminal Court (ICC) to hold individuals responsible for human rights violations (Deitelhoff 2006; Sikkink 2011). And a new international norm has emerged, the Responsibility to Protect (R2P), referring to the responsibility of the international community to intervene – by military means, if necessary – if state rulers are unwilling or incapable of protecting their citizens from gross human rights violations (Evans 2008; Weiss 2005). R2P was recently put to a test with the Western intervention in Libya which had been endorsed by the United Nations Security Council and backed by the Arab League as well as the domestic opposition in Libya.

Second, we see an increasing recognition by states and other actors in the human rights field that weak or limited statehood has become a major obstacle with regard to domestic implementation and compliance. Limited statehood refers to parts of a country's territory or policy areas where central state authorities cannot effectively implement or enforce central decisions or even lack the monopoly over the means of violence (Risse 2011b; see Chapter 4).

We thank the participants of the two workshops in Wyoming in August 2009 and in Berlin in June 2010 for their detailed comments on the draft of this chapter. We are particularly grateful to Arie Kacowicz, Kathryn Sikkink, and three anonymous reviewers of Cambridge University Press.

Third, private actors such as firms and rebel groups are increasingly committed to complying with international human rights standards in a direct way rather than through the mechanisms of domestic law. Within companies, for example, we can observe an emerging international norm of corporate social responsibility that embeds human rights standards in corporate doctrine (e.g. Prakash and Potoski 2007; see Chapters 11 and 12; regarding rebel groups see Chapter 13). Moreover, other private actors, such as families and religious communities, are increasingly recognized as violators and subject to international campaigns – but not yet to consistent governance (Brysk 2005; see Chapter 14).

Last but not least, human rights scholarship has evolved considerably. Human rights research of the 1990s was characterized by comparative case studies as the dominant approach (e.g. Brysk 1994; Clark 2001; Hawkins 2002; Keck and Sikkink 1998; Risse *et al.* 2002). This has changed in that researchers using quantitative methods have begun to investigate the processes and mechanisms by which international human rights norms spread (particularly Hafner-Burton 2008; Simmons 2009). At the same time, international lawyers have become aware of the increasing social science scholarship on human rights, while political scientists started to take the particular characteristics of law seriously (see e.g. Alston and Crawford 2000; Goodman and Jinks 2003; in general Goldstein *et al.* 2000).

This combination of political and academic developments strongly suggests that we take a fresh look at the past twenty years of human rights research. On the one hand, the socialization mechanisms identified in the original PoHR for turning international law into domestic practices have generally held up well in the “laboratory” of subsequent empirical testing. More specifically, we see that much of the recent quantitative work seems to support our earlier largely qualitative findings (see Chapter 3). These mechanisms of change can also be applied to the new human rights agenda, particularly with regard to private actors and their compliance with international norms.

On the other hand, we recognize that our original work on human rights had several weaknesses. First, we under-specified the processes and scope conditions by which and under which states as well as private actors could be moved from commitment to human rights norms to actual compliance with them. Second, our earlier work assumed the presence of fully functioning states, suggesting in turn that compliance with human rights norms was a matter of state commitment and willingness rather than of institutional capacity. “Limited statehood” challenges this assumption and forces us to take a fresh look at the compliance *problématique*. Finally, we did not look at compliance with human rights norms by powerful states like the United States or the People’s Republic of China (see Chapters 8 and 9). This would seem to be a particularly important task in light of post-9/11 US non-compliance during the George W. Bush administration with the anti-torture norm and China’s continuing resistance to human rights pressures.

In this volume, we concentrate on the following research question: *Under what conditions and by which mechanisms will actors – states, transnational corporations, other private actors – make the move from commitment to compliance?*

This chapter proceeds in five steps. First, we recapitulate the spiral model of human rights change as developed in PoHR. Second, we introduce this volume's own unique focus on the processes leading from commitment to compliance, define the respective terms, and discuss the book's expanded focus – not only on a much broader range of actors but also on a more inclusive set of human rights. Third, we take a closer look at the mechanisms and modes of social action that we believe can move these various targeted actors from commitment to compliance; here, we build upon and further specify the mechanisms described in the original spiral model. Fourth, and most important, we introduce the centerpiece of this book's theoretical argument – namely the impact of a set of scope conditions under which movement by state and non-state actors from commitment to compliance is more or less likely to occur. These scope conditions are then evaluated in subsequent empirical chapters. We conclude with a short description of the plan of the book.

The “spiral model” of human rights change revisited

We begin with a brief description of the spiral model of human rights change originally developed in PoHR. The key questions we wished to ask in PoHR were whether it was possible to model the various processes involved in the movement from norm expectation to real country-level results; and, if so, could we document the existence of these processes empirically through the use of country case studies of change in state human rights practices?

In attempting to answer these questions, our theoretical point of departure was the work of a well-known group of social constructivists who had been looking at the relationship between ideas and social processes in a number of diverse issue areas (Adler, 1997; Checkel 1998; Katzenstein 1996; Kratochwil 1989; Wendt 1992). The actual “spiral model” of human rights change that we developed in PoHR built upon work on the “boomerang effect” that had previously been done by Margaret Keck and Kathryn Sikkink (Keck and Sikkink 1998). Incorporating some of their insights about the causal relationships between various state and non-state actors and associated processes, we sought to come up with a more specified conceptualization of these relationships and processes that could be graphically represented.

The eventual result of these efforts was the “spiral model” of human rights change, for which we sought empirical evidence using a comparative case study approach. In our model, we identified three distinct types of socialization processes (instrumental adaptation, argumentation, and habitualization) that

appeared to work together to socialize non-compliant states to human rights norms during a series of five distinct phases (see Figure 1.1):

- (1) *Repression*: there was an initial phase during which the leaders of authoritarian regimes engaged in repression. While the degree of repression that the various regimes in our case studies engaged in varied widely from the quasi-genocidal behavior found in Guatemala (Ropp and Sikkink 1999) to Tunisia's "softer" neo-patrimonialist variant (Gränzer 1999; see Chapter 10), the resulting informational vacuum made it extremely difficult for opposition groups to convince authoritarian leaders that they had anything to deny. As a result, this initial phase tended to be a long drawn-out affair during which none of our three socialization mechanisms worked particularly well.
- (2) *Denial*: if transnational groups eventually succeeded in gathering sufficient information on human rights violations to initiate the advocacy process, our spiral model posited and our case studies documented a second phase that we labeled denial. While the domestic opposition usually remained too weak during this phase to mount a serious challenge to the regime, the increased lobbying of international human rights organizations and of sympathetic democratic states by advocate groups often evoked outraged "How dare you!" denials from officials in repressive states. Such denials reflected a continuing refusal to recognize the validity of international human rights norms and thus an unwillingness to submit themselves to international jurisdiction in such matters. However, we also found this denial phase to be of critical importance in that discursive engagement in any form and no matter what the nature of the "conversation" opened the door to the process of international socialization.
- (3) *Tactical concessions*: we found the third phase of our spiral model to be a particularly precarious one, characterized by a repressive state's use of tactical concessions in order to get the international human rights community "off their backs." These concessions normally included measures such as releasing a few political prisoners, showing greater tolerance for mass public demonstrations, and/or signing up to international treaties. We found that their use of this instrumental logic and subsequent making of what they believe to be "low cost" tactical concessions had an important secondary effect in that it facilitated the rapid mobilization and further normative empowerment of domestic advocacy groups. We found this phase of tactical concessions to be particularly precarious because the government could react to this rapid increase in mobilization either by engaging in unrelenting repression or by making even more generous tactical concessions.
- (4) *Prescriptive status*: while the tactical concessions phase tended to be dominated by a state logic of instrumentality, we found that the "terrain of contestation" shifted radically during phase 4 when states granted human rights

norms prescriptive status (see chapters on Eastern Europe and South Africa, Black 1999; Thomas 1999). The “prescriptive status” phase was characterized by a well-defined set of state actions and associated practices such as ratifying relevant international treaties and their optional protocols, changing related domestic laws, setting up new domestic human rights institutions, and regularly referring to human rights norms in state administrative and bureaucratic discourse.

- (5) *Rule-consistent behavior:* we called the fifth and final phase of our model “rule-consistent behavior,” i.e. behavioral change and sustained compliance with international human rights. In hindsight, we view this phase as involving a set of sub-processes that were somewhat under-specified. To the extent that we did specify these sub-processes in PoHR, we viewed them as consisting of a two-level game at both the domestic and international level that pitted proponents of actual implementation of now prescriptively validated human rights norms against their opponents. From this perspective, sustainable change in actual behavior that was consistent with these norms was viewed as the result of local pro-change groups being able to leverage international support in such a way as to eventually triumph over their domestic opponents.

As mentioned above, we sought empirical evidence for the general validity of our model by using the comparative case study method. Our initial operating assumption was that, by selecting paired country cases of human rights “success” and “failure” in a number of different world regions, we would be able to tease out the various factors that made a difference as they related to the five phases of our model. For “success stories” during the 1980s, we chose Chile, South Africa, the Philippines, Poland, and the former Czechoslovakia. The more difficult cases included Guatemala, Kenya, Uganda, Morocco, Tunisia, and Indonesia. In the meantime, scholars have extended the analysis to China, Egypt, Turkey, and Israel (see Chapter 2).

After examining the evidence gathered from country-level field research that was conducted by our team of German and American scholars, we concluded that the socializing mechanisms of change that we had built into our spiral model had a good deal of explanatory power for most of the individual cases. More importantly, the phased processes of human rights change specified by the model appeared to be generalizable across different types of political regimes, socio-economic systems, and cultural regions. While human rights progress was often uneven and our various phases occurred asynchronously in different countries over time, there was a clearly identifiable pattern of human rights progress that we could also model as a larger norms cascade (Finnemore and Sikkink 1998; see also Haglund and Aggarwal 2011 for a discussion of economic and social rights). Over three decades from the 1960s until the 1990s, the various phases during which human rights change occurred grew progressively

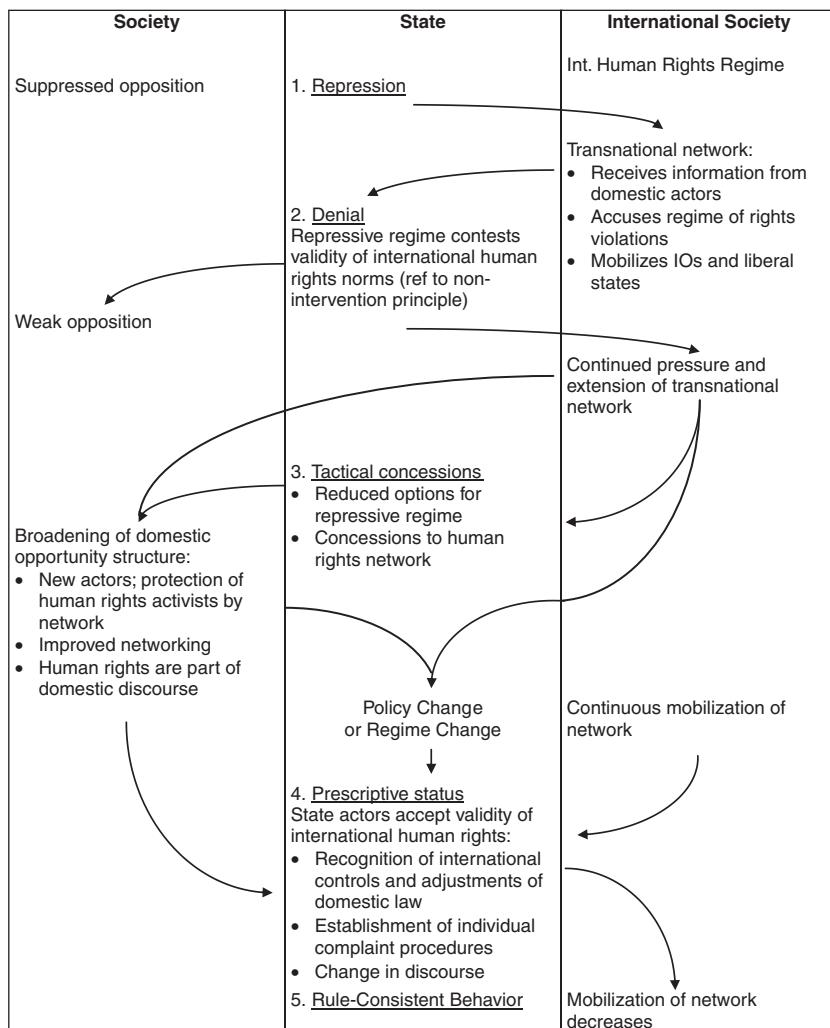


Figure 1.1 The “spiral model” of human rights change

shorter, leading to a “speeding up” of improvement in the overall global human rights situation.

Because we chose to model these causal processes, we opened ourselves up to both praise and criticism within the community of scholars working on human rights issues. Some of our scholarly critics emphasized certain sins of commission such as the fact that the spiral model seemed to “smuggle in” a hidden ideological agenda and that there was an associated linear teleological bent to the analysis. Additional alleged sins of commission included problems with the

measurement and operationalization of key variables, cases where the author's application of the model to a particular country did not seem to square with the empirical evidence, and inadequate treatment of human rights situations where competing norms were involved (see [Chapter 2](#)).

Other scholars emphasized various sins of omission, sins that in retrospect were often the result of the time period when our model was developed (during the 1990s and dealing with cases from the 1980s). For example, the spiral model of human rights assumed the existence of a core group of developed democracies that adhered to human rights norms and could thus legitimately socialize norm-violating regimes to "proper" behavior. It did not seriously take into account the fact that these core states could become norm-violators themselves (see [Chapter 8](#) on the United States). Additional sins of omission that have subsequently been recognized include the absence of attention to human rights violations in areas of limited statehood (see [Chapter 4](#)), and to the growing importance of non-state actors such as multinational corporations in the human rights field (see [Chapters 11 and 12](#)).

From commitment to compliance

The original spiral model dealt with the entire process relating to the human rights socialization of state actors – from repression and initial denial that international human rights law applied to them at all, to their eventual sustained compliance with these norms. More than a decade later, explaining state commitment to international human rights does not seem to be particularly interesting. In the twenty-first century, there is not a single state left in the international system that has not ratified at least one international human rights treaty (the Convention on the Rights of the Child topping all other global human rights treaties, see Liese 2006). Moreover, there is universal agreement that fundamental human rights constitute *ius cogens*, i.e. that part of international law to which states commit irrespective of whether or not they are party to individual treaties.

What does remain interesting is the fact that various actors other than states (e.g. NGOs, multinational corporations and rebel groups) increasingly commit themselves to basic human rights (see [Part IV](#) of this volume). As sociological institutionalists argue, the norm-guided logic of appropriateness now requires both governments *and* non-state actors in world society to at least pay lip service to the idea that there are such things as fundamental human rights (Meyer *et al.* 1997).

This book then focuses on the processes leading from commitment to compliance. By "commitment," we mean that *actors accept international human rights as valid and binding for themselves*. In the case of states and apart from *ius cogens*, this usually requires signing up to and/or ratifying international human rights treaties. With regard to non-state actors such as firms, NGOs, or rebel

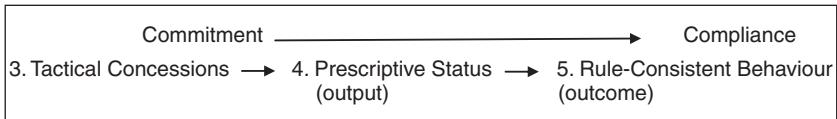


Figure 1.2 Commitment, compliance, and the spiral model

groups, commitment implies at a minimum some sort of statement that the respective actors intend to accept at least voluntary codes of conduct as obligatory (from self-regulation to multi-party “soft law” such as the Global Compact, see [Chapter 11](#)). “Compliance” is defined as *sustained behavior and domestic practices that conform to the international human rights norms*, or what we called “rule-consistent behavior” in the original spiral model. The authors of the various individual chapters in this volume specify in more detail what they mean by commitment and compliance.

We see commitment and compliance as two ends of a continuum (see [Figure 1.2](#)). The spiral model assumed that a government’s commitment to international human rights takes place initially as part of the “tactical concessions” phase. PoHR did not suggest that ratification of international human rights treaties automatically translates into compliance. Rather, we claimed that encouraging governments to move from commitment to compliance involves the application of continuous pressures “from above” and “from below” ([Brysk 1993](#)). Moreover, PoHR defined “prescriptive status” (phase 4 of the model) as the point in time when governments had not only ratified international treaties, but had also transposed them into domestic law, had created the necessary institutions to enforce these laws (e.g. human rights commissions), and had fully acknowledged the validity of international human rights in their official public discourse. In the language of research on compliance (e.g. [Raustiala and Slaughter 2002](#)), “prescriptive status” equals the output dimension of compliance while “rule-consistent behavior” (phase 5) refers to the outcome dimension.

Over the past decade, quantitative research on human rights has confirmed that ratification of international treaties does not lead to compliance per se (e.g. [Hafner-Burton and Tsutsui 2005](#); [Hathaway 2002](#); [Keith 1999](#)). Some authors have even gone so far as to suggest that rights violations became more severe after treaty ratification. This in turn led others to argue that qualitative and quantitative studies on human rights change were reaching different conclusions, with the authors of small-N case studies reaching more optimistic conclusions than those of large-N studies ([Hafner-Burton and Ron 2009](#)).

We disagree with the view that qualitative and quantitative methodologies are yielding strikingly different results (see particularly [Chapters 3 and 5](#)). The various chapters in this volume show a growing convergence between quantitative and qualitative findings on human rights compliance, especially when the quantitative researchers consider the impact of intervening variables such as regime

type when attempting to explain the movement (or lack thereof) from treaty ratification to compliance. For example, in the most sophisticated quantitative and qualitative study on the subject to date, Beth Simmons confirms the importance of some of the causal mechanisms that we originally proposed in PoHR. *Mobilizing for Human Rights* (Simmons 2009) looks at a wide range of human rights issues and demonstrates that three processes – elite-initiated agendas, litigation and political mobilization – do the explanatory work between commitment (e.g. treaty ratification by a given state) and compliance. At least two of these processes – judicial action enabled by human rights treaties and popular mobilization in favour of compliance – are consistent with the spiral model. In addition, Clark's chapter in this volume (Chapter 7) shows that public shaming of norm-violating governments through action by the UN Human Rights Commission matters for producing compliance once states have made a commitment. Murdie and Davis (2012) demonstrate similar effects with regard to human rights INGOs.

Yet, in PoHR, we under-theorized the process leading from commitment all the way to sustained rule-consistent behavior (see Chapter 2 on this point). We simply assumed, but did not explicitly specify, that the same causal mechanisms that worked to move the process along in the earliest phases would also be at work later on. We also thought that the social mechanisms to promote human rights would all be complementary and that there were no contradictions between them (see Chapter 6).

Furthermore, while the original spiral model was never meant to present a fair-weather picture of human rights change, we did not pay sufficient attention to instances in which states got “stuck” somewhere in the process or even experienced backlash. Two prominent cases come to mind: the People’s Republic of China is often cited as a case in which external pressure, applied in an effort to improve human rights performance, did not produce results. However, Kinzelbach's chapter (Chapter 9) shows that the spiral model is indeed applicable to China, even though progress has been slow because the regime is much less vulnerable (in both material and ideational terms) to network pressure than are the regimes in many other countries.

An even more important case – both for academics and in terms of its political consequences – is US human rights performance during the administration of George W. Bush (2001–2009). The United States had been instrumental in bringing about the international Convention against Torture (CAT) and in creating an international normative taboo against torture and the use of other means of cruel and unusual punishment (except for the death penalty; see Sikkink 2004; Thimm 2009). The CAT received full bipartisan support in the US Senate after then-President George H.W. Bush submitted it for ratification in 1990. Yet, in the aftermath of the terrorist attack on the World Trade Center in New York City in September 2001, the US administration authorized special forms of treatment for those suspected of terrorism which

both the previous Clinton administration and the subsequent Obama administration had called by their real name – torture. How is it to be explained that a US president and a vice president could publicly defend the use of waterboarding without being faced with public outrage and being forced to resign? In more academic terms, the US case begs the question of whether the spiral model is suitable to deal with countries that experience such backlash against the domestic legitimacy of human rights norms. Sikkink's chapter (Chapter 8) tackles these issues.

As mentioned above, some of the most notable shortcomings of PoHR were sins of omission that resulted from the time period from which our cases were selected and during which we developed the spiral model (the 1980s and early 1990s). Although sophisticated theoretical accounts of the relationship between state and non-state actors in world politics had existed in the academic literature for a long time (Keohane and Nye 1971), the focus when it came to understanding human rights violators was still on states (primarily authoritarian ones) and their behavior in the late Cold War environment. As a result, PoHR emphasized a narrow set of “freedom from” rights (torture, disappearance, etc.) as well as the types of civil rights (freedom of expression, assembly, etc.) that are associated with established liberal democracies.

The more ambitious task that we set for ourselves in this volume on commitment/compliance mechanisms is to move beyond an exclusive concern with (authoritarian) states as principal human rights violators. We broaden the scope of this study to include non-state rule targets such as corporations and rebel groups (Part IV of the volume). Additionally, we expand the range of human rights that our chapter authors subject to case study analysis to include gender rights (Chapter 14) and labor rights (Chapter 11).

Mechanisms and modes of social action

This brings us back to one of the fundamental concerns of PoHR: how do the various socialization mechanisms that move the human rights process along go together and hang together (see also Chapter 6)? In that previous volume, we identified three such mechanisms (instrumental adaptation, argumentation and habitualization) that were in turn grounded in different logics of action. For example, we believed that the logic of consequences, which posits that leaders of authoritarian states will act rationally in order to balance the costs and benefits of external sanctions and rewards offered for “good” human rights behavior, explained some developments during early stages of the socialization process (e.g. the tactical concession phase). However, we devoted the majority of our attention to the impact of the logics of appropriateness and persuasion, in the sense that state actors were viewed as heavily influenced by human rights norms that suggested appropriate patterns of behavior within the international community of “liberal states.”

The first theoretical contribution of this book is to further tease out these relationships between various socializing mechanisms and to examine their impact. Our central point is that the logic of consequences and the cost-benefit calculations of utility-maximizing egoistic actors are often embedded in a more encompassing logic of appropriateness of norm-guided behavior as institutionalized in the contemporary international human rights regime. For example, firms committing to human rights might initially do so for purely instrumental reasons. They might have been subjected to consumer boycotts, and, thus, market pressures might have forced them to commit (see Chapter 12). However, these market pressures eventually lead to the incorporation of norms of appropriate human rights behavior into the cost-benefit calculations of firms. As a result, it no longer makes sense to test hypotheses derived from rational choice theory against those theories that stress norm-guided behavior. Rather, we aim at systematically examining the mechanisms and sequences (as well as their internal contradictions) by which the various modes of social action interact to bring about human rights change.

Scholars studying compliance have identified four such mechanisms based on different modes of social (inter-)action, two of which were already included in PoHR (e.g. Börzel *et al.* 2010; Checkel, 2001; Hurd 1999; Simmons 2009: ch. 4; Tallberg 2002).

(1) *Coercion: use of force and legal enforcement*

State and non-state actors can be *coerced* to comply with costly rules. Coercion does not leave them much choice but to abide by the norms. Two cases need to be distinguished here, though. On the one hand, compliance with human rights norms can be imposed through the use of force by external actors. The emerging norm of the “responsibility to protect” ultimately aims at legitimizing such use of force to establish basic human rights standards.

On the other hand, while legal enforcement mechanisms often include coercive measures such as sanctions, they are seldom imposed on actors against their will. This is the case because states that have committed, for example, to the Rome Statute of the International Criminal Court (ICC) have voluntarily agreed to accept its provisions and to enforce them through domestic law as well. Thus, a Security Council referral to the ICC of a case like Sudan, which has not ratified the Rome Statute, can be seen as coercion. But a self-referral case brought to the ICC by a state actor that has ratified the Rome Statute (such as in the case of Uganda), should not be seen as coercion. Rather, it should be viewed as the legal enforcement of an agreed-upon prior commitment. The more human rights standards are subjected to international and regional judicialization and thus increasingly involve domestic, regional, or international courts, the more legal enforcement mechanisms come into play as a substitute for the use of force (see Sikkink 2011).

(2) *Changing incentives: sanctions and rewards*

Coercion, whether applied directly and against a recalcitrant actor's will or as part of a legal enforcement mechanism, undoubtedly needs to be recognized as playing a role in the overall change process. However, we believe that incentive structures play an even more important role in moving state and non-state actors from commitment to compliance. Utility calculations can be changed by raising the costs of non-compliance. This is the rational choice mechanism par excellence insofar as it is up to the respective targeted actor to decide whether or not to change her behavior in response to the changed incentives. Once again, we can distinguish two cases here. Sanctions are negative incentives often used by the international community to punish non-compliance.¹ The same holds true for positive incentives (e.g. foreign aid) to enhance compliance with international human rights. The portfolio of most international organizations as well as individual states contains strategies and instruments to induce compliance through incentives (for a discussion with regard to democracy assistance see Magen *et al.* 2009). The effectiveness of such sanctions and rewards will depend in part on the material and social vulnerability of the target actors, as we discuss below.

(3) *Persuasion and discourse*

PoHR heavily emphasized arguing, persuasion, and learning. If persuasion works, it has an advantage over either coercion or the manipulation of incentive structures in that it induces actors into voluntary compliance with costly rules (see e.g. Deitelhoff 2006; Müller 2004; Risse 2000). Persuasion is also more long-lasting as a socialization mechanism than manipulating incentive structures, since the latter leave actors' interests untouched. However, the successful use of pure persuasion through recourse to nothing but the "better argument" is extremely rare in international affairs. In reality, we mostly observe the use of a combination of arguing and incentive-based mechanisms, particularly when external actors try to induce rule targets – whether states or non-state actors – into compliance with human rights (for a general discussion see Deitelhoff and Müller 2005; Ulbert and Risse 2005).

But even if we do not observe processes of persuasion, discourse matters enormously as a mechanism leading to compliance. It is true that naming and shaming can only be successful if either the target actors or an audience central to the change process actually believe in the social validity of the norm. Once human rights have become a dominant discourse, however, this

¹ In some borderline cases, sanctions amount to coercion if they leave the target virtually no choice other than to comply.

discourse exerts structural power on actors. As a result, they are more likely to comply.

In addition to heavily emphasizing persuasion, we assumed in PoHR that arguing and discursive interactions had a “unidirectional” impact in that human rights advocates would always have the better arguments and that these arguments would eventually carry the day. In the meantime, and particularly in the post-9/11 environment, we have witnessed the emergence of powerful regime-based counter-discourses and narratives (see [Chapters 2, 8 and 9](#)). The existence of such discourses and narratives, together with the associated deterioration in the human rights behavior of the countries from which they emanate, obviously undermines our initial assumption regarding “unidirectionality.”

(4) Capacity building

There is a fourth mechanism leading to sustained compliance with international norms which we did not discuss in the original spiral model. Compliance research, however, has always emphasized capacity-building as a pathway to compliance. The “management” approach to compliance points out that involuntary non-compliance with costly rules is at least as important as non-compliance that results from the unwillingness of actors to abide by them (see Chayes and Chayes [1991, 1993, 1995](#)). So, if human rights norms are violated in areas of limited statehood because of a lack of state capacity to enforce them, the three other mechanisms discussed will not do the trick. PoHR did not pay attention to this mechanism and to the fact that commitment might not lead to compliance when central state authorities lack the institutional and administrative capacity to enforce decisions including human rights standards. In other words, PoHR assumed that governments were primarily unwilling rather than unable to comply, thus implicitly taking consolidated statehood for granted.

However, “limited statehood” is much more widespread in the contemporary international system than is usually acknowledged (see [Chapter 4](#)). Most important, areas of limited statehood are not confined to fragile or even failed states, but constitute a common phenomenon among developing countries. As a result, research on human rights has to take the management approach to compliance more seriously than has been the case so far. Capacity-building, as we understand it in this volume, refers to a highly institutionalized process of social interaction aiming toward education, training and the building up of administrative capacities to implement and enforce human rights law.

In sum, we believe that the four processes identified here capture the main social mechanisms which induce or prevent compliance with international human rights norms (see [Table 1.1](#)). These mechanisms rely on different modes of social action. The first and foremost theoretical task ahead is to specify the ways in which the four mechanisms relate to one another. They can be

Table 1.1. *Social mechanisms to induce compliance*

Mechanisms	Modes of social (inter-)action	Underlying logic of action
Coercion	Use of force	Hierarchical authority
	Legal enforcement	(<i>Herrschaft</i>)
Incentives	Sanctions	Logic of consequences
	Rewards	
Persuasion	Arguing	Logic of arguing
	Naming/shaming	and/or
	Discursive power	logic of appropriateness
Capacity-building	Institution-building, education, training	Creating the preconditions so that logics of consequences or of appropriateness can apply

complementary, additive or sequential. But they can also lack complementarity, operate haphazardly and even be subtractive (see [Chapter 6](#)).

Scope conditions for compliance

The second contribution of this book is to specify more clearly the scope conditions under which we would expect these four social mechanisms to induce compliance by both state and non-state actors with international human rights law. We have identified five such factors related to different types of states, regimes, and to the degree of vulnerability of states and other such rule targets to external and domestic pressures. The first two scope conditions apply only to states, while the remaining ones apply to any type of rule target.

(1) *Democratic vs. authoritarian regimes*

The original spiral model was developed and applied only to states with authoritarian and repressive regimes. We asked under which conditions a combination of external and internal mobilization of advocacy networks would bring about liberalization and human rights change within these regimes. The empirical case studies then showed that improvements of human rights almost always resulted from regime change and democratization processes (Morocco being the one exception, Gränzer 1999; see [Chapter 10](#)). Subsequent quantitative research also demonstrated that countries with democratic regimes are more likely to comply with human rights norms than authoritarian ones (for details see [Chapter 3](#); also Simmons 2009). In other words, regime type seems to matter.

However, we need to specify here what we mean by “democracy” in order to avoid an endogeneity problem. Sophisticated conceptualizations of democratic rule usually include participatory and electoral institutions, the rule of law and – indeed – respect for human rights (e.g. Merkel and Croissant 2000; Merkel *et al.* 2003–2004). Datasets such as the Freedom House Index or the Bertelsmann Transformation Index (BTI) also include political and civil rights as indicators to measure regime type. But since human rights behavior is our dependent variable, rule of law and respect for human rights cannot also be part of the definition of democracy we use. To avoid these methodological problems and the subsequent tautological arguments, one should, therefore, use minimalist concepts of democracy focusing on the degree of competition for executive office and the degree of participation by citizens in electing their governments.

We assume that regime type as a scope condition not only affects the general propensity to move from commitment to compliance but also makes a difference with regard to the various social mechanisms specified above. In particular, one would expect that legal enforcement of human rights through domestic, foreign or international courts would bring democracies back into compliance (see Chapter 8 on the United States). Moreover, one would also assume that mechanisms of persuasion, naming and shaming are particularly effective with regard to stable democratic regimes given that respect for human rights constitutes an institutionalized logic of appropriateness in such systems. In contrast, using incentives – whether sanctions or rewards – to induce democracies into compliance might be counter-productive, because it might be perceived as insulting (see Chapter 6). The opposite might be true for autocratic regimes, since there is no institutionally embedded logic of appropriateness which could shame them into compliance.

(2) *Consolidated vs. limited statehood*

As already mentioned, the original spiral model assumed that states are unwilling rather than incapable of complying with human rights norms. We did not take into account the fact that some states lack the kinds of efficient and effective administrative structures and institutions that would allow them to enforce and implement central decisions. We took consolidated statehood for granted, implicitly assuming a full monopoly over the means of violence and the capacity to implement and enforce rules. However, as the literature on weak, fragile and even failed states reminds us, the institutional capacity of states should be treated as a variable rather than as a constant (see e.g. Rotberg 2003, 2004; Schneckener 2004).

“Limited statehood” as a major obstacle to compliance is not confined to fragile or failed states (see Chapter 4; also Risso 2011b). Many states contain political and administrative institutions which are too weak to enforce the law on the whole territory, in some issue-areas (such as human rights), and/or with

regard to particular parts of the population. Related to this, many states of the Global South do not hold a monopoly over the means of violence in parts of their territory.

However, there is no straightforward relationship between state strength and consolidated statehood, on the one hand, and compliance with human rights norms, on the other. As a result, we need to combine the two institutional characteristics – state strength and regime type (see [Figure 4.2](#)). Different social mechanisms should be expected to facilitate the move from commitment to compliance. In the cases of consolidated autocratic or democratic regimes, non-compliance results primarily from state actors being unwilling to implement human rights norms. Therefore, three of the four social mechanisms discussed above – coercion/legal enforcement, positive and negative incentives, and persuasion/shaming – are expected to be applicable. In the case of consolidated democracies, legal enforcement as well as “naming and shaming” by transnational advocacy networks should be particularly effective. With regard to consolidated autocratic regimes, the original assumptions of the spiral model should hold and all three mechanisms might work in principle, even though persuasion could prove to be ineffective.

If limited statehood and lack of political and administrative capacity to enforce decisions is the main problem, however, “involuntary non-compliance” should result. Therefore, capacity-building as prescribed by the “management school” of compliance research (see above) should be the primary mechanism to move a state from commitment to compliance. This is particularly relevant for democratic regimes with weak institutions and low administrative capacity which is characteristic for many new democracies in the Global South. In the case of autocratic regimes in weak states, however, it is very hard to specify the root cause of compliance problems. Capacity-building as such, for example, could result in making a repressive regime more effective in carrying out human rights violations. Coercion, incentivizing and persuasion mechanisms, however, might be equally irrelevant if the regime is unable to enforce the law. In this case, one should think of functional equivalents to consolidated statehood as a remedy for the compliance problems in autocratic regimes within weak states.

(3) Centralized vs. decentralized rule implementation

Our third scope condition has to do with the degree of centralized or decentralized rule implementation in a given situation and with regard to any targeted actor (e.g. states, rebel groups or corporations). The original spiral model in PoHR treated states as unitary actors with regard to compliance. However, the degree to which decision making is centralized with regard to norm compliance makes a difference ([Lutz and Sikkink 2000](#)). Simmons, for example, argues that there has been greater compliance with the norm against the death

penalty in countries that have abolished it because the sanction associated with the norm is centrally carried out by public authorities, and thus easy to monitor (Simmons 2009: 200). Compliance is also more likely if those actors who are committed to human rights norms are also those who comply with them directly. However, compliance is more difficult to achieve if it has to result from collaborative or conflict-ridden negotiations between different decentralized actors. In other words, a situation of decentralized rule implementation means that rule addressees (those who commit to human rights) are not exclusively the rule targets who have to comply (see Börzel 2002).

Take the case of torture: central state authorities (in consolidated states, see below) usually have direct control over their military via a clear line of command and should, therefore, be able to enforce the prohibition against torture committed by members of their armed forces. In the case of the United States and the George W. Bush administration, for example, it was not the military per se that undermined the taboo against torture, but rather officials at the highest levels of the Executive Branch of government (see Chapter 8). At the same time, and given the competencies of communal authorities in most countries, central governments have much less control over the local police forces. As a result, we would expect that it is more difficult to implement the prohibition against torture with regard to the police as compared to the military (e.g. the case of Turkey, Chapter 2, also Liese 2006).

Things become more complex if states, for example, commit to international human rights norms, but firms or even private citizens are the rule targets that are expected to comply (see Chapter 14 on gender rights). In such cases, the implementation process can be extremely decentralized, since states are legally responsible for compliance, but private citizens have to change their behavior, which often includes abandoning or transforming long-standing cultural practices. The problem is exacerbated, of course, in cases where such behavioral change is being encouraged in areas of limited statehood (see above).

Organizational centralization or decentralization also affects the behavior of nonstate actors. For example, as Hyeran Jo and Katherine Bryant show in Chapter 13, rebel groups with more hierarchical organizational structures are more likely to comply with humanitarian norms than loosely organized groups. As to business firms, compliance with regard to things such as social rights should become more problematic, the longer the supply chain (see Chapter 12).

With regard to this particular scope condition, as long as rule implementation is highly centralized, it should not matter much whether coercion, incentives or persuasion is used in efforts to induce compliance. However, since involuntary non-compliance is the main problem in highly decentralized “implementation systems,” capacity-building constitutes a major remedy for tackling the problem in such cases.

(4) *Material vulnerability*

Our two final scope conditions affecting the movement from commitment to compliance relate to any given rule target's vulnerability to external (as well as to internal domestic) pressure. It makes a difference, of course, whether China, Russia or the United States is accused of human rights violations as compared to the Philippines, Guatemala or Kenya (on the latter see Jetschke 1999; Ropp and Sikkink 1999; Schmitz 1999; on the United States and China see *Chapters 8* and *9*). The same should hold true for non-state actors commanding different types and levels of resources.

On average, rule targets commanding powerful economic and/or military resources are expected to be less vulnerable to external pressures to comply with human rights norms than are materially weak targets. This “realist” assumption is straightforward and does not require further specification. Everything else being equal, great powers can “fight off” external network mobilization more easily than can weak states. The same should hold true for non-state actors such as companies. If a Small or Medium-Sized Enterprise (SME) is subjected to a consumer boycott because of its violations of social rights in some country where it invests, the costs incurred are much higher than, say, in the case of a big oil company being subjected to a similar campaign.

Note that we do not assume that materially powerful actors are immune from external pressures or transnational mobilization. We only expect that mechanisms based on material coercion and/or negative incentives such as sanctions are less likely to yield results when used against materially powerful actors than against weak ones. Even if China or Russia were to be exposed to material sanctions by Western states or the international community as a whole, such sanctions alone would probably not be able to move their governments from commitment to compliance. Materially powerful actors are by definition less vulnerable to external economic or military pressures than are weak actors. However, as the case of Tunisia shows (see *Chapter 10*), even materially weak states can reduce their vulnerability toward external pressure by pursuing a strategy of economic inclusion so as to silence domestic opposition.

(5) *Social vulnerability*

A more interesting proposition concerns a target's vulnerability to social pressures. As we argued in PoHR, the more states and other actors care about their social reputation and thus want to be members of the international community “in good standing,” the more vulnerable they are to external naming and shaming and, thus, to social mechanisms relying on the logics of arguing and of appropriateness. Social vulnerability refers to a particular actor's desire to be an accepted member of a social group or a particular community. Constructivists argue that a state's identity may influence its vulnerability to social pressure.

States with insecure identities or those that aspire to improve their standing in the international community may be more vulnerable to pressures (Guowitz 1999). Sociological institutionalists would argue that the logic of appropriateness comes into play here, while rational choice scholars refer to “reputational concerns.” In any event, the application of social pressure works, because actors care about their standing in a social group. And the more the relevant community cares about human rights, the more the target is vulnerable to external (and internal) pressures to comply with these norms.

In the case of states, these concerns are mostly about international legitimacy (see Hurd 1999; see e.g. the case of Morocco’s king, Chapter 10). With regard to non-state actors, things are a bit more complex. As Jo and Bryant show in Chapter 13, rebel groups that are likely to win civil wars and to take over the national government tend to start complying with international humanitarian law precisely because of an expected gain in international legitimacy. In the case of transnational companies, particularly those with a brand name to defend, social vulnerability is often intimately associated with material vulnerability. In the case of Shell and its rights violations in Nigeria, for example, transnational advocacy networks were able to organize consumer boycotts which then resulted in a serious loss of revenue for the company (Chapter 12; see also Chapter 11). In this case, consumers cared about human rights which made even a materially powerful corporation vulnerable to external pressures.

However, we can neither assume that any particular norm target is socially vulnerable, nor that the application of social pressure (e.g. naming and shaming) will have a favorable and unidirectional impact. This is where we have to correct the original spiral model. Some rule targets command powerful social resources which allow them to fight off external pressures. “Soft power,” as Joseph Nye put it (Nye 2004), is not the sole domain of the “good guys” in world politics. The Asian values debate demonstrates, for example, that some states command sufficient international legitimacy to establish a counter-discourse to the Western-led human rights arguments (see Chapter 2). This also happened in the West itself, where the George W. Bush administration in the post-9/11 environment was able to establish a counter-discourse against the universal applicability of the prohibition against torture – at least temporarily (see Chapter 8). In other words, human rights are not the only discourse in town – and some actors command enough social legitimacy to be able to establish persuasive counter-narratives which then reduce their social vulnerability.

In sum, our authors evaluate the impact on human rights change of five scope conditions in the empirical chapters that follow. These scope conditions are (1) regime type (democracy vs. autocracy), (2) state capacity (consolidated vs. limited), (3) rule implementation (centralized vs. decentralized), (4) material vulnerability (substantial vs. limited), and (5) social vulnerability (substantial vs. limited). We believe that the existence of these scope conditions not only affects the overall process moving actors from commitment to compliance

directly but also by influencing the effectiveness of the four different social mechanisms described above.

Plan of the book

Part I of the book is devoted to stock-taking. Chapters 2 and 3 evaluate the original spiral model proposed in PoHR from different perspectives. In [Chapter 2](#), Jetschke and Liese review the literature on the spiral model that has referenced and used it over the past decade. They are particularly interested in determining whether the major assumptions of the model and its causal mechanisms are still viewed as valid. [Chapter 3](#) by Simmons builds upon the considerable quantitative work on human rights that has been done over the past decade and evaluates the spiral model from the perspective of large-N statistical analyses. The chapter compares quantitative findings about the ability of international norms to influence domestic politics, social movements, and practices to findings from the earlier qualitative literature.

Part II is devoted to conceptual and methodological issues. Börzel and Risse argue in [Chapter 4](#) that the original PoHR was based on some implicit assumptions that do not fit states containing “areas of limited statehood.” Such areas can be defined as territorial or functional spaces in which national governments do not control the means of violence and/or are incapable of implementing and enforcing central decisions, including those in the area of human rights. If we take limited statehood seriously, we have to re-formulate and re-conceptualize the human rights agenda, both in terms of research and policies.

Dai takes issue in [Chapter 5](#) with the findings of some recent – mostly quantitative – studies of human rights treaties. The authors of these studies claim that, while states increasingly endorse human rights norms, their actual behavior often does not comport with them. To many, this “compliance gap” calls into question the efficacy of international law. Challenging such an inference, Dai argues that the compliance gap, as it is typically depicted and measured in the literature, does not capture and in fact overemphasizes both the magnitude and the significance of the disparity between commitment and compliance.

[Chapter 6](#) by Goodman and Jinks challenges the view developed in PoHR that “all good things go together,” i.e. that the various compliance mechanisms and logics of social action and interaction reinforce each other and that there are no trade-offs between them. Their starting point is the increased attention being devoted in the literature on human rights to discrete mechanisms of social influence. Goodman and Jinks focus primarily on what they call “negative interaction effects,” that is, cases in which the operation of one mechanism of influence (e.g. material inducement) might crowd out the operation of another (e.g. moral suasion). They argue that combining mechanisms in such a way will, under certain conditions, reduce the overall social effect to levels below what any individual mechanism could have achieved on its own.

Part III of our volume revisits the issue of how state actors behave from the time that they ratify human rights treaties to the point at which they actually comply with these new legally-embedded normative structures. Clark relies on quantitative methods in [Chapter 7](#) to evaluate whether human rights treaty ratification followed by international criticism of human rights behavior has any impact on compliance. She uses dynamic panel data analysis to test the effect of states' exposure to UN human rights criticism when they have or have not ratified two major human rights treaties: the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT). Her statistical findings suggest that once a treaty has been ratified, the likelihood rises significantly that additional criticism from the international community will cause a state to improve its human rights performance.

[Chapter 8](#) focuses on US non-compliance with the prohibition against torture and cruel and degrading treatment during the administration of George W. Bush. Sikkink argues that US policy-makers were intensely aware of domestic and international pressures to comply with the norm, and of the possibility of domestic prosecution under US statutes implementing international human rights law. But such awareness did not lead to greater compliance. The US case shows that a country which had already ratified and implemented international treaties on a core human rights norm could nevertheless experience a profound backlash, resulting in the *de facto* abnegation and "reversal" of these commitments.

The People's Republic of China provides us with another example of a very powerful state which might conceivably be able to "fight off" transnational pressure for human rights compliance. [Chapter 9](#) examines the extent to which the spiral model applies in this case. The Tiananmen Square massacre in 1989 gave rise to a transnational network focused on improving China's human rights situation. International governmental and non-governmental criticism of China's human rights practice continued to be pronounced throughout the two decades that followed. Through a comparison of the impact of the EU and US strategies to influence China's human rights performance, Kinzelbach reaches some interesting conclusions. From her perspective, Beijing's continued non-compliance on core civil and political rights is best explained by a combination of the weakness of domestic change agents attempting to apply pressure "from below" and the absence of sustained pressure from above.

One of the most important recent developments in the human rights field has been the uprisings in the Arab world. PoHR contained a case study on Morocco and Tunisia (Gränzer 1999) – two countries that have followed very different paths during the recent rebellions. In [Chapter 10](#), van Hüllen revisits the two cases in light of recent events. While Morocco remained vulnerable to domestic and external demands and embarked on a cautious process of liberalization, Tunisia was able to shield itself off to outside pressures due to economic

development. When this strategy failed to calm the opposition during the economic crisis, the regime collapsed.

Part IV of the book deals with a major portion of the new agenda in human rights research – the compliance behavior of non-state actors. In [Chapter 11](#), Mwangi, Rieth and Schmitz focus on the UN Global Compact (GC) and related efforts to align economic interests with universally recognized principles. Unlike many skeptics of such efforts to “sign up” corporations to the observance of human rights norms, Mwangi *et al.* find that membership in the GC moves companies towards greater compliance if certain scope conditions are in place. First, the firm has to participate actively in a regional or local GC network where corporate incentives, human rights discourse and capacity-building resources are more highly developed than at the global level. And, second, additional steps must have been taken toward integrating the ten principles into the managerial and strategic culture of a company.

[Chapter 12](#) by Deitelhoff and Wolf also assesses the status of business and human rights in general, and in zones of conflict in particular. The authors argue that the business sector is experiencing a socialization process similar to that specified in the original spiral model of human rights. They further argue that applying the spiral model to business corporations triggers interesting extensions of this model regarding its phases and causal mechanisms. During the socialization process, and under certain conditions, corporations can undergo a transformation from norm consumers to norm entrepreneurs. This transformation occurs not only because of the principled beliefs that these corporations have come to subscribe to but also out of simple cost-benefit calculations with regard to their business models within socially embedded markets.

In [Chapter 13](#) Jo and Bryant deal with rebel groups and warlords whose human rights violations are usually deemed beyond the reach of international law and transnational pressures. Rebel groups in civil wars often commit heinous acts of violence such as killing innocent civilians. However, all rebel groups are not the same. Jo and Bryant argue that reputational concerns and organizational capacity that is adequate to enforce adherence to human rights standards are key conditions for rebel groups to move from commitment to compliance. Additionally, they suggest that rewards and persuasion are the main mechanisms that induce such compliance. By analyzing quantitative data on humanitarian access to conflict zones in civil wars fought between 1991 and 2006, the authors show that some classes of rebel groups with reputational concerns and strong organizational capacity are more likely to grant access to the ICRC than others.

In [Chapter 14](#) Brysk pushes the envelope even further with regard to how we can best explain the compliance behavior of non-state actors. She investigates the conditions under which private individuals can be brought into compliance with international norms related to sexual politics and gender. Private actors such as families, employers and religious communities are increasingly

recognized as potential human rights violators and subject to international campaigns – but not yet to consistent governance. As a constructivist perspective suggests, transnational campaigns against private wrongs (such as violence against women) rely on the use of a combination of the mechanisms of persuasion and capacity-building rather than on coercion and incentives. The chapter analyzes a strikingly similar pattern of norm change through socialization in states and international organizations in the “hard case” of sexual politics, where male elites and social institutions face few incentives or disincentives to change gendered patterns of subjugation.

The concluding chapter by Sikkink and Risse (Chapter 15) revisits the arguments of this introduction, in particular with regard to mechanisms and scope conditions. In addition, the chapter discusses some new developments in the enforcement of human rights norms, namely the emerging international norms of “Responsibility to Protect” (R2P) and of individual criminal responsibility. With regard to the scope conditions discussed above, Sikkink and Risse argue that they can be grouped together for analytical purposes in another alternative way. While regime type and social/material vulnerability concern the *willingness* of actors to move from commitment to compliance, degrees of (limited) statehood and of the centralization of compliance decisions affect actors’ *ability* to comply. The chapter concludes by discussing some policy implications of this volume.

Chapter Two

HOW NORMS GROW

AMNESTY INTERNATIONAL challenged governments to change their behavior, against their sovereign prerogatives. It also has prodded the United Nations to back up idealistic statements of principle with legal norms specifying acceptable and unacceptable member behavior. Amnesty has been able to maintain its challenge to governments precisely because of its status as a bystander with few resources except its principles, objectivity, and information. Those qualities also make AI an interesting, and unusual, international actor. The previous chapter emphasized Amnesty International's origins and its historical role. The attributes that make it unusual also endow AI, and other NGOs that have followed in its path, with the power to shepherd the emergence of principled international norms.

Amnesty International's advocacy of principled norms is theoretically significant for the study of international relations in that it poses anomalies for realism, the prominent theory of international relations that sees states as the dominant actors in international politics and power as the primary determinant of action. Kenneth Waltz, a major proponent of realist theory, predicted even nonstate actors must possess the power attributes of states to be successful.¹ Amnesty's source of efficacy is clearly very different from that of states and yet, as the case studies will demonstrate, it has had significant effects on the actions of states and the rules by which they act. Second, realism looks to power and the lack of central coordination in the international system as key determinants of state action. Realists characterize the absence of centralized supranational rule as anarchy, which is said to be at the root of competition for power among sovereign states. By definition, anarchy is a condition of "no rule," in which governance is absent. In this view, all forms of authority are abstracted to expressions of power as "capability."² Yet Amnesty relies on a very different kind of authority, derived from principled ideas or beliefs about right and wrong.

Norms *are* limited when contradicted by power, but they are not extinguished. Norms based on principles of right and wrong suffer disadvantage when power is primary. If nation-states' security depends upon constant competition, norms of respect for persons and mutual

accommodation more appropriate for a civil society are prevented from emerging. In theory, they would be unlikely to find proponents except, perhaps, among the weak. Thucydides' famous Melian dialogue is often cited as the exemplar of the triumph of power over principle. It is the overpowered representatives of Melos, about to be conquered by Athens, who advocate the preservation of comity between Melos and Athens. Responding to Athenian threats, the Melians argue, "As we think, it is expedient . . . that you should not destroy what is our common protection, the privilege of being allowed in danger to invoke what is fair and right."³

The Melians fight a losing battle in Thucydides' history, but a subtext of the history is its tragedy: Athenians' ability to sustain their acquired power degenerates in proportion to their disregard for the protective value of the shared culture of accountability that had woven together the fate of the city-states.⁴ Contemporary international relations theory, too, has begun to attend to the kinds of social bonds that may arise in the international system. Recent theoretical and empirical studies have revised, to different degrees, the simple realist view of the meaning of anarchy. Although anarchy is commonly imagined as a world of amoral chaos, norms and principles of right action can and do exist in an anarchic world.

Scholars theorizing from varying epistemological perspectives point out that rule-following behavior is a fact of international life, since nation-states build historically specific relationships that, in turn, influence the structural environment. Robert Axelrod demonstrated in formal game-theoretic terms that norms of cooperation may evolve from simple but deliberate reciprocity even in an anarchic environment.⁵ (Friedrich Kratochwil's critique of Axelrod suggests that minimal social norms may also be required.)⁶ Structural anarchy does not have to produce an international system hostile to cooperation, according to Alexander Wendt.⁷ In an empirical critique of the concept of anarchy, Lea Brilmayer concludes that moral principles are relevant to international behavior even if the norms cannot be enforced by a central authority.⁸ Acutely aware of the strictures of anarchy and pessimistic about innovation in basic international arrangements like war, diplomacy, and balance of power, Hedley Bull also recognizes the social, and therefore potentially mutable, nature of such institutions in an international "anarchical society."⁹ These authors give reasons to question the assumption of a normless anarchy. Recent theoretically motivated empirical studies reinforce their criticisms.¹⁰

HUMAN RIGHTS NORMS AS CHALLENGES TO SOVEREIGNTY

Principled norms pose significant challenges to other norms that have emerged as a result of key structuring principles of the international system. Since there is no centralized coordination or supranational gov-

ernance in the global arena, both realists and neoliberal institutionalists characterize the relations as anarchic. By definition, anarchy is a condition of “no rule,” and in this situation, it is to be expected that norms and international organizations will lack authority unless they are awarded power by coordinated agreement, either through force, codes, or custom. While anarchy is not necessarily a malign environment, altruism is not expected of states, since they are in theory expected to act based upon self-interest. The principle of sovereignty and the norm of noninterference are examples of practices said to emerge from and maintain a situation of international anarchy.

Because human rights norms call for international accountability as to how states treat their citizens, the norms potentially modify sovereign practices in important ways. Governments do not welcome external comment on, let alone external interference in, their internal governing practices. Indeed, the older, competing norm of noninterference accounts for the traditionally weak implementation of global human rights norms.¹¹ Nevertheless, although many governments still resist practical observation of human rights principles that they have officially endorsed, the legal force of human rights claims in the international context has grown significantly stronger over recent decades.¹²

An incisive realist could respond that perhaps even norms such as human rights, seemingly based on ideas of right and wrong, actually serve power interests in some way. Below I summarize the logic of such explanations, then show that they do not account for the actual emergence of human rights norms in the late twentieth century. The moral aspects of international norms cannot be completely subordinated to state purposes.

State-centric Explanations of Human Rights Norm Emergence

Human rights norms have commonly been portrayed as an international “regime” that formed as a more or less consensual reaction to the suffering of World War II. Regime theory in its classic form characterizes regimes as sets of shared international rules, adopted to coordinate state activity, usually in the service of mutual interest.¹³ Regimes coordinate state activity on particular issues, also usually in the service of mutual interest. They reduce the costs and uncertainty that would normally be associated with collective action in an anarchic environment. Regimes become institutionalized by way of formal international agreements; thus, norms are fundamental building blocks of regimes. States may build regime participation into domestic law or create international arrangements to monitor compliance with regimes. Once regimes are institutionalized, in some cases they retain influence on states that can be demonstrated to counter states’ narrowly construed self-interest. Thus,

regime theory is one way for realism to account for the existence of shared rules. Regimes may be negotiated to accomplish mutually desired joint action; they are often promoted by a dominant state, or hegemon. In either case—whether regimes form due to states' mutual interest or the interest of one very strong state—regimes, and thus international norms, supposedly arise out of the power needs of states.

Regime theory as joint interest-based cooperation does not account for the increase in attention directed at human rights issues in more recent decades, however. The post-World War II surge in human rights concern was largely symbolic and heralded little action. Even the dominant regime analysis of human rights notes that “postwar frustration, guilt, or unease” prompted demand for norms that was more or less satisfied by the United Nations’ 1948 adoption of the Universal Declaration of Human Rights and the Genocide Convention. National objectives did not stimulate further calls for human rights norms.¹⁴ After a flurry of conventions in the 1950s, formal standard setting slowed dramatically, bogged down by the Cold War. One scholar doubted in 1964 whether the traditional process of creating international law by treaty would prove possible at all for human rights, lamenting that “the conclusion of international treaties has—temporarily, it is hoped—become unavailable.”¹⁵ As it turned out, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights were concluded in 1966, almost twenty years after the adoption of the Universal Declaration. Even then, the fact that treaties did not gain enough signatures to come into effect until 1976 reminds us that human rights norms themselves once risked being left for dead by UN members.

A second possible explanation for the human rights regime is the interest of a hegemon that would help provide for and sustain such a regime. The United States, as Western hegemon, advocated the consideration of human rights at the San Francisco Conference to draft the UN Charter. Notably, the United States was prompted by NGOs consulting with the U.S. delegation.¹⁶ Congress and the Carter Administration also gave human rights a central place in U.S. foreign policy in the 1970s, a fact that undeniably raised the international profile of human rights as a concept. But the United States has shown overt hostility to multilateral norms despite periods of foreign policy support for human rights at a bilateral level.¹⁷ As its ambivalence toward the establishment of an International Criminal Court in the mid-1990s has illustrated, the United States has especially avoided adherence to UN standards that threaten to make national practices subject to international monitoring.¹⁸ A proliferation of UN declaratory statements and related standard setting began in the late 1960s (see fig. 1), but was not driven by U.S. policy. If regimes

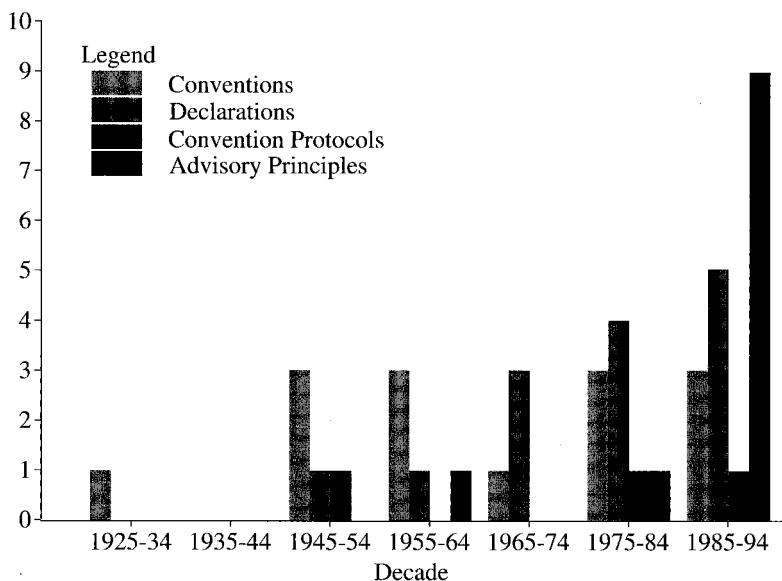


Figure 1. International human rights instruments. (Author's coding of information from "International Human Rights Instruments," University of Minnesota Human Rights Library, www1.umn.edu/humanrts/instrree/ainstls1.htm. Research assistance for this figure provided by Margaret Hirschberg.)

are sets of shared principles, norms, rules, and procedures, the constellation of international human rights standards may be characterized as a regime. However, at its inception the regime did not comprise a self-sustaining set of standards. The Cold War lull in human rights shows that the international community's reaction to World War II did not determine a sustained trajectory for human rights norms.

Regime theory's modification of realism, therefore, does not provide a convincing explanation for the sustained development of human rights norms in the international system, given the hegemonic skepticism of multilateral norms and the challenge international human rights norms pose to state sovereignty. Although scholars increasingly accept that international norms matter, realism provides no adequate explanation for where principled norms come from and how they develop. In regime theory, state interests remain the key determinants of state action and the key to enforcement once a regime is established. The only way to see human rights norms as furthering state power is to redefine them as part of state self-interest, which would contradict other power-based norms

such as sovereignty and noninterference. The “brute fact” of principled preferences that cannot be objectively imputed is an enduring difficulty for rationalist accounts of norms.¹⁹

International Institutions as Frameworks for Norm Formation

Recent emendations of regime theory incorporate processes of reflection, persuasion, criticism, and interpretation of behavior to account for the strengthening of behavioral standards over time.²⁰ Attention to the social and institutional aspects of regimes is compatible with an understanding of norms as communicative reference points in international society. Hedley Bull explains that states form a society in as far as they can recognize common interests and values and “conceive themselves to be bound by a common set of rules . . . and share in the workings of common institutions.”²¹ Others have noted that achieving agreement on moral norms requires procedures for adjudication of differences, which are enhanced by the formation of norms that permit “conversations” about differences. For that reason, shared procedures, but not necessarily shared goals, are a requirement for an international society, in Terry Nardin’s view.²² For Friedrich Kratochwil, international governance develops and is reinforced through social, communicative exchange at the international level in which grievances may be settled by referring to norms and common procedures.²³ On this view, if human rights norms are understood as common societal rules, one is led to ask whether new norms might be traced to the composition of international institutions or to changes in their structure.

The first question to answer is whether the United Nations’ structure itself facilitated norm generation on human rights. Contemporary legal obligations with regard to human rights can be traced to the UN Charter, which held promotion of “universal respect for, and observance of, human rights” to be a purpose of the new organization.²⁴ Despite pervasive nods to state sovereignty, the UN’s institutional purposes also included human rights and incorporated responsiveness to citizens’ groups. UN consultative status vested NGOs whose purposes meshed with stated UN goals. Consultative status was created to allow for representation of public opinion and provide access to groups with special competence in areas of importance to the UN’s Economic and Social Council.²⁵ However, early consultative NGOs had limited ability to act as independent promoters of human rights at the UN. They were expected to act as vehicles for the dissemination of UN humanitarian ideals rather than as critics of UN members’ performance.²⁶ Neither did UN procedures pave the way for the construction of stronger norms on the founda-

tion of early human rights rhetoric. Thus, while the UN constituted a frame for the possible creation of norms, it was only a frame.²⁷ The creation of an institutional climate supporting actual observance of human rights has been a much more contentious affair.

A second possible institutional source of change to examine is the historical change in the UN membership profile. Decolonization altered UN politics as newly independent states joined the organization during its first three decades. The new membership eventually constituted a majority in the UN, a majority that manifested the political will to condemn racial discrimination and apartheid in the southern African states. But while newly independent African states “almost all could agree” on support for racial equality in southern Africa,²⁸ support for criticism of southern Africa did not necessarily extend to support for wider international accountability on the full range of civil and political rights.

NGOs’ Human Rights Advocacy in the UN

Thus, no state-centric explanation for norm emergence, even one that incorporates hegemonic or institutional leadership, accounts for why such challenges to sovereignty might gain a foothold in the society of states. At the same time, numerous studies document NGO involvement in the politics of human rights, either on their own or as part of a network of actors.²⁹ Henry Steiner and Philip Alston illustrate NGO-generated demand for stronger application of UN human rights mechanisms with the observation that the mid-1980s average of 25,000 human rights complaints per year submitted to the UN from all sources skyrocketed to a 1995 level of almost 300,000 complaints per year, but “many of these complaints [were] identical as a result of letter-writing campaigns by groups with a large and active membership.”³⁰ Yet NGOs’ prominence as a source of principled normative claims in international politics has not up to this point been fully analyzed with reference to normative challenges to sovereignty.

In many accounts of norms, both formal and informal institutions are framed as though they only exist in service of state interests. The possibility of their conditioning influence on state action is rarely considered.³¹ Similarly, with overly state-centric assumptions about how international norms affect or are affected by states, a systematic role for nonstate actors in the development of international norms is simply assumed away. What is needed is a deeper understanding that accounts for how norms gain authority and how normative authority interacts with the motives of state and nonstate actors.

WHAT DO NORMS DO? THE TENSION BETWEEN BEHAVIOR AND BELIEFS

If realist assumptions fairly represent the value states place on sovereign autonomy, realism is an overly restrictive framework for understanding how norms work. There is tension between the principled values many states endorse in their rhetoric and the power mandate dictated by adherence to the principle of sovereignty.

Norms are generally defined as rules or standards of behavior based on shared moral, causal, or factual beliefs. In his discussion of regimes, Stephen Krasner placed norms in a continuum of kinds of social rules, in which norms were “standards of behavior defined in terms of rights and obligations,” based on principles, which are “beliefs of fact, causation, and rectitude.”³² While it might be criticized for too strict a separation among kinds of rules, and for limited acknowledgment of the socially constructed nature of such rules, Krasner’s hierarchy is heuristically useful for two reasons. First, it attempts to be comprehensive. It leaves room for the many different kinds of regular behavior that may be observed in the international system. Second, it distinguishes between different kinds of norms, different kinds of beliefs, and implicitly, the different kinds of objectives that guide behavior. Krasner recognizes that regimes change when principles and norms that guide them change. However, the principles and norms are given in the regime model. It is only implicit in Krasner’s definition that norms, being based on belief, are mutable.

To understand principled international norms more fully requires full recognition of norms as reference points for social action. Below, I discuss the increased attention that theorists have devoted to the socially negotiated character of norms. If norms are not simply given, but evolve, then the accumulated choices of international actors gradually impact how the rules of international life are interpreted and applied. Behavior is mediated through normative interpretation and application; therefore, normative standards fluctuate. In line with such a conception of the place of norms in social interaction, it is necessary to study intentions, behavior, and how intentions and behavior are expressed and interpreted in order to understand how international norms change.

When actors appeal to norms, they participate in a process of communication, which is evidenced through reflection, persuasion, criticism, and interpretation of behavior.³³ Friedrich Kratochwil and John Gerard Ruggie argued early that such an approach was lacking in regime theory’s understanding of norms. They called for the incorporation of both communicative and behavioral analysis in the study of international insti-

tutions.³⁴ Kratochwil later described norms as prescriptions regarding proper behavior, to which actors refer when airing grievances.³⁵ Such an approach is pursued by Volker Rittberger et al., who draw explicitly from Jürgen Habermas's theory of communicative action, which understands actors to be advancing truth claims through discourse to arrive at common understandings undistorted by power relationships. Common understandings develop through appeals to principle, and the interpretation of such appeals.³⁶

In a study of international norms and apartheid, Audie Klotz defines norms as "shared (thus social) understandings of standards of behavior."³⁷ I argue that norms go beyond shared understandings: the socially shared interpretation of behavior is a key first step in the development of norms, but shared understandings do not *make* norms. To become norms, shared understandings need some way to inform continuity and change in etiquette, traditions, mores, and, more deliberately, law. Shared understandings of observed behavior take on the power to shape future behavior. Thus, norms as shared standards for behavior have a basis in shared understandings and socially established rules. In a political system these standards may remain informal or be formally codified in law, but norms should be understood as regularly affecting action in a way that the mere existence of shared ideas or principles does not.

The above conception of norms reflects the concept long familiar to legal theorists that formal and informal rules of behavior derive their influence in large part from socially formed expectations. Principled norms of international human rights express obligations for states that reflect the rights due to human beings. In the present international system, the idea of human rights is rooted in the Western liberal conception of individual human dignity. This idea is the object of constant critique by those who would like to diminish it in some respect as well as by those who would like to expand it. For purposes of this study, in accordance with H.L.A. Hart's understanding of law,³⁸ I assume that legal standards of human rights can be understood as referents for the emergence of shared social understandings about human rights in international society. In the present international system, NGOs have worked to reinforce the social expectations that undergird and support human rights.

It is too often assumed in studies of international relations that spotty behavioral compliance with moral principles means that such principles are irrelevant. In the realist tradition, strategic priorities of states are expected to drive out morality when power and principle conflict. The persistent gap between moral standards and state actions is then interpreted as behavioral confirmation of the absence of authoritative norms. However, behavioral compliance and noncompliance are not fully transparent as measures of a norm's existence and authority. In describing

the international system as an anarchical society, Hedley Bull noted that international norms and institutions hold sway for states because of a sense of obligation, even without a central enforcement mechanism: states form a society in as far as they “*conceive themselves to be bound* by a common set of rules.”³⁹ Whether a specific action supports a norm depends in large part on how it is interpreted, justified, and criticized by actors and observers.

To summarize, human rights norms can be understood as standards of behavior defined in terms of rights and obligations, resting on beliefs. Human rights norms rest on beliefs of rectitude, or right and wrong. I have suggested that actors use norms as reference points in their communication and interaction. This communicative process serves as a primary means by which actors may arrive at new norms and reinforce existing principles by acknowledging one another’s full or partial compliance with norms.

How NORMS GROW

Instigating an interplay between facts and principles is a way that NGOs, even in a system dominated by states, both bolster rhetorical principles with meaning and create legitimacy for themselves. Amnesty International used the tension between human rights ideals and the facts of their incomplete realization as moral leverage in the intergovernmental system as it expanded its efforts to aid individuals by working to strengthen legal norms of human rights. The attributes that legitimated AI’s intervention in the process of norm emergence rested on the principles that make principled norms themselves effective: invocation of right and wrong, independence, and conceptual generalization.

These attributes are qualities that governments can rarely afford in their relations with other states. Nation-states in the present international system are faced with contradictory expectations on the normative front. The norms of sovereignty buttress the expectations that states will be self-determining and independent of international accountability. Competing moral expectations based on the universal ideal of human rights demand that the government should protect the integrity of the person. Indeed, the demands are not completely contradictory since—in classic realist texts, at least—the purpose of sovereign power is to provide a buffer for a nation’s subjects against the state of nature. If a government does not protect its citizens, to some extent it may yield its moral claim on sovereignty.⁴⁰

The attributes of AI and other like-minded nongovernmental organizations following in its wake, then, appeal to principled norms rather

than pressure states for material reasons. That means articulating beliefs of rectitude through loyalty to principle, invoking such beliefs in an impartial manner, and deepening the process by relating new facts to general concepts. The remainder of this chapter is devoted to elaborating a theory of how principled norms emerge, based on the history of Amnesty International's practical orientation to the sponsorship and invocation of norms in support of human rights.

The Creation of Legal Standards in the United Nations

The process of articulation and establishment of human rights principles as norms is complex. Much of the interaction takes place within the institutional context of the United Nations. Formal human rights standards are established through UN decisions, declarations, and treaties, which impose obligations of varying legal strength for governments with respect to human rights. A brief discussion of the types of formal standards that have developed in the UN is presented below.

Figure 1 above roughly compares the kinds of human rights standards that emerged from 1925 through 1994. Standard setting in the UN usually starts with a declaration concerning a specific topic, which is adopted by consensus. In theory, a declaration does not require a surrender of sovereignty, but since it is adopted by the UN General Assembly, it can be regarded as pertaining to all UN member states. Subsequent invocation of such statements with reference to concrete circumstances enhances their legitimacy. The level of obligation conferred through a declaration is not as well defined as that of a legally binding treaty, but because the efforts to conclude treaties became difficult during the East-West political conflict of the Cold War, declarations have been used to express international normative intentions on human rights since the founding of the UN.⁴¹ Human rights treaty provisions (conventions and convention protocols), most of which are drafted through UN-affiliated working groups, mark a firmer set of obligations for states. A convention requires a definition of the phenomenon in question and legally binds the states that sign it.⁴² A convention protocol is a separate attachment to a treaty that allows states to make binding commitments to stronger implementation measures on particular issues. Usually states that ratify a treaty must, at minimum, submit regular compliance reports to a central body.⁴³ UN members may also adopt further detailed recommendations, some technical, concerning how to conduct government activities in a manner consistent with broader human rights standards. While such guidelines may not be binding in and of themselves, they endorse behavioral standards of increasing specificity. Examples include UN recommendations for police conduct and detailed guidelines for using autopsy

procedures to document evidence of suspected mistreatment by political authorities.⁴⁴ Insofar as the norms are reflected in international legal instruments, human rights norms are the outcome of an array of procedures that have been developed to generate statements that can then be understood as valid rules of international law. The legal norm-drafting process in the UN is therefore an empirical indicator of varying levels of normative understandings, although some norms do not have fixed authority.

Knowledge of how formal norms of human rights have developed in the UN is necessary as a prelude to a full understanding of how new human rights norms emerge and become part of the social context of international politics. Mature norms as shared standards of behavior represent the outcome of a process of socially mediated communication that draws from the articulation of tradition, interest, and moral principle, and places new knowledge in the context of those standards. Habermas notes that normative legal guarantees are grounded and defined through an inherently “unsteady” social process: “The institutions and legal guarantees of free and open opinion-formation rest on the unsteady ground of the political communication of actors who, in making use of them, at the same time interpret, defend, and radicalize their normative content.”⁴⁵ In the human rights arena, interaction concerning potential legal norms of human rights began, historically, in the absence of strong institutional guarantees.

PHASES IN THE EMERGENCE OF HUMAN RIGHTS NORMS

From the case research presented in the chapters to follow, I have identified four phases in the emergence of human rights norms as a case of principled norm emergence. In the first phase, the groundwork for norm emergence is laid by the discovery and interpretation of facts. The publication and discussion of those facts comprises the second phase of building consensus among advocates of new norms and defenders of the status quo. The process may continue with the construction of discrete legal norms, which is the third phase. The application of newly created norms with regard to state behavior forms a fourth phase.

Phase I: Fact Finding

The first phase in norm emergence that I identify is the fact-finding phase. It forms a basis for all other steps in the emergence of new norms. In this phase, information about specific human rights violations is brought into the open.

When AI began collecting information on prisoners of conscience, there were no UN mechanisms for human rights monitoring. However, the situation is different now. The current institutional context is comprised of an array of monitoring mechanisms sponsored by the UN and regional organizations to publish and interpret information about human rights. NGOs are now widely recognized for their role in providing informational fodder for the operation of monitoring mechanisms. A less theorized but potentially more important function of NGOs is their role in independently interpreting and publishing information as a step in highlighting the gap between facts and normative expectations. To do so sets in motion the kind of reasoning and use of evidence that fosters deeper discussion and potential consensus about questions of right and wrong that must be worked out before formal legal norms can be constructed and ratified. In this phase, it is the NGOs' established history of accuracy, independence, and impartiality that will determine their credibility and authoritative power within international political and public arenas.

The case studies show that information about human rights abuses becomes a node around which clarification of existing normative standards can take place. The simple preservation and publication of facts about state-sponsored human rights abuses is a step toward the generation of norms about human rights behavior. Facts cannot be reconstructed in the absence of witnesses or physical evidence. To seek out and preserve the facts of state repression undermines the efforts of states to keep abuses secret.

The human rights problems in this book—torture, disappearances, and extrajudicial executions—represent secret ways that states evade accountability for quashing political protest. Without the facts of the cases, no judgment and no conscience is possible. For this reason, the moment Amnesty International began to collect facts about prisoners of conscience, the groundwork for principled norm emergence was laid. The ability of AI and other human rights advocates to maintain an uncompromisedly principled interpretation of the facts keeps the focus on the moral content of human rights claims.

Phase II: Consensus Building

It is a tragic reality that the impetus to generate stronger norms often comes after international outsiders realize their shocking failure or inability to aid victims of human rights abuses in individual countries. When facts become available, their interpretation by principled actors opens a state's internal affairs to scrutiny, analysis, and deliberation by members of the international community. In the United Nations, cer-

tainly, such deliberations are not the preserve of exclusively moral actors. Some states press their own political interests in the guise of moral claims. When interviewed for this study, more than one former Amnesty staff member has commented to the effect that, as Nigel Rodley put it, “the UN often does the right thing for the wrong reasons.”⁴⁶ Principled motivations are many times congruent with the interests of certain actors. Whatever the motives behind such political deliberations, they provide an opening to the moral argument that states should bow to greater accountability in the face of human rights ideals.

New norms as formal legal rules cannot be engendered without some form of joint recognition of the need for stronger legal protection. To attain this, generalized patterns of abuse must be identified and publicized. The fact that, in a repressive society, those most aware of the need for protection—domestic human rights advocates and monitors, for example—are themselves likely to be targets of repression complicates the generalization process that is necessary for consensus about the need for human rights norms. State secrecy inhibits documentation of patterns of human rights abuses. The process of gathering and interpreting facts about human rights violations, as assisted by international nongovernmental organizations, enables the categorization and summary of state behavior with regard to human rights principles from outside the societies where abuses may be taking place.

NGOs’ ability to present a full picture of human rights abuses raises public awareness of problems and encourages the public to demand action on human rights. Insofar as the ugly facts of repression elicit the response that systematic protection ought to be provided, collecting and publishing information advertises the need for norms. Using the expertise garnered through familiarity with the facts and sharing such information among elites, NGOs often can also help to form and direct demand for particular kinds of normative remedies. In sum, the second phase of norm emergence is one that problematizes facts by interpreting them with reference to the beliefs upon which norms rest, then builds a consensus about the need for norms that will serve as more specific guides for behavior.

Phase III: Principled Norm Construction

Developing legal standards that formally elaborate on principles of right and wrong is the third phase, principled norm construction. The primary activity in this phase for human rights involves the drafting of legal norms, but there is much political interaction throughout the process. Norm construction is performed by experts who define human rights

problems in language that will accomplish the kind of normative limitations that are desired.

As a background to the norm construction process, states and NGOs compete over whose characterization of a given human rights “problem” will become the standard version. Negotiation also occurs over the level of obligation that will be imposed on states as norms are formalized. In addition, the norm construction phase requires argumentation in light of legal precedent, when precedent can be found. In this phase, publication of facts is still important, but the ability to participate competently in a norm-drafting process becomes important. Margo Picken, AI’s former UN liaison, observed that, because they are not trained in human rights, “diplomats are usually less and less competent” as the details of human rights norms become more complex. At the same time, advocacy groups such as AI must remain wary of the ways in which human rights rhetoric may be manipulated for political purposes. To promote human rights principles, advocates “now need more expertise” than they used to.⁴⁷

International norms, especially in legal terms, have almost always been articulated by states. Although it cannot participate in norm drafting at a level equal to that of states, which generally reserve formal negotiation status for themselves in such negotiations, Amnesty International has been an active participant in the norm-drafting process at the UN. It has regularly participated in debates and lobbying over what should be included, or excluded, over nuances of wording, and over the projected and actual implications of how new formal norms may be framed.

As the case studies will show, Amnesty International became a key actor and commentator in the construction of international norms on human rights. Despite the need for specialized knowledge in this phase, loyalty to principle and the ability to invoke a nonexpert public remains essential to NGOs desiring to influence norm construction. Interpretations that draw upon principle carry more weight when implicitly backed by public support, and such consensus enhances the ability to construct effective formal norms.

Phase IV: Norm Application

The fourth phase of norm emergence involves applying new norms to ongoing cases that challenge principles. Norm application, in some ways, represents a new point in a cycle or spiral of norm building, since to apply human rights norms does require information and building consensus as to how those norms apply.⁴⁸ However, the concept of a cycle also reflects the fact that norm emergence is a product of reference to earlier principles. The cycle leading to the application of norms becomes smoother as practice becomes more consistent with underlying principles.

CONCLUSION

To describe the norm generation process as a positive, step-by-step process risks implying that norm creation is a fait accompli as long as the principled actor remains steadfast. While I argue that the stewardship of human rights principles by NGO actors has been essential to the creation of human rights norms in the international system, in large part flowing from the fact that these actors have been disinterested yet constant promoters of human rights, I do not assume or wish to insinuate that norms automatically triumph given the right formula. Far from it. The process is a process of repeated trial and frequent error. NGOs and states are often at odds. Behind the description presented here is the assumption that discursive conflict over the content of human rights demands does not produce determinate outcomes, and we cannot assume that the outcomes will always be progressive. However, it is fair to assume that states generally want to minimize or place stringent conditions on multilateral accountability for human rights, while NGOs disregard state protests of sovereignty in favor of an emphasis on conformity with demands based on moral principles. Conceived in the terms of the potential influence of civil society on governance, NGOs may be successful in engendering norms if they are able to use their knowledge and influence to propagate their own interpretations of governmental decisions within the public sphere, thus catalyzing broader support and pressure for change. The degree to which NGOs are linked to principle rather than political interests enhances the legitimacy and moral force of their arguments.

The diversity of actors' attitudes and interests assures that working out international standards in rhetoric and behavior is a contentious process. Therefore, while the case studies I present in later chapters are all successful examples of norm emergence, they are characterized by conflict and backward steps as well. State resistance to constraints of transnational origin has been a relative constant. Among actors, including some states, who agree that stronger human rights standards are desirable, neither all NGOs nor all states have similar goals vis-à-vis human rights protection. Different NGOs balance their practical and symbolic goals in different ways. They sometimes disagree among themselves about normative priorities, and even about the degree to which they will associate themselves with states' established institutional processes.⁴⁹

The theory I present outlines necessary ingredients for principled norm emergence, but it is not a foolproof recipe. Norms can be strengthened or weakened by the skill and knowledge of the actors and by the legitimacy of actors' appeals to principle. Many of the subtleties of the process are best discussed in the context of the case studies.

Savages, Victims, and Saviors: The Metaphor of Human Rights

Makau Mutua*

I. INTRODUCTION

The human rights movement¹ is marked by a damning metaphor. The grand narrative of human rights contains a subtext that depicts an epochal contest pitting savages, on the one hand, against victims and saviors, on the other.² The savages-victims-saviors (SVS)³ construction is a three-dimension-

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1. For the purposes of this Article, the "human rights movement" refers to that collection of norms, processes, and institutions that traces its immediate ancestry to the Universal Declaration of Human Rights (UDHR), adopted by the United Nations in 1948. Universal Declaration of Human Rights, G.A. Res. 217(III), U.N. GAOR, 3d Sess., 183d mtg. at 71, U.N. Doc. A/810 (1948) [hereinafter UDHR]. The UDHR, the first human rights document adopted by the United Nations, is the textual foundation of the human rights movement and has been referred to as the "spiritual parent" of most other human rights documents. Henry J. Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. Y.B. 77, 79 (1988). Elsewhere, Steiner and Philip Alston call the UDHR "the parent document, the initial burst of idealism and enthusiasm, terser, more general and grander than the treaties, in some sense the constitution of the entire movement . . . the single most invoked human rights instrument." HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 120 (1996).

2. This oppositional duality is central to the logic of Western philosophy and modernity. As described by David Slater, this binary logic constructs historical imperatives of the superior and the inferior, the barbarian and the civilized, and the traditional and the modern. Within this logic, history is a linear, unidirectional progression with the superior and scientific Western civilization leading and paving the way for others to follow. See generally David Slater, *Contesting Occidental Visions of the Global: The Geopolitics of Theory and North-South Relations*, BEYOND LAW, Dec. 1994, at 97, 100–01.

3. This Article hereinafter refers to the "savages-victims-saviors" metaphor as "SVS." The author uses the term "metaphor" to suggest a historical figurative analogy within human rights and its rhetoric and discourse.

al compound metaphor in which each dimension is a metaphor in itself.⁴ The main authors of the human rights discourse,⁵ including the United Nations, Western states, international non-governmental organizations (INGOs),⁶ and senior Western academics, constructed this three-dimensional prism. This rendering of the human rights corpus and its discourse is unidirectional and predictable, a black-and-white construction that pits good against evil.

This Article attempts to elicit from the proponents of the human rights movement several admissions, some of them deeply unsettling. It asks that human rights advocates be more self-critical and come to terms with the troubling rhetoric and history that shape, in part, the human rights movement. At the same time, the Article does not only address the biased and arrogant rhetoric and history of the human rights enterprise, but also grapples with the contradictions in the basic nobility and majesty that drive the human rights project—the drive from the unflinching belief that human beings and the political societies they construct can be governed by a higher morality. This first section briefly introduces the three dimensions of the SVS metaphor and how the metaphor exposes the theoretical flaws of the current human rights corpus.

The first dimension of the prism depicts a savage and evokes images of barbarism. The abominations of the savage are presented as so cruel and unimaginable as to represent their state as a negation of humanity. The human rights story presents the state as the classic savage, an ogre forever bent on the consumption of humans.⁷ Although savagery in human rights discourse connotes much more than the state, the state is depicted as the operational instrument of savagery. States become savage when they choke off and

4. Each of the three elements of the SVS compound metaphor can operate as independent, stand-alone metaphors as well. Each of these three separate metaphors is combined within the grand narrative of human rights to compose the compound metaphor.

5. I have elsewhere grouped the major authors of human rights as belonging to four dominant schools: conventional doctrinalists, who are mostly, though not exclusively, human rights activists; conceptualizers, mostly senior Western academics who systematize human rights discourse; multiculturalists or pluralists, who are mainly non-Western; and instrumentalists or political strategists, who are Western states and Western dominated inter-governmental organizations such as the United Nations and the World Bank. See generally Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589, 594–601 (1996).

6. Human rights international non-governmental organizations (INGOs) are typically “First World” non-governmental organizations (NGOs) that concentrate on human rights monitoring of, reporting on, and advocacy in “Third World” states. These INGOs share a fundamental commitment to the proselytization of Western liberal values, particularly expressive and political participation rights. See HENRY J. STEINER, DIVERSE PARTNERS: NON-GOVERNMENTAL ORGANIZATIONS IN THE HUMAN RIGHTS MOVEMENT 19 (1991). For a further explanation of the term “Third World,” see *infra* note 23.

7. The human rights corpus is ostensibly meant to contain the state, for the state is apparently the *raison d'être* for the corpus. See Henry J. Steiner, *The Youth of Rights*, 104 HARV. L. REV. 917, 928–33 (1991) (reviewing LOUIS HENKIN, *THE AGE OF RIGHTS* (1990)). Thus the state is depicted as the “antithesis of human rights; the one exists to combat the other in a struggle for supremacy over society.” Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 67 (1997).

oust civil society.⁸ The "good" state controls its demonic proclivities by cleansing itself with, and internalizing, human rights. The "evil" state, on the other hand, expresses itself through an illiberal, anti-democratic, or other authoritarian culture. The redemption or salvation of the state is solely dependent on its submission to human rights norms. The state is the guarantor of human rights; it is also the target and *raison d'être* of human rights law.⁹

But the reality is far more complex. While the metaphor may suggest otherwise, it is not the state per se that is barbaric but the cultural foundation of the state. The state only becomes a vampire when "bad" culture overcomes or disallows the development of "good" culture. The real savage, though, is not the state but a cultural deviation from human rights. That savagery inheres in the theory and practice of the one-party state, military junta, controlled or closed state, theocracy, or even cultural practices such as the one popularly known in the West as female genital mutilation (FGM),¹⁰ not in the state per se. The state itself is a neutral, passive instrumentality—a receptacle or an empty vessel—that conveys savagery by implementing the project of the savage culture.

The second dimension of the prism depicts the face and the fact of a victim as well as the essence and the idea of victimhood. A human being whose "dignity and worth" have been violated by the savage is the victim. The victim figure is a powerless, helpless innocent whose naturalist attributes have been negated by the primitive and offensive actions of the state or the cultural foundation of the state. The entire human rights structure is both anti-catastrophic and reconstructive. It is anti-catastrophic because it is designed to prevent more calamities through the creation of more victims. It is reconstructive because it seeks to re-engineer the state and the society to reduce the number of victims, as it defines them,¹¹ and prevent conditions that give

8. In Western thought and philosophy, the state becomes savage if it suffocates or defies civil society. See generally John Keane, *Despotism and Democracy, in CIVIL SOCIETY AND THE STATE* 35 (John Keane ed., 1988).

9. Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, *supra* note 7, at 67.

10. There has been considerable debate among scholars, activists, and others in Africa and in the West about the proper term for this practice entailing the surgical modification or the removal of some portions of the female genitalia. For a survey of the debate, see Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1, 4–8 (1995); Hope Lewis & Isabelle R. Gunning, *Cleaning Our Own House: "Exotic" and Familial Human Rights Violations*, 4 BUFF. HUM. RTS. L. REV. 123, 123–24 n.2 (1998). See also Isabelle R. Gunning, *Arrogant Perception, World Traveling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189, 193 n.5 (1991–92).

11. The human rights movement recognizes only a particular type of victim. The term "victim" is not deployed popularly or globally but refers rather to individuals who have suffered specific abuses arising from the state's transgression of *internationally recognized human rights*. For example, the human rights movement regards an individual subjected to torture by a state as a victim whereas a person who dies of starvation due to famine or suffers malnutrition for lack of a balanced diet is not regarded as a human rights victim. The narrow definition of the victim in these instances relates in part to the secondary status of economic and social rights in the jurisprudence of human rights. See generally U.N. ESCOR, 7th Sess., Supp. 2, at 82, U.N. Doc. E/1993/22 (1992) (criticizing the emphasis placed upon civil and political

rise to victims. The classic human rights document—the human rights report—embodies these two mutually reinforcing strategies. An INGO human rights report is usually a catalogue of horrible catastrophes visited on individuals. As a rule, each report also carries a diagnostic epilogue and recommended therapies and remedies.¹²

The third dimension of the prism is the savior or the redeemer, the good angel who protects, vindicates, civilizes, restrains, and safeguards. The savior is the victim's bulwark against tyranny. The simple, yet complex promise of the savior is freedom: freedom from the tyrannies of the state, tradition, and culture. But it is also the freedom to create a better society based on particular values. In the human rights story, the savior is the human rights corpus itself, with the United Nations, Western governments, INGOs, and Western charities as the actual rescuers, redeemers of a benighted world.¹³ In reality, however, these institutions are merely fronts. The savior is ultimately a set of culturally based norms and practices that inhere in liberal thought and philosophy.

The human rights corpus, though well-meaning, is fundamentally Eurocentric,¹⁴ and suffers from several basic and interdependent flaws captured in the SVS metaphor. First, the corpus falls within the historical continuum of the Eurocentric colonial project, in which actors are cast into superior and subordinate positions. Precisely because of this cultural and historical context, the human rights movement's basic claim of universality is under-

rights over economic, social, and cultural rights).

12. The art and science of human rights reporting was pioneered and perfected by Amnesty International (AI), the International Commission of Jurists (ICJ), and Human Rights Watch (HRW), the three oldest and most influential INGOs. Other INGOs as well as domestic human rights groups have mimicked this reporting. On the character, work, and mandate of NGOs and INGOs, see generally Nigel Rodley, *The Work of Non-Governmental Organizations in the World-Wide Promotion and Protection of Human Rights*, 90/1 U.N. BULL. HUM. RTS. 84, 85 (1991), excerpted in STEINER & ALLSTON, *supra* note 1, at 476–79; Peter R. Baehr, *Amnesty International and Its Self-Imposed Limited Mandate*, 12 NETH. Q. HUM. RTS. 5 (1994); Jerome Shestack, *Sisyphus Endures: The International Human Rights NGO*, 24 N.Y.L. SCH. L. REV. 89 (1978–79); Theo van Boven, *The Role of Non-Governmental Organizations in International Human Rights Standard-Setting: A Prerequisite of Democracy*, 20 CAL. W. INT'L L.J. 207 (1989–90).

13. Kenneth Roth, the Executive Director of HRW, underscored the savior metaphor when he powerfully defended the human rights movement against attacks that it had failed to move the international community to stop the 1994 mass killings in Rwanda. He dismissed those attacks as misguided, arguing that they amounted to a call to close "the fire brigade because a building burned down, even if it was a big building." Kenneth Roth, Letter to the Editor, *Human-rights abuses in Rwanda*, TIMES LITERARY SUPP., Mar. 14, 1997, at 15. Turning to various countries in Africa as examples, he pointed to the gratitude of Africans, who with the help of the human rights movement, threw off dictatorial regimes and inaugurated political freedom. *Id.* He argued, further, that in some countries, "like Nigeria, Kenya, Liberia, Zambia, and Zaire [now Democratic Republic of the Congo], the human-rights movement has helped numerous Africans avoid arbitrary detention, violent abuse and other violations." *Id.*

14. This Article contends that the participation of non-European states and societies in the enforcement of human rights cannot in itself universalize those rights. It is important to note that the terms "European" or "Eurocentric" are used descriptively and do not necessarily connote evil or undesirability. They do, however, point to notions of cultural specificity and historical exclusivity. The simple point is that Eurocentric norms and cultures, such as human rights, have either been imposed on, or assimilated by, non-European societies. Thus the current human rights discourse is an important currency of cross-cultural exchange, domination, and valuation.

mined. Instead, a historical understanding of the struggle for human dignity should locate the impetus of a universal conception of human rights in those societies *subjected* to European tyranny and imperialism. Unfortunately, this is not part of the official human rights narrative. Some of the most important events preceding the post-1945, United Nations-led human rights movement include the anti-slavery campaigns in both Africa and the United States, the anti-colonial struggles in Africa, Asia, and Latin America, and the struggles for women's suffrage and equal rights throughout the world.¹⁵ But the pioneering work of many non-Western activists¹⁶ and other human rights heroes are not acknowledged by the contemporary human rights movement. These historically important struggles, together with the norms anchored in non-Western cultures and societies, have either been overlooked or rejected in the construction of the current understanding of human rights.

Second, the SVS metaphor and narrative rejects the cross-contamination¹⁷ of cultures and instead promotes a Eurocentric ideal. The metaphor is premised on the transformation by Western cultures of non-Western cultures into a Eurocentric prototype and not the fashioning of a multicultural mosaic.¹⁸ The SVS metaphor results in an "othering" process that imagines the creation of inferior clones, in effect dumb copies of the original. For example, Western political democracy is in effect an organic element of human rights.¹⁹ "Savage" cultures and peoples are seen as lying outside the human rights orbit, and by implication, outside the regime of political democracy. It is this distance from human rights that allows certain cultures to create victims. Political democracy is then viewed as a panacea. Other textual examples anchored in the treatment of cultural phenomena, such as "traditional" practices that appear to negate the equal protection for women, also illustrate the gulf between human rights and non-liberal, non-European cultures.

15 MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 39–58 (1998).

16. See, e.g., JOSIAH MWANGI KARIUKI, "MAU MAU" DETAINEE: THE ACCOUNT BY A KENYAN AFRICAN OF HIS EXPERIENCES IN DETENTION CAMPS, 1953–1960 (1963); KWAME NKRUMAH, AUTOBIOGRAPHY OF KWAME NKRUMAH (1973); MOHANDAS K. GHANDI, AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH (1957).

17. The author uses the term "cross-contamination" facetiously here to refer to the idea of "cross-fertilization." Many Western human rights actors see the process of multiculturalization in human rights as contaminating as opposed to cross-fertilizing in an enriching way. For example, Louis Henkin has accused those who advocate cultural pluralism or diversity of seeking to make human rights vague and ambiguous. LOUIS HENKIN, THE AGE OF RIGHTS, at x (1990). In other words, he casts cross-fertilization as a negative process, one that is contaminating and harmful to the clarity of human rights.

18. Slater argues that the "Western will to expand was rooted in the desire to colonize, civilize and possess the non-Western society; to convert what was different and enframed as inferior and backward into a subordinated same." Slater, *supra* note 2, at 101.

19. For a discussion on the relationship among human rights, political democracy, and constitutionalism, see STEINER & ALSTON, *supra* note 1, at 710–25.

Third, the language and rhetoric of the human rights corpus present significant theoretical problems. The arrogant and biased rhetoric of the human rights movement prevents the movement from gaining cross-cultural legitimacy.²⁰ This curse of the SVS rhetoric has no bearing on the substance of the normative judgment being rendered. A particular leader, for example, could be labeled a war criminal, but such a label may carry no validity locally because of the curse of the SVS rhetoric.²¹ In other words, the SVS rhetoric may undermine the universalist warrant that it claims and thus engender resistance to the apprehension and punishment of real violators.

The subtext of human rights is a grand narrative hidden in the seemingly neutral and universal language of the corpus. For example, the U.N. Charter describes its mandate to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."²² This is certainly a noble ideal. But what exactly does that terminology mean here? This phraseology conceals more than it reveals. What, for example, are fundamental human rights, and how are they determined? Do such rights have cultural, religious, ethical, moral, political, or other biases? What exactly is meant by the "dignity and worth" of the human person? Is there an essentialized human being that the corpus imagines? Is the individual found in the streets of Nairobi, the slums of Boston, the deserts of Iraq, or the rainforests of Brazil? In addition to the Herculean task of defining the prototypical human being, the U.N. Charter puts forward another pretense—that all nations "large and small" enjoy some equality. Even as it ratified power imbalances between the Third World²³ and the dominant American and European powers, the United Nations gave the latter the primary power to define and determine "world peace" and "stability."²⁴ These fictions of neutrality and universality, like so much else in a lopsided world, undergird the human rights corpus and belie its true identity and purposes. This international rhetoric of goodwill re-

20. Since the rhetoric is flawed, those who create and promote it wonder whether it will resonate "out there" in the Third World. The use of the SVS rhetoric is in itself insulting and unjust because it draws from supremacist First World/Third World hierarchies and the attendant domination and subordination which are essential for those constructions.

21. For example, Serbs sympathized with former Yugoslav President Slobodan Milošević possibly because they felt he had been stigmatized by the West. Milošević played to locals' fears of the West and used the arrogance of the discourse to blunt the fact that he is an indicted war criminal. See e.g., Niles Lathem, *Defiant Milošević: Hell, No, I won't go!*, N.Y. POST, Aug. 7, 1999, at 10.

22. U.N. CHARTER pmbL.

23. The term "Third World" here refers to a geographic, political, historical, developmental, and racial paradigm. It is a term that is commonly used to refer to non-European, largely non-industrial, capital-importing countries, most of which were colonial possessions of European powers. As a political force, the Third World traces its origins to the Bandung Conference of 1955 in which the first independent African and Asian states sought to launch a political movement to counter Western hegemony over global affairs. See ROBERT MORTIMER, THE THIRD WORLD COALITION IN GLOBAL AFFAIRS (1984). See also Makau Mutua, *What is TWAIL?*, in PROC. 94TH ANN. MEETING—AM. SOC'Y INT'L L. (forthcoming 2001).

24. Dianne Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, 5 SOC. & LEGAL STUD. 337, 339–40 (1996).

veals, just beneath the surface, intentions and reality that stand in great tension and contradiction with it.

This Article is not merely about the language of human rights or the manner in which the human rights movement describes its goals, subjects, and intended outcomes. It is not a plea for the human rights movement to be more sensitive to non-Western cultures. Nor is it a wholesale rejection of the idea of human rights.²⁵ Instead, the Article is fundamentally an attempt at locating—philosophically, culturally, and historically—the normative edifice of the human rights corpus. If the human rights movement is driven by a totalitarian or totalizing impulse, that is, the mission to require that all human societies transform themselves to fit a particular blueprint, then there is an acute shortage of deep reflection and a troubling abundance of zealotry in the human rights community. This vision of the “good society” must be vigorously questioned and contested.

Fourth, the issue of power is largely ignored in the human rights corpus. There is an urgent need for a human rights movement that is multicultural, inclusive, and deeply political. Thus, while it is essential that a new human rights movement overcome Eurocentrism, it is equally important that it also address deeply lopsided power relations among and within cultures, national economies, states, genders, religions, races and ethnic groups, and other societal cleavages. Such a movement cannot treat Eurocentrism as the starting point and other cultures as peripheral. The point of departure for the movement must be a basic assumption about the moral equivalency of all cultures. Francis Deng has correctly pointed out that to “arrogate the concept [of human rights] to only certain groups, cultures, or civilizations is to aggravate divisiveness on the issue, to encourage defensiveness or unwarranted self-justification on the part of the excluded, and to impede progress toward a universal consensus on human rights.”²⁶

The fifth flaw concerns the role of race in the development of the human rights narrative. The SVS metaphor of human rights carries racial connotations in which the international hierarchy of race and color is reintrenched and revitalized. The metaphor is in fact necessary for the continuation of the global racial hierarchy. In the human rights narrative, savages and victims are generally non-white and non-Western, while the saviors are white. This old truism has found new life in the metaphor of human rights. But there is also a sense in which human rights can be seen as a project for the redemp-

25. I have argued elsewhere that all human cultures have norms and practices that both violate and protect human rights. Fundamental to this idea is the notion that all cultures construct their view of human dignity. What is needed is not the imposition of a single culture's template of human dignity but rather the mining of all cultures to craft a truly universal human rights corpus. See generally Makau wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 V.A. J. INT'L L. 339 (1995).

26. Francis M. Deng, *A Cultural Approach to Human Rights Among the Dinka*, in HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES 261, 261 (Abdullahi A. An-Na'im & Francis M. Deng eds., 1990).

tion of the redeemers, in which whites who are privileged globally as a people—who have historically visited untold suffering and savage atrocities against non-whites—redeem themselves by “defending” and “civilizing” “lower,” “unfortunate,” and “inferior” peoples. The metaphor is thus laced with the pathology of self-redemption.

As currently constituted and deployed, the human rights movement will ultimately fail because it is perceived as an alien ideology in non-Western societies. The movement does not deeply resonate in the cultural fabrics of non-Western states, except among hypocritical elites steeped in Western ideas. In order ultimately to prevail, the human rights movement must be moored in the cultures of all peoples.²⁷

The project of reconsidering rights, with claims to their supremacy, is not new. The culture of rights in the present milieu stretches back at least to the rise of the modern state in Europe. It is that state’s monopoly of violence and the instruments of coercion that gave rise to the culture of rights to counterbalance the abusive state.²⁸ Robert Cover refers to this construction as the myth of the jurisprudence of rights that allows society to both legitimize and control the state.²⁹ Human rights, however, renew the meaning and scope of rights in a radical way. Human rights bestow naturalness, transhistoricity, and universality to rights. But this Article lodges a counterclaim against such a leap. This Article is certainly informed by the works of critical legal scholars,³⁰ feminist critics of rights discourse,³¹ and critical race theorists.³² Still, the approach of this Article differs from all three because it

27. But genuine reconstructionists must not be mistaken with cynical cultural manipulators who will stop at nothing to justify repressive rule and inhuman practices in the name of culture. Yash Ghai powerfully exposed the distortions by several states of Asian conceptions of community, religion, and culture to justify the use of coercive state apparatuses to crush dissent, protect particular models of economic development, and retain political power within the hands of a narrow, largely unaccountable political and bureaucratic elite. Yash Ghai, *Human Rights and Governance: The Asia Debate*, 15 AUSTL. Y.B. INT'L L. 1 (1994).

Such cultural demagoguery is clearly as unacceptable as is the insistence by some Western academics and leaders of the human rights movement that the non-West has nothing to contribute to the human rights corpus and should accept the human rights corpus as a gift of civilization from the West. See Aryeh Neier, *Asia's Unacceptable Standard*, 92 FOREIGN POL'Y 42 (1993). Henkin has written that the United States viewed human rights “as designed to improve the condition of human rights in countries other than the United States (and a very few like-minded liberal states).” HENKIN, *supra* note 17, at 74. Elsewhere, Henkin has charged advocates of multiculturalism and ideological diversity in the reconstruction of human rights with desiring a vague, broad, ambiguous, and general text of human rights, one that would be easily manipulated by regimes and cultures bent on violating human rights. *Id.* at x.

28. See Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65 (1987).

29. *Id.* at 69. See also JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

30. For examples of critical legal scholarship, see generally Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

31. For examples of feminist critiques of the law, see generally Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986).

32. For examples of critical race theory scholarship, see generally CRITICAL RACE THEORY: THE KEY

seeks to address an international phenomenon and not a municipal, distinctly American question. The critique of human rights should be based not just on American or European legal traditions but also on other cultural milieus. The indigenous, non-European traditions of Asia, Africa, the Pacific, and the Americas must be central to this critique. The idea of human rights—the quest to craft a universal bundle of attributes with which all societies must endow all human beings—is a noble one. The problem with the current bundle of attributes lies in their inadequacy, incompleteness, and wrong-headedness. There is little doubt that there is much to celebrate in the present human rights corpus just as there is much to quarrel with. In this exercise, a sober evaluation of the current human rights corpus and its language is not an option—it is required.³³

The Article continues to build on this theoretical background. Part II relates human rights to the emergence of European and American senses of global predestination and the mission to civilize by universalizing Eurocentric norms. Part III focuses on the metaphor of the savage and looks at human rights norms, work, and scholarship to underscore the theme of the Article. Parts IV and V use the same methodology and approach to explain the victim and the savior metaphors, respectively. Part VI concludes by contending that since an international discourse on human dignity is desirable and inevitable, it is imperative that the grand metaphor be abandoned and the mask of the false consensus lifted so that a new genuine consensus can be constructed.

II. DEVELOPMENT OF THE GRAND NARRATIVE OF HUMAN RIGHTS

The Charter of the United Nations, which is the constitutional basis for all U.N. human rights texts, captures the before-and-after, backward-progressive view of history. It declares human rights an indispensable element for the survival of humankind. It does so by undertaking as one of its principal aims the promotion of “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”³⁴ This self-representation of human rights requires moral and historical certainty and a belief in particular inflexible truths. The Universal Declaration of Human Rights (UDHR), the grandest

WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988). For examples of critical race feminism, an offshoot of critical race theory, see generally CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 1997); Leila Hilal, *What is Critical Race Feminism?*, 4 BUFF. HUM. RTS. L. REV. 367 (1997) (reviewing CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 1997)).

33. For other probing critiques of the human rights movement, see Raimundo Panikkar, *Is the Notion of Human Rights a Western Concept?*, 120 DIOGENES 75 (1982); Bilahari Kausikan, *Asia's Different Standard*, 92 FOREIGN POL'Y 24 (1993); Josiah A.M. Cobbah, *African Values and the Human Rights Debate: An African Perspective*, 9 HUM. RTS. Q. 309 (1987).

34. U.N. CHARTER art. 55(c). See also *id.* pmbl.

of all human rights documents, endows the struggle between good and evil with historicity in which the defeat of the latter is only possible through human rights.³⁵ This is now popularly accepted as the normal script of human rights.³⁶ In fact, there is today an orgy of celebration of this script by prominent scholars who see in it the key to the redemption of humanity.³⁷ But this grand script of human rights raises a multitude of normative and cultural questions and problems, especially in light of the historical roots of the human rights movement.

Any valid critique must first acknowledge that the human rights movement, like earlier crusades, is a bundle of contradictions. It does not have, therefore, a monopoly on virtue that its most vociferous advocates claim. This Article argues that human rights, and the relentless campaign to universalize them, present a historical continuum in an unbroken chain of Western conceptual and cultural dominance over the past several centuries. At the heart of this continuum is a seemingly incurable virus: the impulse to universalize Eurocentric norms and values by repudiating, demonizing, and “othering” that which is different and non-European. By this argument, the Article does not mean to suggest that human rights are bad *per se* or that the human rights corpus is irredeemable. Rather, it suggests that the globalization of human rights fits a historical pattern in which all high morality comes from the West as a civilizing agent against lower forms of civilization in the rest of the world.³⁸

Although the human rights movement is located within the historical continuum of Eurocentrism as a civilizing mission, and therefore as an attack on non-European cultures, it is critical to note that it was European, and not non-European, atrocities that gave rise to it. While the movement has today constructed the savage and the victim as non-European, Adolf Hitler was the quintessential savage. The abominations and demise of his regime ignited the human rights movement.³⁹ Hitler, a white European, was

35. The UDHR argues in its preamble that it is the “disregard and contempt for human rights that have resulted in barbarous acts” and that human dignity, freedom, justice, and peace can only be achieved if human rights are respected. See UDHR, *supra* note 1, pmb.

36. As noted by Mary Ann Glendon, the UDHR “is already showing signs of having achieved the status of holy writ within the human rights movement.” Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153, 1153 (1998). Glendon also notes that “[c]ults have formed around selected provisions [of the UDHR].” *Id.*

37. Henkin has called this the “Age of Rights” and asserted, unequivocally, that “[h]uman rights is the idea of our time, the only political-moral idea that has received universal acceptance.” HENKIN, *supra* note 17, at xvii. Alston has argued that the naming of a claim “as a human right elevates it above the rank and file of competing societal goals” and provides it with “an aura of timelessness, absoluteness and universal validity.” Philip Alston, *Making Space for New Human Rights: The Case of the Right to Development*, 1 HARV. HUM. RTS. Y.B. 3, 3 (1988). See also Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992) (arguing not only for the universality of rights but also, to achieve human rights goals, that human rights law requires a Western-style democratic government).

38. I have argued elsewhere that although the human rights corpus is essentially Eurocentric normatively and culturally, it might be redeemed through the process of genuine multiculturalization. See generally Mutua, *The Ideology of Human Rights*, *supra* note 5.

39. As noted by Thomas Buergenthal, the rise and development of the human rights movement “can

the personification of evil. The Nazi regime, a white European government, was the embodiment of barbarism. The combination of Hitler's gross deviation from the evolving European constitutional law precepts and the entombment of his imperial designs by the West and the Soviet Union started the avalanche of norms known as the human rights corpus.

Nuremberg, the German town where some twenty-two major Nazi war criminals were tried—resulting in nineteen convictions—stands as the birthplace of the human rights movement, with the London Agreement⁴⁰ its birth certificate. Originally, the West did not create the human rights movement in order to save or civilize non-Europeans, although these humanist impulses drove the anti-slavery abolitionist efforts of the nineteenth century.⁴¹ Neither the enslavement of Africans, with its barbaric consequences and genocidal dimensions, nor the classic colonization of Asians, Africans, and Latin Americans by Europeans, with its bone-chilling atrocities, were sufficient to move the West to create the human rights movement. It took the genocidal extermination of Jews in Europe—a white people—to start the process of the codification and universalization of human rights norms. Thus, although the Nuremberg Tribunal⁴² has been argued by some to be in a sense hypocritical,⁴³ it is its promise that is significant. For the first time, the major powers drew a line demarcating impermissible conduct by states towards their own people and created the concept of collective responsibility for human rights. But no one should miss the irony of brutalizing colonial powers pushing for the Nuremberg trials and the adoption of the UDHR.

Perhaps more importantly, two of the oldest and most prestigious human rights INGOs—the International Commission of Jurists (ICJ) and Amnesty International (AI)—were established to deal with human rights violations in Europe, not the Third World. The ICJ was formed as a tool for the West in

be attributed to the monstrous violations of human rights of the Hitler era and to the belief that these violations and possibly the war itself might have been prevented had an effective international system for the protection of human rights existed." THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 21 (1995).

40. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544 [hereinafter London Agreement].

41. HOWARD B. TOLLEY, JR., THE INTERNATIONAL COMMISSION OF JURISTS: GLOBAL ADVOCATES FOR HUMAN RIGHTS 7 (1994).

42. The International Military Tribunal at Nuremberg was established in 1945 by the London Agreement, resulting from conferences held among the United States, Britain, France, and the Soviet Union to determine what policies the victorious allies should pursue against the defeated Germans, Italians, and their surrogates. London Agreement, *supra* note 40.

43. See Kenneth Anderson, *Nuremberg Sensibility: Telford Taylor's Memoir of the Nuremberg Trials*, 7 HARV. HUM. RTS. J. 281 (1994) (reviewing TELFORD TAYLOR, ANATOMY OF THE NUREMBERG TRIALS (1992)). Nuremberg has been criticized for the Allies' selective prosecution of war criminals and their inventiveness of the applicable law. Nuremberg also has been labeled a gross demonstration of the powers of the victors over the vanquished. U.S. Chief Justice Harlan Fiske Stone said the Nuremberg trials had a "false façade of legality" and were "a little too sanctimonious a fraud to meet my old-fashioned ideas." ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 715–16 (1956).

the Cold War.⁴⁴ According to A.J.M. van Dal of the Netherlands, one of its original officials, the mission of the ICJ was to "mobilize the forces—in particular the juridical forces—of the free world for the defense of our fundamental legal principles, and in so doing to organize the fight against all forms of systematic injustice in the Communist countries."⁴⁵ AI was launched in 1961 by Peter Benenson, a British lawyer, to protest the imprisonment, torture, or execution of prisoners held in Romania, Hungary, Greece, Portugal, and the United States because of their political opinions or religious beliefs.⁴⁶ In all of these cases, the targets of AI were European or American, and not the Third World.

Thus, the human rights movement originated in Europe to curb European savageries such as the Holocaust, the abuses of Soviet bloc Communism, and the denials of speech and other expressive rights in a number of Western countries. The movement grew initially out of the horrors of the West, constructing the image of a European savage. The European human rights system, which is now a central attribute of European legal and political identity, is designed to hold member states to particular standards of conduct in their treatment of individuals.⁴⁷ It is, as it were, the bulwark against the re-emergence of the unbridled European savage—the phenomenon that gave rise to and fueled the Third Reich.

The human rights corpus, only put into effect following the atrocities of the Second World War, had its theoretical underpinnings in Western colonial attitudes. It is rooted in a deep-seated sense of European and Western global predestination.⁴⁸ As put by David Slater, European "belief in the necessity of an imperial mission to civilize the other and to convert other societies into inferior versions of the same" took hold in the nineteenth century.⁴⁹ This impulse to possess and transform that which was different found a ready mask and benign cover in messianic faiths. For example, Denys Shropshire, a European Christian missionary, described Africans as "primitive" natives in the "technically barbaric and pre-literary stage of sociological and cultural development."⁵⁰ The purpose of the missionary was not "merely to civilize but to Christianize, not merely to convey the 'Gifts of Civiliza-

44. See TOLLEY, *supra* note 41, at 25–44.

45. Dudley Bonsal, Lawyers and the Cold War in Cooperation with the ICJ, Minutes of the Association of the Bar of the City of New York, May 4, 1953, quoted in TOLLEY, *supra* note 41, at 34.

46. Ian Martin, The New World Order: Opportunity or Threat for Human Rights, Edward A. Smith Lecture at the Harvard Law School Human Rights Program (Apr. 14, 1993), available at <http://www.law.harvard.edu/programs/HRP/Publications/martin.html> (visited on Nov. 9, 2000).

47. The European human rights system, which includes the European Commission on Human Rights and the European Court of Human Rights, is central to the European Union. The system was put in place following the atrocities of the Second World War. See, e.g., BUERGENTHAL, *supra* note 39, at 102–73; Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997).

48. See Slater, *supra* note 2, at 100.

49. *Id.*

50. DENYS W. T. SHROPSHIRE, *THE CHURCH AND PRIMITIVE PEOPLES*, at xiii (1938).

tion."⁵¹ By the nineteenth century, the discourse of white over black superiority had gained popularity and acceptance in Europe:

The advocates of this discourse—[German philosopher Georg] Hegel most typically, but duly followed by a host of ‘justifiers’—declared that Africa had no history prior to direct contact with Europe. Therefore the Africans, having made no history of their own, had clearly made no development of their own. Therefore they were not properly human, and could not be left to themselves, but must be “led” towards civilization by other peoples: that is, by the peoples of Europe, especially of Western Europe, and most particularly of Britain and France.⁵²

As if by intuition, the missionary fused religion with civilization, a process that was meant to remove the native from the damnation of prehistory and to deliver him to the gates of history. In this idiom, human development was defined as a linear and vertical progression of the dark or backward races from the savage to the civilized, the pre-modern to the modern, from the child to the adult, and the inferior to the superior.⁵³ Slater has captured this worldview in a powerful passage:

[T]he geological power over other societies, legitimated and codified under the signs of manifest destiny and civilizing missions, has been a rather salient feature of earlier Western projects of constructing new world orders. These projects or domains of truth, as they emanated from Europe or the United States, attempted to impose their hegemony by defining normalcy with reference to a particular vision of their own cultures, while designating that which was different as other than truth and in need of tutelage.⁵⁴

The United States, whose history is simply a continuation of the Age of Europe,⁵⁵ suffers from this worldview just like its European predecessors. American predestination, as embodied in the Monroe Doctrine, is almost as

51. *Id.* at 425.

52. BASIL DAVIDSON, *AFRICA IN HISTORY*, at xvi (1991).

53. A description of Henry the Navigator is telling:

The heathen lands were kingdoms to be won for Christ, and the guidance of their backward races was a duty that must not be shirked. Henrique shouldered this responsibility. If he had the spirit of a crusader, he had that of a missionary as well. Where he explored his aim was to evangelize, to civilize, and educate the simple savages with whom his seamen made contact. He sent out teachers and preachers to the black men of Senegal.

ELAINE SANCEAU, *HENRY THE NAVIGATOR* 139 (n.d.).

54. See Slater, *supra* note 2, at 100.

55. As I have written elsewhere, the term “Age of Europe” denotes a “historical and philosophical paradigm; that of European hegemony imposed over the globe, particularly the South, over the last five centuries, culminating in the domination of the Americas, Africa, and parts of Asia by Western European norms and forms in the fields of government, religion, society, culture, and the economy.” Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113, 1114 n.5 (1995).

old as the country itself. President Theodore Roosevelt expressed this sense of predestination when he referred to peoples and countries south of the United States as the "weak and chaotic governments and people south of us" and declared that it was "our duty, when it becomes absolutely inevitable, to police these countries in the interest of order and civilization."⁵⁶ The treatment of the Portuguese and Spanish-speaking Latin America as being in the backyard of the United States was instrumental in consolidating the psyche of the United States as an empire.

In the last several hundred years, the globe has witnessed the universalization of Eurocentric norms and cultural forms through the creation of the colonial state and the predominance of certain economic, social, and political models. International law itself was founded on the preeminence of four specific European biases: geographic Europe as the center, and Christianity, mercantile economics, and political imperialism as superior paradigms.⁵⁷ Both the League of Nations and its successor, the United Nations, revitalized and confirmed European-American domination of international affairs. In the post-War period, non-European states were trusted or mandated to Western powers or became client states of one or another Western state.⁵⁸

Since 1945, the United Nations has played a key role in preserving the global order that the West dominates. A critically important agenda of the United Nations has been the universalization of principles and norms which are European in identity. Principal among these has been the spread of human rights which grow out of Western liberalism and jurisprudence.⁵⁹ The West was able to impose its philosophy of human rights on the rest of the

56. DANA G. MUNRO, *INTERVENTION AND DOLLAR DIPLOMACY IN THE CARIBBEAN 1900–1921*, at 76 (1964). William Alford has captured well the evolution of this American sense of predestination:

The United States has a long history of endeavoring to enlighten, if not save, our foreign brethren by exporting ideas and institutions that we believe we have realized more fully. These include efforts to bring "civilization," principally in the form of Christianity, to age-old civilizations in Asia, Africa, and elsewhere; to foster "modernization," especially as manifested through economic development; and to expound a gospel of science and technology. With the ebbing of the Cold War, democracy promotion—a capacious term used to encompass efforts to nurture electoral processes, the rule of law, and civil society, all broadly defined—has become a key organizing principle of American foreign policy, if not this nation's broader interface with the world.

William P. Alford, *Exporting "The Pursuit of Happiness,"* 113 HARV. L. REV. 1677, 1678–79 (2000) (reviewing THOMAS CROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* (1999)).

57. Mohammed Bedjaoui of the International Court of Justice has written, "This classic international law thus consisted of a set of rules with a geographical bias (it was a European law), a religious-ethical inspiration (it was a Christian law), an economic motivation (it was a mercantilist law) and political aims (it was an imperialist law)." Mohammed Bedjaoui, *Poverty of the International Order*, in *INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE* 153, 154 (Richard Falk et al. eds., 1985).

58. See generally Otto, *supra* note 24, at 339–40. Note that the U.N. Security Council, the only organ of the United Nations that wields real power, has been dominated by the United States, United Kingdom, France, and formerly the Soviet Union. China, the only permanent non-European member of the Security Council, has traditionally been isolated by the three Western powers that control it.

59. See Jack Donnelly, *Human Rights and Western Liberalism*, in *HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES*, *supra* note 26, at 31; Virginia Leary, *The Effect of Western Perspectives on International Human Rights*, in *HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES*, *supra* note 26, at 15.

world because it dominated the United Nations at its inception.⁶⁰ The fallacy of the UDHR, which refers to itself as the "common standard of achievement for all peoples and all nations,"⁶¹ is now underscored by the identification of human rights norms with political democracy. The principal focus of human rights law has been on those rights that strengthen, legitimize, and export the liberal democratic state to non-Western societies.⁶²

Some scholars have argued that democratic governance has evolved from a moral prescription to an international legal obligation.⁶³ According to Thomas Franck, the right to democratic governance is supported by a large normative human rights canon.⁶⁴ He asserts that people almost everywhere, including Africa and Asia, "now demand that government be validated by [W]estern-style parliamentary, multiparty democratic process."⁶⁵ He concludes, rather triumphantly, that:

This almost-complete triumph of the democratic notions of Hume, Locke, Jefferson and Madison—in Latin America, Africa, Eastern Europe and, to a lesser extent, Asia—may well prove to be the most profound event of the twentieth century and, in all likelihood, the fulcrum on which the future development of global society will turn. It is the unanswerable response to those who have said that free, open, multiparty, electoral parliamentary democracy is neither desired nor desirable outside a small enclave of [W]estern industrial states.⁶⁶

Franck presents the apparent triumph of liberal democratic nationalism as the free, uncoerced choice of non-Western peoples.

It may appear that Third World states have participated in the legitimization of the human rights corpus, particularly at the United Nations, the institution most responsible for the creation and universalization of human rights norms. However, too much should not be made of this Third World participation in the making of human rights law.⁶⁷ The levers of power at

60. Antonio Cassese, *The General Assembly: Historical Perspective 1945–1989*, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 25, 31–32 (Philip Alston ed., 1992).

61. UDHR, *supra* note 1, pmbL.

62. The human rights corpus has been concerned mainly with the development of civil and political rights in a scheme that leads to the construction of a liberal state. The application of human rights norms appears to lead to the typology of state governed by the project of constitutionalism. Such a state yields the following key characteristics: the government rests on popular sovereignty; accountability for political leadership by the populace is exercised through various devices such as open, periodic, and competitive elections; government is limited through the separation of powers; the judiciary is independent to safeguard the rule of law; and individual civil and political rights are sanctified. See STEINER & ALSTON, *supra* note 1, at 710–25.

63. See Franck, *supra* note 37; see also Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992).

64. Franck, *supra* note 37, at 79.

65. *Id.* at 49.

66. *Id.*

67. Virginia Leary, for instance, notes that:

Western influence, dominant in the origin of the development of international human rights norms, is now only one of a number of cultural influences on the development of international human

the United Nations and other international law-making fora have traditionally been out of the reach of the Third World. And even if they were within reach, it is doubtful that most Third World states actually represent their peoples and cultures. In other words, a claim about the universality or democratization of human rights norm-making at the United Nations cannot be made simply by looking at the numerical domination of that body by Third World states.

The human rights movement is not only lacking in Third World legitimacy, but also it is aimed primarily at the Third World. It is one thing for Europeans and North Americans, whose states share a common philosophical and legal ancestry, to create a common political and cultural template to govern their societies. It is quite another to insist that their particular vision of society is the only permissible civilization which must now be imposed on all human societies, particularly those outside Europe. The merits of the European and American civilization of human rights notwithstanding, all missionary work is suspect and might easily seem as part of the colonial project. Once again, the allegedly superior Europeans and North Americans descend on supposedly backward natives in the Third World with the human rights mission to free them from the claws of despotic governments and benighted cultures.

But the human rights project is no longer just a critique of the Third World by the West. Individual states of all cultural and political traditions, including those in the Third World, have taken coercive measures against other states in the name of human rights. Based on imported Western norms and definitions, many NGOs in the Third World openly oppose human rights violations committed by their own states and societies. Non-Europeans now confront each other within the confines of their states over the enforcement of human rights. The observance or denial of human rights now pits African against African, Arab against Arab, and Asian against Asian.

Today, most of the activities of the ICJ, AI, and the other Western-based INGOs, such as Human Rights Watch (HRW), the Lawyers Committee for Human Rights, and the International Human Rights Law Group, are focused on the Third World. As a consequence, the predominant image of the savage in the human rights discourse today is that of a Third World, non-European person, cultural practice, or state.

At first blush, there appear to be sufficient grounds for the INGOs' unrelenting emphasis on Third World states as the foci for their work. As a general rule, INGOs concentrate their work on the violations of civil and political rights—the species of legal protections associated with a functioning

rights standards. Its contribution to the development of human rights has been great, but it has not been unique, and other cultures have made and are making significant contributions to our collective conception of human dignity.

Leary, *supra* note 59, at 30.

political democracy. Admittedly, there are more undemocratic states in the Third World than in the developed West. Third World despots have acted with impunity. Violations of civil and political rights and the plunder of Third World economies by their leaders are common and flagrant. The spotlight by INGOs here is appropriate, necessary, and welcome, particularly where local advocacy groups and the press have been muzzled or suffocated by the state. There is no doubt that mechanisms for the protections of human rights are more fragile in many Third World states, if they exist at all.

But while this explains the work of INGOs in the Third World, it does not excuse their relative inactivity on human rights violations in the West. Western countries, like the United States, are notorious for their violations of the civil rights of racial minorities and the poor. Although both AI and HRW have haltingly started to breach the publicity and advocacy barriers in these areas,⁶⁸ such reports have been sparse and episodic, and have given the impression of a public relations exercise, designed to mute critics who charge INGOs with a lopsided Third World focus.

The ravages of globalization notwithstanding, INGOs have largely remained deaf to calls for advocacy on social and economic rights.⁶⁹ There certainly is no sufficient defense for their failure to address the violations of economic and social rights by Western states.⁷⁰ It is true, of course, that dominant public discourse in the West generally opposed the mainstreaming of an agenda for economic and social rights, and instead characterized them as inimical to free enterprise. But in reality, most countries—socialist, capitalist, and Third World—have never seriously sought to fulfill economic, social and cultural rights, even those which rhetorically championed them, such as the Soviet Union.

68. See AMNESTY INT'L, UNITED STATES OF AMERICA: RACE, RIGHTS AND POLICE BRUTALITY (1999); HUMAN RIGHTS WATCH & AMERICAN CIVIL LIBERTIES UNION, HUMAN RIGHTS VIOLATIONS IN THE UNITED STATES (1993).

69. For example, HRW recently declined to co-publish a study on trade and human rights [MAKAU MUTUA & ROBERT HOWSE, PROTECTING HUMAN RIGHTS IN A GLOBAL ECONOMY: CHALLENGES FOR THE WORLD TRADE ORGANIZATION (2000)], although it had jointly commissioned it with the Montreal-based International Centre for Human Rights and Democratic Development.

70. HRW is the only major INGO to pay some attention to economic and social rights, although its 1996 policy was so nebulous that it has been relegated to the margins. See Mutua, *The Ideology of Human Rights*, *supra* note 5, at 619. Although HRW has recently reported on corporations and human rights, such activity remains very restricted and highly unsatisfactory. Here, HRW has taken on "easier" or less stigmatized economic and social rights such as labor rights in the Third World—which Western states now advocate because of pressure from organized labor in their countries—and the atrocities committed by oil companies in complicity with repressive governments. The violations of labor rights around the world—particularly in developing and industrializing countries such as India, Vietnam, and Pakistan, to name a few—have become a sort of a *cause célèbre* in the West. The prominence of these violations in the Western press have increased pressure on them to act. Still, INGOs have not tackled the more difficult questions of official corruption within governments, transnational corporations, and the pernicious effects of globalization on the rights to health, the environment, education, and land. In its most important report of the year, a 517-page tome, HRW only devoted a scant five pages to economic and social rights. See HUMAN RIGHTS WATCH, WORLD REPORT 2000, at 464–69 (1999).

The historical pattern is undeniable. It forms a long queue of the colonial administrator, the Bible-wielding Christian missionary, the merchant of free enterprise, the exporter of political democracy, and now the human rights zealot. In each case the European culture has pushed the "native" culture to transform. The local must be replaced with the universal—that is, the European. Are the connections between human rights and particular attributes of European-American culture—such as hedonism, excess individualism, free markets, and now globalization—contingent and not organic? Is, in fact, the text of human rights so open that it is up for grabs, allowing different interests to make whatever claims they wish on it? In other words, are non-European cultures better advised to adopt the human rights text to their specific contexts, but to leave its core in place, if they seek redemption from their own backwardness? Can they segregate the "good" from the "bad" in human rights and reject the baggage of the West, while building a culture that is free from the evils that deny human potential?

Although it is not the purpose of this Article to address particularized national settings, it is sufficient to note that the SVS metaphor has deep historical parallels in the national histories of states where non-whites, and especially persons of African ancestry, have been subjected to oppression, abuse, exploitation, and domination by whites. The history of South Africa, as told by Nelson Mandela, is not just a testament to the cooperation of black and white South Africans against apartheid.⁷¹ There is in that history a strong undercurrent of white benefactors, sometimes pejoratively referred to as "do-gooders," a species of humans cut from the abolitionist cloth.⁷² During the darkest days of apartheid, many individual white lawyers, white law firms, and white human rights organizations spoke for and defended black South Africans.⁷³ Many whites became key leaders in what was essentially a black liberation struggle.⁷⁴ In the United States, from the earliest days of

71. For a history of South Africa, and in particular the struggle against apartheid, see NELSON MANDELA, *LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA* (1994).

72. For a discussion of the abolitionist impulse in human rights, see Makau wa Mutua, *The Politics of Human Rights: Beyond the Abolitionist Paradigm in Africa*, 17 MICH. J. INT'L L. 591 (1996) (reviewing CLAUDE E. WELCH, *PROTECTING HUMAN RIGHTS IN AFRICA: STRATEGIES AND ROLES OF NON-GOVERNMENTAL ORGANIZATIONS* (1995)).

73. For example, the Legal Resources Centre (LRC), one of the best known anti-apartheid human rights organizations, was established by white lawyers in 1979 as a public interest law firm. Among the more famous white liberals to lead the LRC was Arthur Chaskalson who, in 1994, became the first President of the Constitutional Court, South Africa's highest court. For a brief history of the LRC, see PUBLIC INTEREST LAW AROUND THE WORLD 159–63 (Julius L. Chambers et al. eds., 1992). For the racialization of the South African criminal justice system, and the exclusion of black Africans from the legal profession, see Charles J. Ogletree, Jr., *From Mandela to Mthwana: Providing Counsel to the Unrepresented Accused in South Africa*, 75 B.U. L. REV. 1 (1995).

74. Among the more famous whites to participate in South Africa's liberation struggle were the late Joe Slovo, the leader of the South African Communist Party, a key ally of the African National Congress, and Albie Sachs, the renowned jurist-activist who, in 1994, became a justice of South Africa's Constitutional Court. Nelson Mandela recalled with fondness the lifelong political relationships that he formed with whites, including Slovo, whom he had met while a law student at the University of the Witwatersrand. MANDELA, *supra* note 71, at 84.

the enslavement of Africans by whites up to the civil rights movement, whites often played important roles in the struggle for equality by blacks. As in South Africa, many American whites held key positions in the fight for civil rights.⁷⁵ It seems politically incorrect to consign white participation in these noble causes to the SVS metaphor. But it is an unavoidable conclusion that the metaphor largely describes their involvement. It would also be a tragic historical error not to recognize the importance of those struggles to the liberal project and its centrality to democracy and the freedom of whites as a people themselves.

The purpose of this Article is not to assign ignoble intentions or motivations on the individual proponents, leaders, or participants in the human rights movement. Without a doubt many of the leaders and foot-soldiers of the human rights movement are driven by a burning desire to end human suffering, as they see it from their vantage point. The white American suburban high school or college student who joins the local chapter of AI and protests FGM in far away lands or writes letters to political or military leaders whose names do not easily roll off the English tongue are no doubt drawing partly from a well of noblesse oblige. The zeal to see all humanity as related and the impulse to help those defined as in need is noble and is not the problem addressed here. A certain degree of human universality is inevitable and desirable. But what that universality is, what historical and cultural stew it is made of, and how it is accomplished make all the difference. What the high school or college student ought to realize is that her zeal to save others—even from themselves—is steeped in Western and European history. If one culture is allowed the prerogative of imperialism, the right to define and impose on others what it deems good for humanity, the very meaning of freedom itself will have been abrogated. That is why a human rights movement that pivots on the SVS metaphor violates the very idea of the sanctity of humanity that purportedly inspires it.

III. THE METAPHOR OF THE SAVAGE

Human rights law frames the state as its primary target. Although voluntarily entered into, human rights treaties are binding on the state.⁷⁶ The

75. For example, in 1961, Jack Greenberg, a white, was handpicked by Thurgood Marshall to succeed him as the director-counsel of the NAACP Legal Defense and Educational Fund. JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 294–95* (1994). Greenberg was also instrumental in the establishment of the LRC in South Africa. PUBLIC INTEREST LAW AROUND THE WORLD, *supra* note 73, at 159. On the controversy of white liberals and their involvement in civil rights, see Randall Kennedy, *On Cussing Out White Liberals*, *THE NATION*, Sept. 4, 1982, at 169.

76. Human rights treaties are negotiated by states and are meant to bind them. States undertake in human rights treaties to respect the rights contained therein. For example, the International Covenant on Civil and Political Rights (ICCPR) gives individuals a multitude of rights and then declares that “Each State Party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.” ICCPR, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 53, U.N. Doc. A/6316 (1966) (entered into force Jan. 3, 1976). All

state is both the guarantor and subject of human rights. Underlying the development of human rights is the belief that the state is a predator that must be contained. Otherwise it will devour and imperil human freedom. From this conventional international human rights law perspective, the state is the classic savage.

But it is not the state per se that is predatory, for the state in itself is simply a construct that describes a repository for public power, a disinterested instrumentality ready to execute public will, whatever that may be. There is a high degree of fluidity in the nature of that power and how it is exercised. For instance, a state's constitutional structure could in its configuration require a particular form of democratic government. Or a state's constitution could locate public power in religious bodies and clerics, as has been the case in the Islamic Republic of Iran.⁷⁷ However, a state could, through revolution or some other device, be Islamic today and secular tomorrow. Since the state in this construction appears to be an empty vessel, the savage must be located beyond the state.

The state should be unmasked as being a mere proxy for the real savage. That leaves the historically accumulated wisdom, the culture of a society, as the only other plausible place to locate the savage. I have argued elsewhere that culture "represents the accumulation of a people's wisdom and thus their identity; it is real and without it a people is without a name, rudderless, and torn from its moorings."⁷⁸ In this sense, culture is a set of local truths which serve as a guide for life's many pursuits in a society. The validity of a cultural norm is a local truth, and judgment or evaluation of that truth by a norm from an external culture is extremely problematic, if not altogether an invalid exercise.⁷⁹ But culture itself is a dynamic and alchemical mix of many variables, including religion, philosophy, history, mythology, politics, environmental factors, language, and economics. The interaction of these variables—both within the culture and through influence by other cultures—produces competing social visions and values in any given society. The dominant class or political interests that capture the state make it the public expression of their particular cultural vision. That is to say, the state is more a conveyer belt than an embodiment of particular cultural norms. The state is but the scaffolding underneath which the real savage resides. Thus, when human rights norms target a deviant state, they are really attacking the normative cultural fabric or variant expressed by that

other human rights treaties have similar obligatory language. Thus, although states voluntarily enter into treaty obligations, they are bound by them once ratified.

77. The Iranian constitution provides for the supremacy of the Islamic Consultative Assembly and the Guardian Council over many areas including legislation and the adoption of international agreements. IRAN CONST. art. 71–99.

78. Makau Mutua, *Returning to My Roots: African "Religions" and the State*, in PROSELYTIZING AND COMMUNAL SELF-DETERMINATION IN AFRICA 169, 170 (Abdullah Ahmed An-Na'im ed., 1999).

79. See EELVIN HATCH, CULTURE AND MORALITY: THE RELATIVITY OF VALUES IN ANTHROPOLOGY 8 (1983). See also The Executive Board, Am. Anthropological Ass'n, *Statement on Human Rights*, 49 AM. ANTHROPOLOGIST 539 (1947).

state. The culture, and not the state, is the actual savage. From this perspective, human rights violations represent a clash between the culture of human rights and the savage culture.

The view that human rights is an ideology with deep roots in liberalism and democratic forms of government is now supported by senior human rights academics in the West.⁸⁰ The cultural biases of the human rights corpus can only be properly understood if it is contextualized within liberal theory and philosophy. Understood from this position, human rights become an ideology with a specific cultural and ethnographic fingerprint.⁸¹ The human rights corpus expresses a cultural bias, and its chastening of a state is therefore a cultural project. If culture is not defined as some discrete, exotic, and peculiar practice which is frozen in time but rather as the dynamic totality of ideas, forms, practices, and structures of any given society, then human rights, as it is currently conceived, is an expression of a particular European-American culture. The advocacy of human rights across cultural borders is then an attempt to displace the local culture with the "universal" culture of human rights. Human rights, therefore, become the universal culture. It is in this sense that the "other" culture, that which is non-European, is the savage in the human rights corpus and its discourse.

In major international human rights instruments, the "other" culture is quite often depicted as the evil that must be overcome by human rights itself. An example is the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW),⁸² which is based on equality and anti-discrimination, the two basic and preeminent norms of the human rights corpus. The most transformatively radical human rights treaty, CEDAW refers to offending "social and cultural patterns"⁸³ and demands that the state take all appropriate measures to transform attitudes and practices that are inimical to women.⁸⁴ The treaty explicitly requires that states seek the "elimination of prejudices and customary and all other practices" that are based on the ideas of the inequality of the sexes.⁸⁵

80. See Burns H. Weston, *Human Rights*, 20 NEW ENCYCLOPEDIA BRITANNICA 656 (15th ed. 1992); Mutua, *The Ideology of Human Rights*, *supra* note 5; Steiner, *Political Participation as a Human Right*, *supra* note 1; HENKIN, *supra* note 17, at x; JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* (1989); Adamantia Pollis & Peter Schwab, *Human Rights: A Western Construct with Limited Applicability*, in *HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES* 1 (Adamantia Pollis & Peter Schwab eds., 1979); Cassese, *supra* note 60, at 25.

81. Steiner has stated that "[o]bservers from different regions and cultures can agree that the human rights movement, with respect to its language of rights and the civil and political rights that it declares, stems primarily from the liberal tradition of Western thought." STEINER & ALSTON, *supra* note 1, at 187.

82. Convention on the Elimination of all Forms of Discrimination against Women, 1249 U.N.T.S. 14 (*entered into force* Sept. 3, 1981).

83. *Id.* at pt. 1, art. 5(a).

84. See generally Convention on the Elimination of all Forms of Discrimination against Women, *supra* note 82.

85. *Id.* at pt. 1, art. 5(a).

While there are no cultures that are innocent of discriminatory practices against women, human rights discourse treats non-Western cultures as particularly problematic in this regard. For example, in its first report, the Women's Rights Project of HRW focused on wife-murder, domestic battery, and rape in Brazil.⁸⁶ Significant here is the fact that HRW's first report on violations of women's human rights did not focus on the wife-murder, domestic battery, and rape commonplace in the United States or a European country but rather on Brazil, a Third World state. Other reports by the Women's Rights Project have concentrated on violations in Indonesia, Botswana, Haiti, and Turkey, which is Muslim and on the periphery of Europe.⁸⁷

The impression left by the reports and the activities of powerful INGOs is unmistakable. While the West is presented as the cradle of a feminist movement, countries in the South have been constructed as steeped in traditions and practices which are harmful to women. In one of her first reports, Radhika Coomaraswamy, the U.N. Special Rapporteur on Violence against Women, confirmed this impression when she noted that "[c]ertain customary practices and some aspects of tradition are often the cause of violence against women."⁸⁸ She noted that "besides female genital mutilation, a whole host of practices violate female dignity. Foot binding, male preference, early marriage, virginity tests, dowry deaths, sati, female infanticide and malnutrition are among the many practices that violate a woman's human rights."⁸⁹ All of these practices are found in non-Western cultures. Images of practices such as FGM, dowry burnings, and honor killings have come to frame the discourse, and in that vein stigmatize non-Western cultures.

Elsewhere, non-European political traditions, which lie outside the liberal tradition and do not yield political democratic structures, are demonized in the text of human rights and its discourse. Take, for example, the view expressed by human rights documents in the area of political participation. Here, the human rights corpus expects all societies to support a pluralist, democratic society. Both the UDHR and the International Covenant on Civil and Political Rights (ICCPR), the two key documents in the area of

86. *Brazil: Criminal Injustice: Violence Against Women in Brazil*, WOMEN'S RTS. PROJ. (HUM. RTS. WATCH/Women's Rights Project Watch, New York, N.Y.), 1991.

87. *Indonesia: The Damaging Debate on Rapes of Ethnic Chinese Women*, WOMEN'S RTS. PROJ. (HUM. RTS. WATCH/Women's Rights Project, New York, N.Y.), Sept. 1998; *Botswana: Second Class Citizens: Discrimination Against Women Under Botswana's Citizenship Act*, WOMEN'S RTS. PROJ. (HUM. RTS. WATCH/Women's Rights Project, New York, N.Y.), Sept. 1994; *Haiti: Rape in Haiti: A Weapon of Terror*, WOMEN'S RTS. PROJ. (HUM. RTS. WATCH/Women's Rights Project, New York, N.Y.), July 1994; *A Matter of Power: State Control of Women's Virginity in Turkey*, WOMEN'S RTS. PROJ. (HUM. RTS. WATCH/Women's Rights Project, New York, N.Y.), June 1994. In an encouraging move, however, HRW also produced a report on the violations of women's human rights in Michigan state prisons. See *U.S.: Retaliation Against Women in Michigan State Prisons*, WOMEN'S RTS. PROJ. (HUM. RTS. WATCH/Women's Rights Project, New York, N.Y.), Sept. 1998.

88. U.N. ESCOR, 50th Sess., Agenda Item 11(a), at para. 67, U.N. Doc. E/CN.4/1995/42 (1994).

89. *Id.*

civil and political rights, are explicit about the primacy of rights of expression and association. They both give citizens the right to political participation through elections and the guarantee of the right to assemble, associate, and disseminate their ideas.⁹⁰ This scheme of rights coupled with equal protection and due process rights implies a political democracy or a political society with a regularly elected government, genuine competition for political office, and separation of powers with judicial independence. While it is true that the human rights regime does not dictate the particular permutation or strain of political democracy, it suggests a Western-style liberal democracy nevertheless. Systems of government such as monarchies, theocracies, dictatorships, and one party-states would violate rights of association and run afoul of the human rights corpus.⁹¹ When it rejects non-Western political cultures as undemocratic, the human rights corpus raises the specter of political savagery.

In scholarship by many Western academics, the same sharp contrast is drawn between human rights supporters and the cultural or political savage who must be civilized by human rights. Industrial democracies in the last two decades have worked to link human rights to aspects of foreign policy such as development assistance, aid, and trade with non-Western states.⁹² Such linkage requires the recipient, usually a non-Western state, to conform aspects of its domestic laws, policies, or programs to human rights or democratic norms. The coercive maneuver is intended to civilize the offending state. In this sense, Western states frequently use human rights as a tool of foreign policy against non-Western states.⁹³

Some writers have depicted certain practices as part of a savage culture. In the gruesome conflict following the collapse of Yugoslavia, genocide and other war crimes were perpetrated with chilling callousness. In particular, one of the most horrifying war crimes was the massive rape by Serbs of Muslim Bosnian women, with some reports estimating as many as 20,000 victims.⁹⁴ Todd Salzman characterizes these offenses as "an assault against

90. The following provisions of the ICCPR are illustrative: Article 21 on assembly, Article 22 on freedom of association, Article 25 on political participation, Article 19 on expression, and Article 18 on free thought, conscience, and religion. ICCPR, *supra* note 76. The UDHR includes Article 21 on political participation, Article 20 on assembly, and Article 19 on freedom of opinion and expression. UDHR, *supra* note 1.

91. Steiner, *The Youth of Rights*, *supra* note 7, at 930–31.

92. See AM. ASS'N FOR THE INT'L COMMISS'N OF JURISTS, HUMAN RIGHTS AND U.S. FOREIGN POLICY: THE FIRST DECADE 1973–1983 (1984); THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD: THE LEARNING CURVE (1999); Stephen B. Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. INT'L L. 246 (1982); Demetrios James Marantis, *Human Rights, Democracy and Development: The European Community Model*, 7 HARV. HUM. RTS. J. 1 (1994).

93. Henkin notes that the extensive human rights efforts abroad by the United States are attributable to conceptions of individual rights that "dominate [America's] constitutional jurisprudence, and are the pride of its people, their banner to the world." HENKIN, *supra* note 17, at 65.

94. *Contemporary Forms of Slavery. Working Paper on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices During Wartime, Including Internal Armed Conflict*, Submitted by Ms. Linda Chavez in Accordance with Subcommission Decision 1994/109, U.N. ESCOR, 47th Sess., Agenda Item 16, at 2–3, U.N. Doc. E/CN.4/Sub.2/1995/38 (1995). See also M. CHERIF BASSIOUNI & MARCIA MCCORMICK, SEXUAL

the female gender, violating her body and its reproductive capabilities as a 'weapon of war.'⁹⁵ He traces these atrocities to a savage Serbian patriarchal culture that usurps the female body and reduces the female to "her reproductive capacities in order to fulfill the overall objective of Serbian nationalism by producing more citizens to populate the nation."⁹⁶ According to Salzman, this view of the female body is deeply rooted in Serbian culture, the Serbian Orthodox Church, and Serbian official policies.⁹⁷ The savage here is located in religion, politics, and culture which the state supports and implements for the purpose of creating "Greater Serbia."

The image of the savage is also painted impressively by INGOs in their work through reporting and other forms of public advocacy. The focus here is not on domestic human rights non-governmental organizations (NGOs) in the Third World because many simply imitate the practices of their predecessors in the North.⁹⁸ Typically, INGOs perform three basic functions: investigation, reporting, and advocacy.⁹⁹ The focus of human rights INGOs is usually human rights violations in a Third World country, where the "investigation" normally takes place. Generally, a Western-based INGO—typically based in the political and cultural capitals of the most powerful countries in the West¹⁰⁰—sends a team of investigators called a human rights mission to a country in the South. The mission lasts anywhere from several days to a few weeks, and collects data and other information on human rights questions from victims, local NGOs, lawyers, local journalists, human rights defenders, and government officials. Information from these local sources is usually cross-checked with other, supposedly more objective sources—meaning Western embassies, locally based Western reporters, and other Western interests such as foundations. Upon returning to the West, the mission systematizes the information and releases it in the form of a report.

The human rights report is a catalogue of abuses committed by the state against liberal values.¹⁰¹ It criticizes the state for departing from the civil and political rights obligations provided for in the major instruments. Its purpose is to shame the Third World state by pointing out the gulf between the state's conduct and internationally sanctioned civilized behavior. This

VIOLENCE: AN INVISIBLE WEAPON OF WAR IN THE FORMER YUGOSLAVIA (1996).

95. Todd A. Salzman, *Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethnic Responses to Rape Victims in the Former Yugoslavia*, 20 HUM. RTS. Q. 348, 349 (1998).

96. *Id.* at 349.

97. *Id.* at 349–52.

98. See, e.g., Mutua, *The Ideology of Human Rights*, *supra* note 5, at 597.

99. For a helpful overview of the investigative processes of INGOs, see Diane F. Orentlicher, *Bearing Witness: The Art and Science of Human Rights Fact-Finding*, 3 HARV. HUM. RTS. J. 83 (1990).

100. None of the major INGOs have located their headquarters in the Third World. AI is headquartered in London; HRW is based in New York City; ICJ is based in Geneva; the Lawyers Committee for Human Rights is based in New York City; and the International Human Rights Law Group is based in Washington, D.C. See, e.g., Mutua, *The Ideology of Human Rights*, *supra* note 5, at 610–12; Issa G. SHIVJI, *THE CONCEPT OF HUMAN RIGHTS IN AFRICA* 34–35 (1989).

101. See, e.g., STEINER, DIVERSE PARTNERS, *supra* note 6, at 22–25.

departure from good behavior is stigmatized and used to paint the state either as a pariah or out-of-step with the rest of the civilized world. Reports normally contain corrective measures and recommendations to the offending state. In many instances, however, the audience of these reports is the West or some other Western institution, such as the European Union. The pleas of the INGO report here pit a First World state or institution against a Third World state or culture. The report asks that the West cut off aid, condition assistance, impose sanctions, and/or publicly denounce the unacceptable conduct of the Third World state.¹⁰² INGOs thus ask First World states and institutions to play a significant role in "taming" and "civilizing" Third World states, even though such a role relies on the power and economic imbalances of the international order which favors the North over the South.¹⁰³

The human rights report also tells another, more interesting, story about the target of the human rights corpus. In this story, the report describes several images of the savage, including the Third World state, the quintessential savage. Human rights literature is replete with images of blood-thirsty Third World despots and trigger-happy police and security forces.

Perhaps in no other area than in the advocacy over FGM is the image of culture as the savage more poignant. The word "mutilation" itself implies the willful, sadistic infliction of pain on a hapless victim, and stigmatizes the practitioners and their cultures as barbaric savages. Descriptions of the practice are so searing and revolting that they evoke images of a barbarism that defies civilization.¹⁰⁴ Although the practice has dissipated over the last several decades, it is still carried out in parts of Africa and the Middle East.

102. See, e.g., AFRICA WATCH COMMITTEE, KENYA: TAKING LIBERTIES 362–82 (1991) (calling on the British and American governments to push Kenya proactively towards democracy and more respect for human rights); ALICE JAY, ROBERT F. KENNEDY MEM'L CTR. FOR HUMAN RIGHTS, PERSECUTION BY PROXY: THE CIVIL PATROLS IN GUATEMALA 69–71 (Kerry Kennedy Cuomo, et al. eds., 1993) (urging the United States to press Guatemala to abolish and disarm abusive civil patrols).

103. Ian Martin, a former secretary general of AI, has expressed disapproval of advocacy strategies that exploit power imbalances. He has argued that although many powerful Western states appear ready in the aftermath of the Cold War to use their economic power to compel Third World states to comply with human rights, INGOs should be suspicious of such offers. "My contention is that this is a prospect which the human rights movement should view coolly. It should avoid aligning itself with the power relationships of an unjust world and it should recognize the ways in which the cause of human rights requires that those relationships be challenged." Martin, *supra* note 46.

104. Of the three forms of female circumcision practiced, two are often described in particularly graphic and cruel language. First, the mildest form is "circumcision proper" in which only the clitoral prepuce is removed. Second,

(e)xcision involves the amputation of the whole of the clitoris and all or part of the labia minora. [Third,] (s)nfibulation, also known as *Pharaonic circumcision*, involves the amputation of the clitoris, the whole of the labia minora, and at least the anterior two-thirds and often the whole of the medial part of the labia majora. The two sides of the vulva are then stitched-together with silk, catgut or thorns, and a tiny sliver of wood or a reed is inserted to preserve an opening for urine and menstrual blood. The girl's legs are usually bound together from ankle to knee until the wound has healed, which may take anything up to 40 days (italics in original).

World Health Org., *A Traditional Practice That Threatens Health—Female Circumcision*, 40 WORLD HEALTH CHRON. 31–32 (1986).

Given Western stereotypes of barbaric natives in the “dark” continent,¹⁰⁵ Western advocacy over FGM has evoked images of machete-wielding natives only too eager to inflict pain on women in their societies.

The speed, for example, with which the 1994 mass killings in Rwanda took place, and the weapons used, have come to symbolize in the Western mind the barbarism of Africans. Philip Gourevitch, an American journalist, was one of the instrumental voices in the creation of this portrayal:

Decimation means the killing of every tenth person in a population, and in the spring and early summer of 1994 a program of massacres decimated the Republic of Rwanda. *Although the killing was low-tech—performed largely by machete—it was carried out at dazzling speed: of an original population of about seven and a half million, at least eight hundred thousand people were killed in just a hundred days.* Rwandans often speak of a million deaths, and they may be right. The dead of Rwanda accumulated at nearly three times the rate of Jewish dead during the Holocaust. It was the most efficient mass killing since the atomic bombings of Hiroshima and Nagasaki (emphasis added).¹⁰⁶

These images are critical in the construction of the savage. Human rights opposition and campaigns against FGM, which have relied heavily on demonization, have picked up where European colonial missionaries left off.¹⁰⁷ Savagery in this circumstance acquires a race—the black, dark, or non-Western race. The Association of African Women for Research and Development (AAWORD), by contrast, opposed female circumcision but sharply denounced the racism inherent in Western-led, anti-FGM campaigns:

This new crusade of the West has been led out of the moral and cultural prejudices of Judaeo-Christian Western society: aggressiveness, ignorance or even contempt, paternalism and activism are the elements which have infuriated and then shocked many people of good will. In trying to reach their own public, the new crusaders have fallen back on sensationalism, and have become insensitive to the dignity of the very women they want to “save.”¹⁰⁸

105. Images of African savagery, for example, are standard fare in the American press. Reporting on the killings of eight Western tourists in Uganda in March 1999, a journalist characterized the suspected killers as “100 Rwandan Hutus, screaming and brandishing machetes and guns,” and expressed surprise that there were not more fatalities “given the killers’ barbarism.” Romesh Ratnesar, *In Uganda, Vacation Dreams Turn to Nightmares*, TIME, Mar. 15, 1999, at 64.

106. PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES 3 (1998).

107. See generally Lewis & Gunning, *supra* note 10; JOMO KENYATTA, FACING MOUNT KENYA: THE TRIBAL LIFE OF THE GIKUYU 130–54 (1953).

108. AAWORD, A Statement on Genital Mutilation, in THIRD WORLD—SECOND SEX: WOMEN’S STRUGGLES AND NATIONAL LIBERATION 217–18 (Miranda Davies ed., 1983). See also Gunning, *supra* note 10; Yael Tamir, *Hands Off Clitoridectomy*, BOSTON REV., Summer 1996, at 21.

AAWORD vigorously questioned the motives of Western activists and suggested that they were twice victimizing African women. It stopped just short of asking Western activists to drop the crusade, yet openly denounced the use of the SVS metaphor:

[Western crusaders] are totally unconscious of the latent racism which such a campaign evokes in countries where ethnocentric prejudice is so deep-rooted. And in their conviction that this is a "just cause," they have forgotten that these women from a different race and a different culture are also *human beings*, and that solidarity can only exist alongside self-affirmation and mutual respect (emphasis in original).¹⁰⁹

As illustrated by the debate over FGM, advocacy across cultural barriers is an extremely complex matter. Making judgements across the cultural divide is a risky business because the dice are always heavily loaded. Not even the black-white pretense of human rights can erase those risks. But since that is precisely what the human rights movement does—make judgements across cultures—there is an obligation to create truly universal standards. Otherwise, the human rights enterprise will continue to present itself as a struggle between the cultures of non-Western peoples and the “universal” culture of the West.

IV. THE METAPHOR OF THE VICTIM

The metaphor of the victim is the giant engine that drives the human rights movement. Without the victim there is no savage or savior, and the entire human rights enterprise collapses. This section examines the victim from the perspective of the United Nations, human rights treaties, human rights law, and, especially, human rights literature. Also, race and the legacy of colonialism, as intertwined in the victim identity, are examined.

The basic purpose of the human rights corpus is to contain the state, transform society, and eliminate both the victim and victimhood as conditions of human existence. In fact, the human rights regime was designed to respond to both the potential and actual victim, and to create legal, political, social, and cultural arrangements to defang the state. The human rights text and its discourse present political democracy, and its institutions of governance, as the *sine qua non* for a victimless society.

On the international level, the United Nations pursues civilizing campaigns that ostensibly seek to prevent conditions that create human victims,

109. AAWORD, *supra* note 108, at 218. As further expressed by Lewis:

A primary concern in African feminist texts is the tendency among Western human rights activists to essentialize the motivations for practicing FGS [Female Genital Surgery] as rooted in either superstition or in the passive acceptance of patriarchal domination. In rejecting these characterizations, African feminists seek to recapture and control the representation of their own cultural heritage.

Lewis, *supra* note 10, at 31.

to "save succeeding generations from the scourge of war,"¹¹⁰ to "establish conditions under which justice" can be maintained,¹¹¹ and to "reaffirm faith in fundamental human rights."¹¹² Human rights treaties are therefore a series of obligations assumed by states to prevent the creation of victims. To accomplish this, the state obligates itself to three basic duties for every basic human right: to avoid depriving, to protect from deprivation, and to aid the deprived.¹¹³ The first duty, being negative, may be the least costly and mainly requires self-restraint; the latter two are positive and demand the expenditure of more resources and the implementation of programs.

Human rights law protects against the invasion of the inherent dignity and worth of the potential victim. Regardless of whether an individual is guilty of some offense, the state is not permitted to violate his fundamental rights without abiding by certain state-created norms. The state's culpability extends to individuals and entities within its jurisdiction, whether or not the violation can be traced directly to it. Thus, for example, the state's failure to prevent or punish domestic violence can be seen as a human rights violation.

In human rights literature, the victim is usually presented as a helpless innocent who has been abused directly by the state, its agents, or pursuant to an offensive cultural or political practice.¹¹⁴ The most visible human rights victims, those that have come to define the term, are subjected to the now numbingly familiar set of abuses: arbitrary arrest and detention; denial of the rights to speech, assembly, and association; involuntary exile; mass slaughter and genocide; discrimination based on race, ethnicity, religion, gender, and political opinion; and denial of due process.¹¹⁵ Consider this descriptive report of an incident where Iraqi government soldiers randomly selected Kurdish male villagers and executed them within earshot of their wives, children, and relatives:

The soldiers opened fire at the line of thirty three squatting men from a distance of about 5–10 meters Some men were killed immediately by rifle fire. Others were wounded, and a few were missed altogether [S]everal soldiers approached the line of slumped bodies on orders of the lieutenant and fired additional individual rounds as a coup de grace. The soldiers then left the execution site, without burying the

110. U.N. CHARTER, pmbL.

111. *Id.*

112. *Id.*

113. HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND U.S. POLICY* 52 (1996).

114. Images of the victim painted by a recent AI report on refugees are standard fare. In addition to the gloomy descriptions in the report, accompanying pictures show Rwandan refugees in the wild with their worldly belongings on their heads, Afghan and Sri Lankan "boat people" arriving in Denmark, and Sudanese youths caught between government and rebel forces fleeing on a raft. The images of despair and defeat are overwhelming. AMNESTY INT'L, *AMNESTY INTERNATIONAL REPORT* 1997 3, 11, 17 (1997).

115. For a recent survey of human rights victims, see HUMAN RIGHTS WATCH, *HUMAN RIGHTS WATCH WORLD REPORT* 2000, *supra* note 70.

bodies or otherwise touching them, according to survivors who lay among the corpses.¹¹⁶

A basic characteristic of the victim is powerlessness, an inability for self-defense against the state or the culture in question. The usual human rights narrative generally describes victims as hordes of nameless, despairing, and dispirited masses. To the extent they have a face, it is desolate and pitiful. Many are uneducated, destitute, old and infirm, young, poorly clad, and/or hungry. Many are peasants, the rural and urban poor, marginalized ethnic groups and nationalities, and lower castes, whose very being is a state of divorce from civilization and a large distance from modernity. Many are women and children twice victimized because of their gender and age,¹¹⁷ and sometimes the victim of the savage culture is the female gender itself.¹¹⁸

Another example of the images of helplessness and utter degradation of victims comes from a report by AI, detailing the torture and abuse, including rape, of women in detention in many states around the globe. An account from an Israeli detention center, while not unique, is particularly disturbing:

Dozens of Palestinian women and children detained in the Israeli-Occupied Territories have reportedly been sexually abused or threatened in sexually explicit language during interrogation. Fatimah Salameh was arrested near Nablus in July 1990. Her interrogators allegedly threatened to rape her with a chair leg and told her they would photograph her naked and show the pictures to her family. "They called me a whore and said that a million men had slept with me," she said. Fatimah Salameh agreed to confess to membership in an illegal organization and was sentenced to 14 months' imprisonment.¹¹⁹

The language of the human rights reports suggests the need for help—most likely outside intervention—to overcome the conditions of victimization. In many instances, the victims themselves deeply believe in and openly declare their helplessness and plead for outside help. A classic example was the case of the Kosovars who sought Western support in their conflict with the Serbian government of Slobodan Milošević.¹²⁰ Individual victims serve as more vivid illustrations of this particular victim syndrome. Tong Yi, a Chinese dissident who was jailed and freed in 1997 partly due to

116. MIDDLE EAST WATCH, THE ANFAL CAMPAIGN IN IRAQI KURDISTAN: THE DESTRUCTION OF KOREME 46–47 (Andrew Whitley ed., 1993).

117. See AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 1997, *supra* note 114.

118. See Salzman, *supra* note 95, for descriptions of the female gender as the victim.

119. AMNESTY INT'L, RAPE AND SEXUAL ABUSE: TORTURE AND ILL TREATMENT OF WOMEN IN DETENTION 4 (1992).

120. A recent poll of Kosovo Albanians found that 52% thought that the 1999 American-led NATO intervention, ostensibly to create an autonomous Kosovo, was the most important event for Kosovo in the second half of the twentieth century. *NATO Intervention was the Biggest Event, Say Kosovar Albanians*, DEUTSCHE PRESSE-AGENTUR, Jan. 7, 2000, available in LEXIS, News Library, CURNWS File.

the pressure exerted by HRW and the U.S. government, was profusely grateful to Robert Bernstein, the human rights patriarch and founder of HRW, whom she credited with her release. Despite her torturous time in prison, Yi noted that “[i]f there’s a smile on my face, it’s because of Bob Bernstein.”¹²¹

The victim must also be constructed as sympathetic and innocent. Otherwise it is difficult to mobilize public outrage against the victimizer. Moral clarity about the evil of the perpetrator and the innocence of the victim is an essential distinction for Western public opinion, for it is virtually impossible to evoke sympathy for a victim who appears villainous, roguish, or unreceptive to a liberal reconstructionist project.¹²²

In the case of the Kosovo Albanians, the demon was Milošević, the hated autocrat who has refused to join the democratic-privatization dance currently in vogue in the former Soviet bloc. The NATO intervention may have been more intended to oust him and replace him with a “Good Serb”¹²³ than to save the Kosovars. The Kosovars and their rag-tag band of fighters were painted as defenders of an innocent population against the cruel repression of Milošević. Although Kosovars are Muslims, the press did not employ the stigma of Islamic fundamentalism to discredit their victim status. In stark contrast to this depiction, Chechen fighters have been portrayed as Islamic zealots and dangerous terrorists responsible for bombings and fundamentalist atrocities in both Chechnya and Russia.¹²⁴

The face of the prototypical victim is non-white. With the exception of the wars and atrocities committed in the former Yugoslavia and in Northern Ireland, the most enduring faces of human rights victims have been either black, brown, or yellow. But even in Bosnia and Kosovo the victims were Muslims, not Christians or “typical” white Westerners. The images of the most serious suffering seem to be those of Africans, Asians, Arabs, or Latin Americans. Thus, since the Second World War, the major focus of human rights advocacy by both the United Nations and INGOs has been in the Third World in Latin America, Africa, and Asia.

121. Meryl Gordon, *Freedom Fighter*, NEW YORK, Nov. 16, 1998, at 42. Incidentally, Robert Bernstein claimed the mantle of the savior without equivocation: “When you meet [a victim] . . . you really personalize it. It’s not just some person being beat up. You think, *She could be my daughter.*” *Id.* (emphasis in original).

122. Other factors may, of course, enter the decision-making calculus and drive public opinion and determine whether Western states will intervene. It is unlikely, for example, that the West would rush to intervene in a domestic conflict involving a nuclear power such as Russia. For an example of the calculus of intervention, see Editorial, *The Intervention Debate*, The DETROIT NEWS, Jan. 10, 2000, at A8 (discussing the rationale for intervention in Kosovo and Rwanda).

123. For a discussion of the “Good” versus the “Bad” Serb, see Thomas Goltz, *An Anti-Ethnic Diatribe*, 22 WASH. Q. 113, 118–21 (1999).

124. *Chechnya Reveals Western Hypocrisy*, TORONTO SUN, Nov. 25, 1999, at 15.

Rarely is the victim conceived as white.¹²⁵ Due to sensationalistic reporting by dominant Western media organizations¹²⁶ and the instantaneous availability of these stories worldwide, the human rights crises afflicting the non-white world seem to be overwhelming and without number. As a result, many affluent Westerners have in the past decade spoken of what Susan Moeller terms "compassion fatigue,"¹²⁷ a euphemism for a lack of interest in the suffering of people who are seemingly remote, benighted, different in appearance and language, and lacking in any discernibly immediate impact on the lives of people in the West. Yet it is precisely these dire, seemingly catastrophic situations that the human rights movement is relentlessly committed to change.

While many victims in Latin American countries are white, the popular perception of Latin Americans in the West is that of non-white, underdeveloped victims of crude despotism. Latin American whites, who form the ruling elites of the region, are not perceived in the West as "typical" whites, with the attendant benefits of modern affluence, presumed intelligence, global power, and influence. At best, they have been constructed as "second class" whites, lower in the racial pecking order than whites in Australia, New Zealand, and even South Africa—the three other countries outside Europe and North America with substantial white populations. In any case, the typical Latin American victim is presumed to be indigenous.

The representations of the victim in human rights literature spring from a messianic ethos in both the INGO and the United Nations. There is a colonial texture to the relationship between the human rights victim and the West. In the colonial project, for example, the colonizer justified his mission

125. This perception is often grounded in reality. Even in the United States, the typical victim of human rights violations is more likely to be African American or Hispanic. A rare report by human rights groups on human rights violations in the United States focused on the death penalty, immigrants' rights, race discrimination, prison conditions, police brutality, and language rights—all areas in which the victims predominantly are African American, Hispanic, or another non-white minority, such as Asian Americans. Only three areas—religious liberty, freedom of expression, and sex discrimination—did not focus on persons of color. See HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, *supra* note 68; AMNESTY INT'L, UNITED STATES OF AMERICA: RACE, RIGHTS AND POLICE BRUTALITY, *supra* note 68. For an analysis of race construction in America, see MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S (1994); RONALD TAKAKI, A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA (1993).

126. The intense media coverage of the tragic cases of Abner Louima and Amadou Diallo, two black immigrants in New York City who were subjects of police violence, has dramatically reinforced the perception of non-whites as "victims" to the American public. For examples of the media coverage of these cases, see Helen Peterson, *600 Respond to 2nd Louima Jury Trial Call*, N.Y. DAILY NEWS, Jan. 4, 2000, at 12; Alan Feuer, *Jury Selection Begins for Trial in Louima Case*, N.Y. TIMES, Jan. 4, 2000, at B3; Kevin Flynn, *Officers in Diallo Trial Want Experts to Testify*, N.Y. TIMES, Jan. 8, 2000, at B5; Kathleen Kenna, *New York Police Dogged by Cruelty Charges*, TORONTO STAR, Jan. 3, 2000; Leonard Levitt, *Newspapers: Keep Diallo Court Open*, NEWSDAY, Jan. 6, 2000, at A37. For a recent and detailed report on the relationship between law enforcement agencies, the criminal justice system, and the victimization of persons of color in the United States, see AMNESTY INT'L, UNITED STATES OF AMERICA: RACE RIGHTS AND POLICE BRUTALITY, *supra* note 68.

127. SUSAN D. MOELLER, COMPASSION FATIGUE: HOW THE MEDIA SELL DISEASE, FAMINE, WAR, AND DEATH (1999).

by drawing a distinction between the “native” and the “civilized” mind. In one case, which was typical of the encounter between Africa and the West, a European missionary compared what he called the “Bantu mind” to that of a “civilized man”:

It is suggested that the mere possession on the part of the Bantu of nothing but an oral tradition of culture creates a chasm of difference between the Native ‘mind’ and that of civilized man, and of itself would account for a lack of balance and proportion in the triple psychological function of feeling, thinking and acting, implying that thinking is the weakest of the three and that feeling is the most dominant. The Native seeks not truth nor works, but power—the dynamical mood.¹²⁸

The view that the “native” is weak, powerless, prone to laziness, and unable on his own to create the conditions for his development was a recurrent theme in Western representations of the “other.” Early in the life of the organization, an International Labor Organization report concluded, for example, that indigenous peoples could not by themselves overcome their “backwardness.” It noted, “[I]t is now almost universally recognized that, left to their own resources, indigenous peoples would have difficulty in overcoming their inferior economic and social situation which inevitably leaves them open for exploitation.”¹²⁹ In the culture of the human rights movement, whose center is in the West, there is a belief that human rights problems afflict people “over there” and not people “like us.” The missionary zeal to help those who cannot help themselves is one of the logical conclusions of this attitude.

The idea that the human rights corpus is concerned with ordering the lives of non-European peoples has a long history in international law itself. More recent scholarship explores this link between international law and the imposition of European norms, values, ideas, and culture on non-European societies and cultures.¹³⁰ Since the inception of the current international legal order some five centuries ago, there have been outright challenges by non-European cultures to the logic, substance, and purpose of international

128. SHROPSHIRE, *supra* note 50, at xix. Or consider, for example, the repugnant views of Lord Asquith, an arbitrator in the dispute between the Sheikh of Abu Dhabi and Petroleum Development Ltd. In his view, Koranic law was primitive at best:

[N]o such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.

Petroleum Development Ltd. v. Sheikh of Abu Dhabi, 18 I.L.R. 144, 149 (1951).

129. INT'L LABOUR ORG., CONDITIONS OF LIFE AND WORK OF INDIGENOUS POPULATIONS OF LATIN AMERICAN COUNTRIES, FOURTH CONFERENCE OF AMERICAN STATES MEMBERS OF THE INTERNATIONAL LABOUR ORGANIZATION, Report II (1949).

130. See Ruth Gordon, *Growing Constitutions*, 1 U. PA. J. CONST. L. 528 (1999); Ruth Gordon, *Saving Failed States: Sometimes a Neo-Colonialist Notion*, 12 AM. J. INT'L L. & POL'Y 903 (1997); Note, *Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture*, 106 HARV. L. REV. 723 (1993).

law.¹³¹ The development of human rights has only blunted, but not eliminated, some of those challenges.

V. THE METAPHOR OF THE SAVIOR

The metaphor of the savior is constructed through two intertwining characteristics—Eurocentric universalism and Christianity's missionary zeal. This section examines these characteristics and the institutional, international actors who promote liberal democracy as the antidote to human rights abuses.

First, the savior metaphor is deeply embedded in the Enlightenment's universalist pretensions, which constructed Europe as superior and as center of the universe.¹³² International law itself is founded on these assumptions and premises.¹³³ International law has succeeded in governing "states of all civilizations, European and non-European,"¹³⁴ and it has become "universal" although some have argued that it bears an ethnocentric fingerprint.¹³⁵

In addition to the Eurocentric focus of human rights, the metaphor of the savior is also located in the missionary's Christian religion. Inherent to any universalizing creed is an unyielding faith in the superiority of at least the beliefs of the proselytizer over those of the potential convert, if not over the person of the convert. The project of universality or proselytism seeks to remake the "other" in the image of the converter. Christianity has a long history of such zealotry. Both empire-building and the spread of Christendom justified the means.

131. See Christopher Weeramantry & Nathaniel Berman, *The Grotius Lectures Series*, 14 AM. U. INT'L. L. REV. 1515 (1999).

132. See Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOC. & LEGAL STUD. 321 (1996). For example, not only does the world use the Gregorian calendar, but also time is universally calibrated from Greenwich Mean Time. It is the "centrality" of England in the social and political construction of the world that gave rise to designations of places as the "Middle East," "Far East," "remote," and so on.

133. See James Thuo Gathii, *International Law and Eurocentrism*, 9 EUR. J. INT'L L. 184 (1998). See also Nathaniel Berman, *Beyond Colonialism and Nationalism? Ethiopia, Czechoslovakia, and "Peaceful Change"*, 65 NORDIC J. INT'L L. 421 (1996).

134. S. PRAKASH SINHA, *LEGAL POLYCENTRICITY AND INTERNATIONAL LAW* 15 (1996).

135. For a very insightful and pathbreaking discussion of the ethnocentricity of international law, see Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1 (1999). Antony Anghie writes that:

the association between international law and universality is so ingrained that pointing to this connection appears tautological. And yet, the universality of international law is a relatively recent development. It was not until the end of the nineteenth century that a set of doctrines was established as applicable to all states, whether these were in Asia, Africa, or Europe.

Id. at 1. He writes, further, that:

[t]he universalization of international law was principally a consequence of the imperial expansion that took place towards the end of the 'long nineteenth century.' The conquest of non-European peoples for economic and political advantage was the most prominent feature of this period, which was termed by one eminent historian, Eric Hobsbawm, as the 'Age of Empire.'

Id. at 1–2. See also CHRISTOPHER WEERAMANTRY, *NAURU: ENVIRONMENTAL DAMAGE UNDER INTERNATIONAL TRUSTEESHIP* (1992).

Crusades, inquisitions, witch burnings, Jew burnings and pogroms, burnings of heretics and gay people, of fellow Christians and of infidels—all in the name of the cross. It is almost as if Constantine, upon his and his empire's conversion to Christianity in the fourth century, uttered a well-fulfilled prophecy when he declared: 'In the name of this cross we shall conquer.' The cross has played the role of weapon time and time again in Christian history and empire building.¹³⁶

In fact, the political-cultural push to universalize one's beliefs can be so obsessive that it has been identified frequently with martyrdom in history.

[T]he supreme sacrifice was to die fighting under the Christian emperor. The supreme self-immolation was to fall in battle under the standard of the Cross But by the time Christianity was ready to meet Asia and the New World, the Cross and the sword were so identified with one another that the sword itself was a cross. It was the only kind of cross some conquistadores understood.¹³⁷

There is a historical continuum in this impulse to universalize Eurocentrism and its norms and to ratify them under the umbrella of "universalism." Whether it is in the push for free markets, liberal systems of government, "civilized" forms of dress, or in the ubiquity of the English language itself, at least the last five centuries can appropriately be called the Age of Europe. These Eurocentric models have not been content to remain at home. They intrinsically define themselves as eternal truths. Universalization is an essential attribute of their validity. This validation comes partly from the conquest of the "primitive" and his introduction and delivery to "civilization."¹³⁸ For international law, Anghie has captured this impulse clearly:

[T]he extension and universalization of the European experience, which is achieved by transmuting it into the major theoretical problem of the discipline [international law], has the effect of suppressing and subordinating other histories of international law and the people to whom it has applied. Within the axiomatic framework of positivism, which decrees that European states are sovereign while non-European states are not, there is only one means of relating the history of the non-European world, and this the positivists proceed to do: it is a history of the civilizing mission, the process by which peoples of Africa, Asia, the Ameri-

136. MATTHEW FOX, A SPIRITUALITY NAMED COMPASSION AND THE HEALING OF THE GLOBAL VILLAGE, HUMPTY DUMPTY AND US 112 (HarperSanFrancisco 1990) (1979).

137. THOMAS MERTON, CONJECTURES OF A GUILTY BYSTANDER 87 (1966).

138. See, e.g., Chris Tennant, *Indigenous Peoples, International Institutions, and the International Legal Literature from 1945–1993*, 16 HUM. RTS. Q. 1 (1994) (reviewing literature on indigenous peoples and concluding, among other things, that indigenous peoples have been represented as the "other" that needs saving by the West).

cas, and the Pacific were finally assimilated into a European international law.¹³⁹

The impulses to conquer, colonize, save, exploit, and civilize non-European peoples met at the intersection of commerce, politics, law, and Christianity and evolved into the Age of Empire. As put by John Norton Pomeroy, lands occupied by "persons who are not recognized as belonging to the great family of states to whom international law applies" or by "savage, barbarous tribes" belonged as of right upon discovery to the "civilized and Christian nation."¹⁴⁰

The savior-colonizer psyche reflects an intriguing interplay of both European superiority and manifest destiny over the subject. The "othering" project degrades although it also seeks to save. One example is the manipulative manner in which the British took over large chunks of Africa. Lord Lugard, the British colonialist, described in denigrating language a "treaty-making" ceremony in which an African ruler "agreed" to "British protection." He described this ceremony with both parties "[s]eated cross-legged on a mat opposite to each other on the ground, you should picture a savage chief in his best turn-out, which consists probably of his weapons of war, different chalk colourings on his face, a piece of the skin of a leopard, wild cat, sheep or ox."¹⁴¹ As put by a European missionary, the "Mission to Africa" was "the least that we [Europeans] can do . . . to strive to raise him [the African] in the scale of mankind."¹⁴² Anghie notes that the deployment of denigrating, demeaning language is essential to the psyche of the savior. He writes:

The violence of positivist language in relation to non-European peoples is hard to overlook. Positivists developed an elaborate vocabulary for denigrating these peoples, presenting them as suitable objects for conquest, and legitimizing the most extreme violence against them, all in the furtherance of the civilizing mission – the discharge of the white man's burden.¹⁴³

Human rights law continues this tradition of universalizing Eurocentric norms by intervening in Third World cultures and societies to save them from the traditions and beliefs that it frames as permitting or promoting despotism and disrespect for human rights itself.

139. Anghie, *Finding the Peripheries*, *supra* note 135, at 7.

140. JOHN NORTON POMEROY, LECTURES ON INTERNATIONAL LAW IN TIME OF PEACE 96 (Theodore Salisbury Woolsey ed., 1886). Similarly, Edward Said has identified this European predestination in the construction of Orientalism as the "corporate institution of dealing with the Orient—dealing with it by making statements about it, authorizing views of it, describing it, by teaching it, settling it, ruling over it: in short, Orientalism as a Western style for dominating, restructuring, and having authority over the Orient." EDWARD SAID, ORIENTALISM 3 (1978).

141. See Frederick Lugard, *Treaty-Making in Africa*, 1 GEOGRAPHICAL J. 53, 53–54 (1893).

142. A.H. BARROW, FIFTY YEARS IN WEST AFRICA 29 (1900).

143. Anghie, *Finding the Peripheries*, *supra* note 135, at 7.

While it is incorrect to equate colonialism with the human rights movement, at least in terms of the methods of the two phenomena, it is not unreasonable to draw parallels between them with respect to some of their motivations and purposes. Colonialism was driven by ignoble motives while the human rights movement was inspired by the noblest of human ideals. However, both streams of historical moment are part of a Western push to transform non-European peoples. Louis Henkin celebrates the embrace of human rights by diverse states across the globe as the triumph of the post-1945 era:

Ours is the age of rights. Human Rights is the idea of our time, the only political-moral idea that has received universal acceptance. The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, has been approved by virtually all governments representing all societies. Human rights are enshrined in the constitutions of virtually every one of today's 170 states—old states and new; religious, secular, and atheist; Western and Eastern; democratic, authoritarian, and totalitarian; market economy, socialist, and mixed; rich and poor, developed, developing, and less developed. Human rights is the subject of numerous international agreements, the daily grist of the mills of international politics, and a bone of continuing contention among superpowers.¹⁴⁴

Henkin is so quick to celebrate universality that he fails to problematize the human rights project. Why does he not express more suspicion about the contrasting diversity of states that have ratified human rights instruments? Might that not mean that they are simply bowing to a false international consensus because in some sense their statehood and belonging to the “international community” is dependent on paying homage to international law, to human rights? Do non-European states really have a choice of rejecting in any sustained manner any doctrine of international law, particularly human rights, which represent the penultimate civilizing project of international law? Why should credence be given to states here when many, if not the majority, do not even speak for their peoples or cultures? Might states not just be acting cynically because they want to be seen to belong among the ranks of the “civilized?” After all, how much does the ratification of international law instruments mean to Third World states when they live under a patently unjust international order in which they are the subordinates? Yet Henkin rejects this debate and argues that “cultural relativists” who question the human rights corpus on ideological or cultural grounds desire a vague, broad, and ambiguous text of human rights.¹⁴⁵ He ignores these questions because they may be fatal to the project of universality, which is essential for the human rights project.

144. HENKIN, *supra* note 17, at ix.

145. *Id.* at x.

Proponents of human rights universality claim that the antidote to illiberal, authoritarian, and closed societies is constitutionalism and political democracy. The corpus proceeds from the premise that the world should be a marketplace of ideas. The expressive rights in the basic human rights instruments are based on this assumption although they are subject to some limitations.¹⁴⁶ But this assumption imposes on other cultures the obligation and the requirement to compete against human rights, even though those cultures may not be universalistic and may be ill-equipped to compete in the marketplace of ideas.¹⁴⁷

Human rights are part of the cultural package of the West, complete with an idiom of expression, a system of government, and certain basic assumptions about the individual and his relationship to society.¹⁴⁸ The spread of the liberal constitution—with its normative assumptions and the political structures it implies—makes human rights an integral part of the Western conception of modern society and its ubiquitous domination of the globe.

Institutionally, saviors constitute a broad range of actors and interests which are driven by a belief in the redemption of non-liberal, usually non-European, societies and cultures from human rights abominations. Such actors include those at the intergovernmental, governmental, and non-governmental levels.

At the intergovernmental level, the U.N. vertical enforcement processes and machineries act as the official guardians of the human rights corpus, and its location at the heart of U.N. activities and purposes gives it the imprimatur of objectivity and neutral internationalism.¹⁴⁹ A maze of human rights bodies—committees and commissions—is responsible for developing, overseeing, monitoring, and enforcing human rights.¹⁵⁰ Most of the U.N. work in human rights focuses on Third World states and societies, complete with technical assistance programs and other “hand-holding” projects to ensure the incorporation, dissemination, and enforcement of human rights norms, as well as the creation and nurturing of institutions to perform these

146. Cf. Articles 18 and 19, UDHR, *supra* note 1; Articles 18 and 19, ICCPR, *supra* note 76.

147. Makau wa Mutua, *Limitations on Religious Rights: Problematising Religious Freedom in the African Context*, in *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES* 417, 418 (Johan D van der Vyver & John Witte, Jr. eds., 1996).

148. It is useful here to refer to Steiner's discussion of the connections among liberalism, constitutionalism, and human rights. He notes that all three concepts are linked in that human rights, as it is known today, would not be possible without liberal thought and the notion of constitutionalism. See STEINER & ALSTON, *supra* note 1, at 187–92, 710–12.

149. In 1993, the United Nations established the Office of the High Commissioner for Human Rights, and mandated the High Commissioner for Human Rights to be the U.N. “official with principal responsibility for United Nations human rights activities under the direction and authority of the Secretary-General,” in effect a U.N. human rights czar. G.A. Res. 141, U.N. GAOR, 48th Sess., Supp. No. 49, Agenda Item 114(b), at para. 4, U.N. Doc. A/RES/48/141 (1994).

150. For a description of the maze of U.N. human rights bodies, see STEINER & ALSTON, *supra* note 1, at 362–63. See also Makau wa Mutua, *Looking Past the Human Rights Committee: An Argument for Demarginalizing Enforcement*, 4 BUFF. HUM. RTS. L. REV. 211 (1998).

tasks.¹⁵¹ The United Nations is, in a sense, the grand “neutral” savior, and Western liberal democracies treat it as such.

Although the United Nations is an institution composed of states, and therefore is bound in theory to respect the sovereignty of all states, it has recently taken a more active posture in human rights matters. U.N. failures in Rwanda and Somalia, as well as the atrocities in the former Yugoslavia, have embarrassed the world body and have made an urgent case for more effective intervention.¹⁵² The creation of the International Criminal Tribunal for the Former Yugoslavia,¹⁵³ the International Criminal Tribunal for Rwanda,¹⁵⁴ and the 1998 adoption in Rome of the Statute of the International Criminal Court are just several recent examples of this renewed urgency in the area of human rights.¹⁵⁵ But these actions came after long periods of resistance by major Western powers, including the United States, and only after intense public scrutiny and media exposures of atrocities.¹⁵⁶ Following the Yugoslav and Rwanda crises, HRW lamented the “moral vacuum in the halls of the United Nations.”¹⁵⁷ It decried the U.N.’s “posture of neutrality between murderer and victim” and argued that the “failure of leadership, eagerly abetted by the Security Council’s permanent members, led to a squandering of the United Nations’ unique capacity on the global stage to articulate fundamental human rights values and to legitimize their enforcement.”¹⁵⁸ The weight of responsibility placed on the United Nations in the area of human rights is undeniable.

After the United Nations, the second powerful tier of saviors is constituted by Western states and Western or Western-controlled institutions, including, recently, the World Bank, which is not primarily concerned with

151. Philip Alston, *Appraising the United Nations Human Rights Regime*, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL, *supra* note 60, at 1.

152. See Letter Dated 99/12/15 from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/1999/1257 (1999). See generally UNITED NATIONS, THE UNITED NATIONS AND RWANDA: 1993–1996 (1996); Peter Rosenblum, *Dodging the Challenge*, 10 HARV. HUM. RTS. J. 313 (1997) (reviewing UNITED NATIONS, THE UNITED NATIONS AND RWANDA: 1993–1996 (1996)).

153. In 1993, the U.N. Security Council established on an ad hoc basis the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991. See S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/Res/808 (1993).

154. In 1994, the U.N. Security Council established the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Such Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandans Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between January 1, 1994 and December 31, 1994. See Report of the Secretary-General Pursuant to Paragraph 5 of the Security Council Resolution 955 (1994), U.N. SCOR, 50th Sess., U.N. Doc. S/1995/134 (1995).

155. *Rome Statute of the International Criminal Court*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF/183/9 (1998).

156. Benjamin B. Ferencz, *Introduction* to 1 VIRGINIA MORRIS & MICHAEL P. SCHAFER, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, at xxi (1994). See also Makau Mutua, *Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 TEMPLE INT’L & COMP. L.J. 167 (1997).

157. HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 1995, at xiv (1994).

158. *Id.*

human rights.¹⁵⁹ Western states usually employ a horizontal state-to-state enforcement of human rights in which their foreign policies become the conveyer belts of "civilization." Through foreign ministries, diplomatic missions, and special agencies (such as the United States Agency for International Development and the Canadian Agency for International Development), Western governments use a carrot-and-stick approach to force certain policy choices on recipient states, frequently but only selectively using human rights to achieve specific policy objectives.

Human rights have featured prominently, if inconsistently, in the calculus of U.S. foreign policy. The U.S. Congress mandated in 1976 that a human rights bureau be established in the State Department and instructed that the office report annually on the human rights conditions of all countries in the world.¹⁶⁰ President Jimmy Carter gave human rights unprecedented rhetorical significance in foreign policy, though President Ronald Reagan dropped this emphasis. In 1994, the head of the human rights bureau was renamed from the Assistant Secretary of State for Human Rights and Humanitarian Affairs to the Assistant Secretary of State for Democracy, Human Rights, and Labor.¹⁶¹ This change seems to acknowledge the broad civilizational sweep of human rights and their inseparability from free markets and political democracy. In other words, the United States sees itself as promoting this cultural package when it advocates human rights abroad.

Increasingly, the human rights movement has come to be identified openly with the United States, whose chief executive frequently invokes human rights when he addresses a non-European nation.¹⁶² In fact, President Bill Clinton's speeches on human rights have come to resemble lectures and sermons, very much in the savior mode.¹⁶³ Today the presence of the United States—which has succeeded France and Britain as the major global cultural, military, and political power—is ubiquitous. There is virtually no conflict or issue of importance today in which the United States does not seek, and often play, the crucial role whether by omission or commission. The domination of the globe exercised by European powers for the last several centuries has been assumed by the United States. The United States is now the major determinant of "international peace and security" and the

159. The World Bank has started to consider the linkages between human rights, governance, and economic performance. See generally CAROLINE M. ROBB, *CAN THE POOR INFLUENCE POLICY?* (1998); David Gillies, *Human Rights, Democracy and Good Governance: Stretching the World Bank's Policy Frontiers*, in *THE WORLD BANK: LENDING ON A GLOBAL SCALE* 101 (Jo Marie Griesgraber & Bernhard G. Gunter eds., 1996); LAWYERS COMM. FOR HUMAN RIGHTS, *THE WORLD BANK: GOVERNANCE AND HUMAN RIGHTS* (1993).

160. The reports are called *Country Reports on Human Rights Practices* and catalogue violations of civil and political rights.

161. E.g., *Human Rights and Development Assistance*, 22 U.S.C. § 2151n(c) (1994).

162. See, e.g., Laura Myers, *Clinton Talk at University Prods China on Freedom*, BUFFALO NEWS, June 29, 1998, at A1.

163. See, e.g., Charles Babington, *Improve Rights Record, Clinton Urges Turkey*, WASH. POST, Nov. 16, 1999, at A21; Scott Peterson, *Lives Still Restricted, Afghan Women See Hope*, CHRISTIAN SCI. MONITOR, Dec. 30, 1999, at 1.

spokesperson for the "welfare" of humanity. Never before has one state wielded so much power and influence over so vast a population. A global policeman, the United States now plays the central civilizing role through the export of markets, culture, and human rights.

European states have similar approaches in their relationships with the Third World.¹⁶⁴ Former Communist states in Eastern Europe, and the former Soviet Union, whose political cultures the West deems inferior, are treated as being in need of "civilizing."¹⁶⁵ Turkey, the only Muslim member of NATO, has been denied entry into the European Union on human rights grounds.¹⁶⁶ Western European liberal democracies leave little doubt that human rights covenants are meant for the Third World, which needs "improving." Justice Higgins of the International Court of Justice, formerly the British member of the Human Rights Committee (HRC), the body that oversees the implementation of the ICCPR, notes this attitude in a revealing passage.

As for the liberal democracies, their approach has often been that the Covenant [ICCPR] is a splendid document—splendid, that is, for the Third World countries and Eastern Europe, where human rights are in urgent need of attention. Although they submit their reports [to the HRC] and attend to public examination, the impression is often given that the Covenant is not really for them, because the observance of human rights is fully guaranteed in their countries.¹⁶⁷

Finally, INGOs constitute perhaps the most important element of the savior metaphor. Conventionally doctrinal, INGOs are the human rights movement's foot soldiers, missionaries, and proselytizers. Their crusade is framed in moral certainty in which "evil" and "good" are as separate as night and day. They claim to practice law, not politics.¹⁶⁸ Although they promote

164. See Marantis, *supra* note 92.

165. Although the Statute of the Council of Europe did not do so when only Western European states were members, it now requires that all Central and Eastern European states, namely the former Communist states, ratify the European Convention on Human Rights as a condition for membership in the Council of Europe. The Statute of the Council of Europe provides that "[e]very Member of the Council of Europe must accept the principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms . . ." Statute of the Council of Europe, May 5, 1949, art. 3, 87 U.N.T.S. 103, 106. See also European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. See BUERGENTHAL, *supra* note 39, at 102-03; Leyla Boulton, *Ankara Quick to Air Shift on Human Rights*, FIN. TIMES, Dec. 15, 1999, at 3.

166. Turkey, which historically was referred to as the "sick man of Europe," is now a candidate to join the European Union, after centuries of fruitless attempts to become a full member of Europe. See *Looking West Europe, the United States and Turkey Have Much to Gain from Turkey's Joining the European Union*, FORT WORTH STAR-TELEGRAM, Dec. 14, 1999, at 10, available at LEXIS, News Library, CURNWS File; *Turkey Invited to Join EU, With Conditions*, NEWSDAY, Dec. 12, 1999, at A23.

167. Rosalyn Higgins, *Opinion: Ten Years on the UN Human Rights Committee: Some Thoughts Upon Parting*, 1 EUR. HUM. RTS. L. REV. 570, 581 (1996).

168. See Thomas Carothers, *Democracy and Human Rights: Policy Allies or Rivals*, 17 WASH. Q. 106, 109 (1994).

paradigmatic liberal values and norms, they present themselves as neutral, universal, and unbiased. Based in the capitals of the powerful Western states, their staffs are mostly well-educated, usually trained in the law, middle-class, and white.¹⁶⁹ They are very different from the people they seek to save. They are modern-day abolitionists who see themselves as cleansers, single-handedly rooting out evil in Third World countries and cultures by shining light where darkness reigns.

INGOs have also been instrumental in the creation of national NGOs in the Third World. Mandates of many national NGOs initially mirrored those of INGOs. However, in the last decade, many Third World NGOs have started to broaden their areas of concentration and go beyond the INGOs' civil and political rights constraints. In particular, domestic Third World NGOs are now paying more attention to economic and social rights, development, women's rights, and the relationships between transnational corporations and human rights conditions. In spite of this incipient conceptual independence on the part of NGOs, many remain voiceless in the corridors of power at the United Nations, the European Union, the World Bank, and in the dominant media organizations in the West.

INGOs occupy such a high moral plane in public policy discourse that they are rarely the subject of probing critiques. Morally righteous, they are supported by an almost universal consensus that they are the "good guys." Even academia has been slow to reflect seriously on INGOs. INGOs and their supporters see those who question them as naive, at best, and apologists for repressive governments and cultures, at worst. This climate of passivity has a chilling effect on human rights speech, particularly of young, probing scholars and activists. It also encourages a herd mentality and compliance with knee-jerk, governmental human rights strategies, positions, or responses. It certainly does not encourage innovation on the part of the movement.

INGOs also play the role of gatekeepers to powerbrokers in the West, including powerful Western states. Significantly, national NGOs have virtually no financial independence. They rely almost exclusively on funding from Western states, foundations, charities, development agencies, and intergovernmental institutions such as the European Union. In spite of these criticisms of INGOs, many non-Western NGOs expressed appreciation for the work of INGOs at a retreat¹⁷⁰ which discussed the roles of NGOs in the human rights movement. In fact, many sought a more involved approach by INGOs.

The critics sought a more expanded role of INGOs and not an abandonment of their traditional work. No one at the retreat doubted IN-

169. See Mutua, *The Ideology of Human Rights*, *supra* note 5, at 613–16.

170. The retreat was composed of human rights activists associated with INGOs. It was held June 5–10, 1989, on the island of Crete, Greece. STEINER, DIVERSE PARTNERS, *supra* note 6.

GOs' contributions to the growth of the human rights movement as a whole and to heightening consciousness about rights in general, thereby influencing the directions and pace of change. No one doubted the vital importance of INGOs' activities: monitoring, investigative reports, publicity, education, and lobbying or interventions before national and intergovernmental bodies.¹⁷¹

The lack of a more vigorous and fundamental disagreement between national NGOs and Western INGOs may speak volumes about the leadership of Third World human rights actors. This complacency also does not take into account locally grown, indigenous, "non-human rights" efforts to oppose repression and fight for political and social change. While it is true that INGOs often spoke and agitated for those who were politically voiceless, especially during the Cold War, it would be a mistake to see local human rights activists as separate from the entire human rights project. Opposing that project would be tantamount to self-repudiation. These so-called human rights activists, local collaborators in the civilizing mission, are drawn primarily from the elite in their own societies and aspire generally to the political, social, and economic models of the West. Many of these activists and their organizations are financially dependent on the West, and rely on connections with Western institutions, including the diplomatic missions in their countries, for their social status.

In the last decade in Africa, however, a more politically educated activist and thinker, one who questions the human rights project more seriously and who seeks a culturally grounded program for social change, has started to emerge.¹⁷² This activist and thinker understands the connections among power relations, human rights, economic domination, and the historical relationships between the West and the rest of the world. Such a thinker is aware of the deep contradictions that mark the human rights enterprise and seeks the construction of a different human rights movement. While this new actor is still being defined, and constitutes but a small fraction of the human rights movement on the African continent, he is now increasingly at the center of innovative thinking and action. At the core of this new activism and thinking is the push for intellectual originality and self-reliance, local and not Western foundation support, and a commitment to challenge all sources of violations, be they local or foreign. This development represents the cultivation of a truly local human rights culture in terms of the definition of rights and their enforcement.

171. *Id.*, at 22.

172. Two examples of such politically educated African human rights scholars and activists are James Thuo Gathii, Assistant Professor, Graduate School of Management, Rutgers University, and Obiora Chinedu Okafor, Assistant Professor of Law, Carleton University.

VI. CONCLUSION

The promise that human rights holds out to the Third World is that problems of cruel conditions of life, state instability, and other social crises can be contained, if not substantially eliminated, through the rule of law, grants of individual rights, and a state based on constitutionalism. Through the metaphor of human rights and its grand narrative, the Third World is asked to follow a particular script of history. That script places hope for the future of the international community in liberal nationalism and democratic internal self-determination. The impression given is that a unitary international community is possible within this template if only the Third World followed suit by climbing up the civilizational ladder. However, I argue that this historical model, as now diffused through the human rights movement, cannot respond to the needs of the Third World absent some radical re-thinking and restructuring of the international order.

The human rights movement must abandon the SVS metaphor if there is going to be real hope in a genuine international discourse on rights. The relentless efforts to universalize an essentially European corpus of human rights through Western crusades cannot succeed. Nor will demonizing those who resist these efforts achieve a truly international approach. The critiques of the corpus from Africans, Asians, Muslims, Hindus, and a host of critical thinkers from around the world are the one avenue through which human rights can be redeemed and truly universalized. This multiculturalization of the corpus could be attempted in a number of areas: balancing between individual and group rights, giving more substance to social and economic rights, relating rights to duties, and addressing the relationship between the corpus and economic systems. This Article does not develop those substantive critiques, but it is important that these issues be raised. Further work must done on these questions to chart out how such a vision affects or distorts non-European societies.

Ultimately, a new theory of internationalism and human rights, one that responds to diverse cultures, must confront the inequities of the international order. In this respect, human rights must break from the historical continuum—expressed in the metaphor and the grand narrative of human rights—that keeps intact the hierarchical relationships between European and non-European populations. Nathaniel Berman is right in his prognosis of what has to be done.

The contradictions between commitments to sovereign equality, stunning political and economic imbalances, and paternalistic humanitarianism cannot be definitively resolved logically, doctrinally, or institutionally; rather, they must be confronted in ongoing struggle in all legal, political, economic, and cultural arenas. Projections of a unitary international community, even in the guise of the inclusive U.N., or a unified civilizational consensus, even in the guise of human rights dis-

course, may be provisionally useful and important but cannot indefinitely defer the need to confront these contradictions.¹⁷³

This Article has viewed the human rights text and its discourse as requiring the typology of state based on constitutionalism and political democracy.¹⁷⁴ The logic of the human rights text is that political democracy is the only political system that can guarantee or realize the fundamental rights it encodes.¹⁷⁵ As Henry Steiner points out, the basic human rights texts, such as the ICCPR, "should be understood not as imposing a universal blueprint of the myriad details of democratic government but rather as creating a minimum framework for popular participation, individual security, and nonviolent change."¹⁷⁶ However, the point then is that if this were a game or sport, its essence would have been decided, leaving those who adopt it only the option of tweaking or revising the rules governing it without transforming its purpose. It is in this construction that the SVS metaphor comes to life.

Using political democracy as one medium through which the human rights culture is conveyed, one is able to capture the imperial project at work. First, the choice of a political ideology that is necessary for human rights is an exclusionary act. Thus, cultures that fall outside that ideological box immediately wear the label of the savage. To be redeemed from their culture and history, which may be thousands of years old, a people must then deny themselves or continue to churn out victims. The savior in this case becomes the norms of democratic governments, however those are transmitted or imposed on the offending cultures. Institutions and other media—both those that purport to have a universalist warrant and those that are the obvious instruments of a particular nation's foreign policy and its interests—are critical to the realization of the grand script and metaphor of human rights explored in this Article. However, the imposition of the current dogma of human rights on non-European societies contradicts conceptions of human dignity and rejects the contributions of other cultures in efforts to create a universal corpus of human rights. Proponents of human rights should first accept the limitations of working within the metaphor. Then they must reject it and seek a truly universal platform.

Stepping back from the SVS rhetoric creates a new basis for calculating human dignity and identifies ways and societal structures through which

173. Berman, *supra* note 133, at 478.

174. See generally, Henry J. Steiner, *Do Human Rights Require a Particular Form of Democracy?*, in DEMOCRACY, THE RULE OF LAW AND ISLAM 193 (Eugene Cotran & Abdel Omar Sherif eds., 1999).

175. Steiner, for example, does not dispute that the human rights text requires a political democracy. He argues that it in fact does impose just such a model. But he correctly points out that the model envisaged is not "detailed and complete." *Id.* at 200. The "essential elements" of a democratic government that the human rights instruments impose do not constitute a complete blueprint but rather "leave a great deal open for invention, for political variation, for progressive development of the very notion of democracy." *Id.*

176. *Id.* at 200–01.

such dignity could be protected or enhanced. Such an approach would not assume, *ab initio*, that a particular cultural practice was offensive to human rights. It would respect cultural pluralism as a basis for finding common universality on some issues. With regard to FGM, for instance, such an approach would first excavate the social meaning and purposes of the practice, as well as its effects, and then investigate the conflicting positions over the practice in that society. Rather than demonizing and finger-pointing, under the tutelage of outsiders and their local supporters, the contending positions would be carefully examined and compared to find ways of either modifying or discarding the practice without making its practitioners feel shameful of their culture and of themselves. The zealotry of the SVS approach leaves no room for a deliberative intra-cultural dialogue and introspection.

The purpose of this Article is not to raise or validate the idea of an original, pure, or a superior Third World society or culture. Nor is it to provide a normative blueprint for another human rights corpus, although such a project must be pursued with urgency. Rather, the Article is a plea for a genuine cross-contamination of cultures to create a new multicultural human rights corpus. The human rights movement should rethink and re-orient its hierarchical, binary view of the world in which the West leads the way and the rest of the globe follows. Human rights can play a role in changing the unjust international order and particularly the imbalances between the West and the Third World. Still, it will not do so unless it stops working within the SVS metaphor. Ultimately, the quest must be for the construction of a human rights movement that wins for all.

Refugees

Gustavo Gutierrez was a good cop, so good that he was used in public advertisements as a model for the Juárez police force: an honest officer whose only goal was to enforce the law. That is what got him in trouble. Drug gangs noticed the ads and offered him bribes. He refused. They threatened him and his family. The threats were credible since the gangs had killed dozens of police officers and justice officials in Juárez. Gutierrez quit his job and moved to another part of Mexico over 16 hours away, but he still did not feel safe. In 2008 he fled to Canada and asked for asylum. “I had a good life—house, car, relatives close by,” he says. “I lost all of that. I’m glad I’m alive, but it’s hard to start again.”¹

Should Canada admit Gustavo Gutierrez as a refugee? Should it send him back to Mexico? If he is sent back, he may be killed. If Canada admits him, is it obliged to take in the many thousands of other people threatened by violent drug gangs in Mexico, Jamaica, and other countries? What about others around the world facing threats to their lives and well-being? We have only to mention Bosnia, Sri Lanka, Rwanda, Iran, Iraq, Congo, Darfur, and Afghanistan to evoke some of the recent cases that have caused millions of people to flee their homes in a desperate effort to find safety. Do those of us who live in democratic states have a responsibility to admit these refugees if they want to find a new home in one of our communities? Are we justified in refusing them entry?

Refugees and the Holocaust

Contemporary reflection about refugees begins in the shadow of the Holocaust. In discussing the topic of refugees, we should remember one fundamental truth: Jews fleeing Hitler deserved protection, and most of them did not get it.

In July 1938, representatives from over thirty countries met in France to discuss how to respond to the refugees generated by Hitler’s persecution of German Jews. Apart from the Dominican Republic, no state offered to take in more refugees. Some Jews were able to find an open door—leading intellectuals and scientists, people with financial resources or political connections, and

a few other lucky ones. But many more were turned away.² In one famous case in 1939, Jewish refugees from Germany reached the shores of North America in a ship named the *St. Louis* and sought asylum. They were refused permission to land. The boat returned to Europe and many of its passengers perished in the Holocaust.³

Some may object that no refugee situation today compares with Hitler's Germany. There is a lot of truth in that, but we should be wary of taking easy comfort in such a view, imagining that we would never act as our predecessors did. If one looks at the responses to Jewish refugees in the late 1930s, it is striking how many echoes one hears of contemporary concerns and attitudes. Remember that, at this time, the death camps had not yet been built, and the Nazi regime had not yet committed itself to the Final Solution. Everyone knew that Jews were suffering but there were differing perceptions about the extent of their oppression. Some of those opposed to admitting Jewish refugees were overtly anti-Semitic but many people took a view that went more like this:

What is happening to the Jews is too bad, but it's not our fault. We have our own problems. If we take in all the Jews who want to come, we will be overwhelmed. There are simply too many of them. Besides, while Jews may be subject to discrimination and occasional acts of violence, things are not as bad as their advocacy groups say. They exaggerate the problem. Many of the Jews really just want better economic opportunities than they have now at home. In fact, the ones who do manage to make it to North America to seek asylum cannot be among the worst off because they have enough economic resources to cross the Atlantic. Times are tough here. We have an obligation to look out for our own needy first. A large influx of Jews could be a cultural and political threat. They don't share our religious traditions or our democratic values. Some of them are communists and pose a basic security threat, but it's hard to be sure which ones, so it's better to err on the side of caution in restricting entry. Many of them have shown that they don't really respect the law because they have bribed officials abroad for exit permits and travel papers, they have purchased forged documents, they have hired smugglers to transport them illegally, and they have lied to our immigration officials. Finally, admitting Jewish refugees serves the Nazis' own goals and does not help to address the underlying problems that have given rise to the Nazi phenomenon.

In some respects, many of the concerns about Jewish refugees then were as reasonable as the concerns about asylum seekers are today. There was debate and uncertainty about the extent of the risks faced by Jews in Hitler's Germany

even during the late 1930s. Those who were able to travel to North America were economically better off on average. Some Jews were communists. Some did bribe officials and use forged documents and hire smugglers in order to escape. Not all of the people who were turned away died in the Holocaust. The potential number of refugees was very large. Admitting Jewish refugees would not have solved the problem of the Nazis. Yet despite all of these facts, I take it to be incontestable that the response of democratic states to Jewish refugees during the 1930s was a profound moral failure, something that we should acknowledge as a shameful moment of our histories and resolve never to repeat.

We often gain our most important moral insights not from theory but from experience. As Rawls says, we have “considered convictions of justice” that we should use as a way of testing and criticizing our theoretical accounts.⁴ I propose to use this terrible failure to accept Jewish refugees as a constraint upon our inquiry into the ethics of admitting refugees. Whatever principles or approaches we propose, we should always ask ourselves at some point, “What would this have meant if we had applied it to Jews fleeing Hitler?” And no answer will be acceptable if, when applied to the past, it would lead to the conclusion that it was justifiable to deny safe haven to Jews trying to escape the Nazis. This approach will not settle every question about refugees that we have to consider, but it will give us a minimum standard, one fixed point on our moral compass.

Refugees and Immigration: Framing the Inquiry

I approach the topic of refugees from the limited perspective of my concern with immigration into democratic states. This is only one of many normative issues raised by refugees, but I address these wider issues only to the extent necessary to address my more limited concerns.⁵

In this chapter, I will work within the familiar constraints of the conventional assumption about the right of democratic states to exercise discretionary control over immigration. This might seem surprising at first glance, but the idea that refugees have special moral claims to admission implicitly assumes the conventional view. It treats the obligation of states to admit refugees as an exception to the general rule that states are free to control entry and settlement.⁶ This is not an unusual approach. Even those who most strongly defend the moral right of states to exercise discretionary control over admissions usually say that democratic states have a duty to accept at least some refugees.⁷

Treating the claims of refugees as a special case makes sense only if we presuppose that most people in the world cannot advance such claims. Some would object to that premise, arguing that the vast economic and political differences between states provide legitimate reasons for people from poor, authoritarian

states to move to rich, democratic ones. I will consider that line of argument in the next chapter. In this one, however, I want to accept, as a premise, that what one might call the “ordinary inequalities of the modern world” do not give rise to a moral claim to admission as a refugee.

The Duty to Admit Refugees

Why should democratic states take in refugees at all? There are at least three kinds of reasons that can generate a duty to admit refugees: causal connection, humanitarian concern, and the normative presuppositions of the state system.⁸

The first rationale is causal connection. Sometimes we have an obligation to admit refugees because the actions of our own state have contributed in some way to the fact that the refugees are no longer safe in their home country.⁹ Americans—whether supporters or opponents of the war—recognized this in the wake of the Vietnam War and took in hundreds of thousands of refugees from Vietnam, Cambodia, and Laos. The United States has the same sort of obligation toward Afghan and Iraqi refugees, especially those forced to flee because their lives were put in danger as a result of their cooperation with American troops, but, by comparison with the response to Vietnam, the country has done comparatively little to meet this responsibility so far.

We should already be starting to think about environmental refugees—people forced to flee their homes because of global warming and the resulting changes in the physical environment. One argument is that the rich democratic states bear a major responsibility for these environmental changes and so have a duty to admit the people who are forced to leave their home states because of these changes. Of course, there are counter arguments, as there are in the wider debate about how to allocate the costs of responding to climate change.

The general point is simply that causal connections can generate moral duties. I will not attempt an assessment of the competing accounts of the causes of refugee flows in this book.¹⁰ That is beyond my competence. Obviously, the assignment of moral responsibility on the basis of causal connections will depend crucially on the interpretation of those causal connections.¹¹

A second source of the duty to admit refugees is humanitarian concern. We have a duty to admit refugees simply because they have an urgent need for a safe place to live and we are in a position to provide it. This sort of moral view has many different sources, secular and religious. I won’t try to identify those sources here. It is enough to note that they exist and that they converge here on a sense of obligation to help people in dire need.¹² When I advanced my claims at the outset about our obligations to Jewish refugees, I was appealing intuitively to this overlapping consensus, to a shared sense, with many different foundations, that we ought to have opened our doors to these refugees.

A third way to think about the duty to admit refugees is to see it as something that emerges from the normative presuppositions of the modern state system. The modern state system organizes the world so that all of the inhabited land is divided up among (putatively) sovereign states who possess exclusive authority over what goes on within the territories they govern, including the right to control and limit entry to their territories. Almost all human beings are assigned to one, and normally only one, of these states at birth. Defenders of the state system argue that human beings are better off under this arrangement than they would be under any feasible alternative. There are ways of challenging that view, and I will consider some of them in the next chapter. For the moment, however, let's assume that it is correct.

Even if being assigned to a particular sovereign state works well for most people, it clearly does not work well for refugees. Their state has failed them, either deliberately or though its incapacity. Because the state system assigns people to states, states collectively have a responsibility to help those for whom this assignment is disastrous. The duty to admit refugees can thus be seen as an obligation that emerges from the responsibility to make some provision to correct for the foreseeable failures of a social institution. Every social institution will generate problems of one sort or another, but one of the responsibilities we have in constructing an institution is to anticipate the ways in which it might fail and to build in solutions for those failures. If people flee from the state of their birth (or citizenship) because it fails to provide them with a place where they can live safely, then other states have a duty to provide a safe haven. Thus, we can see that states have a duty to admit refugees that derives from their own claim to exercise power legitimately in a world divided into states.

These three rationales are complementary. All three can be relevant at the same time, and any one of them is sufficient to create at least a *prima facie* duty to admit refugees.

Four Sets of Questions

Given this general sense that there is some duty to admit refugees, how can we clarify the nature and extent of that duty for democratic states? Refugees raise four basic kinds of questions for the ethics of immigration. First, who should be considered a refugee? For the purposes of my inquiry, a refugee is someone whose situation generates a strong moral claim to admission to a state in which she is not a citizen, despite the absence of any morally significant personal tie to those living there (as in family reunification). What gives rise to this sort of moral claim?

Second, what is owed to refugees? At a minimum, refugees need a place where they can be safe, but do they have a moral claim to more than that? Should they receive an opportunity to build a new life—jobs, education for their children, and so on? Are they entitled to a permanent new home rather than just a temporary shelter?

Third, how should responsibilities for refugees be allocated among different states? In particular, what is the nature and extent of the obligation of democratic states to admit refugees? This is the most crucial question from the perspective of this book.

Finally, are there limits to our obligations to refugees and, if so, what are they? Is there some point at which a democratic state is morally entitled to say to refugees: “We know that you face genuine and dire threats, but we have done enough. You are not our responsibility. We leave you to your fate.”

The Current Refugee Regime

In exploring these questions, I proceed, as usual, through critical reflection upon current practices, beginning with a brief description of how things work now. Democratic states admit refugees in two ways today: resettlement and asylum.

Resettlement

Resettlement occurs when a state selects refugees who have found a safe haven elsewhere, usually under UN auspices, and offers them a permanent new home. Most of the states with significant resettlement programs (the United States, Canada, and Australia) are traditional immigration countries. (Sweden is an important exception to this pattern.)

For the purposes of this chapter, two things matter most about resettlement as it is currently practiced. First, the overall number of those resettled is very small relative to the needs of refugees. For example, in 2011, the UN High Commissioner for Refugees (UNHCR) had over ten million refugees under its care, over half of whom had been in exile for several years or more, but there were only about 80,000 places available for resettlement.¹³ So, resettlement currently helps some refugees but is irrelevant to most.

Second, there is no generally recognized obligation to take in refugees for resettlement. States who accept refugees for resettlement may be seen as generous, but those who refuse to do so violate no generally acknowledged norm. For that reason, resettlement, as currently practiced, is not seen as a moral duty that constrains the state’s discretionary control over immigration. I add the qualifier

“as currently practiced” because I will argue in this chapter that we should see resettlement as a strong and extensive moral duty.

Asylum

The second way in which democratic states admit refugees is by granting them asylum. Asylum is far more significant and far more controversial than resettlement as a way of admitting refugees to democratic states.

Like Gustavo Gutierrez whose story opened this chapter, some people arrive in democratic states and ask to be allowed to stay there on the grounds that they are refugees. Under the Geneva Convention on Refugees, states may not return refugees to their state of origin or send them to any other state in which their lives or liberties would be threatened. This is the principle of non-refoulement. The Convention was originally adopted in 1951, but it applied then only to refugees in Europe whose plight was due to events prior to its adoption. In 1967, however, a Protocol was adopted that removed these geographical and temporal limits, making it a universal and ongoing commitment to assist refugees. Over one hundred states have signed the Convention including all democratic states in Europe and North America. The refugee regime created by the Geneva Convention establishes the normative principles that democratic states currently acknowledge as defining their responsibilities to refugees.

Every signatory state must pass legislation to make the Geneva Convention applicable within its own legal system. In principle, every person who arrives in a state and claims to be a refugee is supposed to be given a fair hearing to determine whether or not her claim is valid. If a state accepts the claim, it is obliged, roughly speaking, to grant the refugee asylum and to provide her with a fairly extensive package of legal rights.¹⁴

During the first decade or so after the 1967 Protocol was adopted, relatively few people came to affluent democratic states as asylum seekers, in part because communist countries restricted emigration and in part because there were relatively few claimants from the developing world. During the 1980s this changed rapidly. Requests for asylum grew dramatically in the industrialized states, from several thousand per year in the 1970s to a few hundred thousand in the early 1980s, then to several hundred thousand in the late 1980s, peaking at over 850,000 in 1992. Although the breakup of the former Yugoslavia generated a significant portion of the refugee claimants in the late 1980s and early 1990s, hundreds of thousands of others came from all over the world. Rich democratic states began to fear that they would face a continually growing number of claimants as changes in transportation and communication made it possible for more people from Asia, Africa, and Latin America to seek refuge in Europe and North America. They also worried that many people from poor states had come to view

asylum claims as a way to bypass normal immigration controls and gain temporary entry, with the hope of finding some way to stay on, even if they did not qualify as refugees under the Convention.

In response to these concerns, every state in Europe and North America adopted policies to prevent people from arriving and claiming refugee status. The most important technique was to impose more stringent visa controls on states whose citizens seemed likely to ask for asylum after arrival. To get a visa, people were required to provide supporting documentation about their lives that would convince immigration officials that they would want to return home and so would be unlikely to file a claim for asylum.¹⁵ To enforce compliance with these visa restrictions, airlines and other carriers were subjected to heavy fines for transporting people without proper documentation. In addition, states adopted other policies to restrict the filing of asylum claims. One important tactic was to insist that any asylum claim must be filed in the first safe state in which an applicant arrived after leaving her home country. This had the effect of limiting claims in the rich democratic states, since refugee claimants usually travel over land and most refugee-generating states do not border Western Europe or the United States.¹⁶ Some states declared the arrival area of their airports or other border entry points not to be part of their territory for purposes of asylum. This (legally problematic) move enabled them to assert that they were not violating their obligations under the Geneva Convention if they sent travelers back without a proper hearing to the state from which they had just arrived even if the travelers claimed to be refugees. In some cases, boats carrying potential refugees were interdicted at sea.¹⁷

As measures to reduce the number of asylum applicants, these techniques of exclusion were fairly effective. They stopped the exponential growth of claims and reduced the annual average to about 400,000 a year in the rich countries, a level that is well above what it was in the 1970s and early 1980s but also well below the peak years.

How does the current refugee regime answer the four questions that I posed above and what should we think of these answers?

Defining Who Is a Refugee

The Geneva Convention answers the question “who should be considered a refugee” by defining a refugee as any person who

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or,

owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.¹⁸

As with all legal definitions, each of its terms (“well-founded,” “persecution,” “membership of a social group”) must be interpreted and then applied to particular cases.

People seeking asylum in democratic states often meet a skeptical and critical inquiry into the question of whether they are really refugees. Every democratic state has established a set of laws and institutions to determine whether particular asylum claimants meet the requirements of the Convention. The use of the term “persecution” is clearly intended in part to recognize the principle that we should not lightly override the normal rule that states are free to exercise discretionary control over entry and settlement by noncitizens. Given the premises of this chapter, that is a reasonable concern. No state is perfect. The ordinary failures of law enforcement, like the ordinary inequalities of the modern world, do not provide grounds for giving someone refugee status.¹⁹ To deserve refugee status a person must be facing a serious threat to her fundamental interests, not simply the risks faced in ordinary life in a society that normally protects people’s basic human rights.

There is some variation in the ways that democratic states interpret and apply the Convention definition. What should it take to establish that one qualifies as a refugee under this definition? Would being a Jew in Germany during the late 1930s be enough or should one have to show that one had been personally subjected to violence or threats by agents of the state? From my perspective, the former should clearly be sufficient, but some states interpret the Convention as requiring something like the latter. What about being a black in apartheid South Africa? Should that have been enough to qualify someone who escaped from South Africa as a refugee or should that person have been required to prove something more, such as that she had expressed anti-apartheid views and been punished or threatened as a result? Again, I take the former view.

As these examples suggest, I think the right approach is one that takes a more flexible and expansive reading of the Convention’s requirements. Some democratic states have taken this sort of approach. For example, some states have accepted women fleeing domestic violence as refugees on the grounds that the state from which they were fleeing did not take this threat seriously and this amounted to persecution on the basis of gender.²⁰ Even on the most expansive interpretation of the Convention, however, people fleeing civil wars and famine are generally not thought to qualify, because they are not targets of violence or deprivation, despite the fact that their lives are in danger. On the

other hand, someone who seeks asylum because she was thrown in jail for a few weeks for expressing political views would normally qualify as a refugee under the Convention.

In my view, this discrepancy reveals that the Convention embodies a misplaced set of priorities. To insist that a refugee must be deliberately targeted is a mistake. From a moral perspective, what is most important is the severity of the threat to basic human rights and the degree of risk rather than the source or character of the threat. Some regional associations of states and many scholars have endorsed the idea of adopting a more expansive definition of who is a refugee.²¹

UNHCR adopts just such an expansive definition in interpreting its mandate to protect refugees. I noted above that UNHCR was responsible for over ten million refugees in 2011.²² Not all of these people would qualify as refugees under the Convention definition, but UNHCR also

recognizes as refugees persons who are outside their country of nationality or habitual residence and unable to return there owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order.²³

There is normally not much worry that people under the care of UNHCR are taking advantage of the refugee regime simply to gain access to another country. Most of these are people living in states next to their country of citizenship, often in refugee camps. Very few people pretend to be refugees in order to gain the opportunity to live in a refugee camp.

Note that even an expansive definition like the one used by UNHCR falls well short of treating the “ordinary inequalities of the modern world” as giving rise to a claim to be a refugee. Nevertheless, most democratic states have resisted this sort of expansion. Some object that if we were to define “refugee” this broadly for purposes of asylum, too many people would qualify as refugees. Then democratic states would no longer be willing to support the refugee regime and it would collapse.²⁴

It is certainly appropriate to worry about feasibility, especially if one is making recommendations for action. We should not push to change the official definition of “refugee” if we think that will create a backlash that will lead to less actual protection for refugees. Nevertheless, in an academic inquiry like this one, it is important to get clear first about what we think is right in principle before moving to the question of what we should do in practice. If one moves too quickly to the question of feasibility, one risks confusing elements of analysis that should be kept distinct. In thinking about how to define the category of refugee, we should focus above all on the seriousness of the moral claim that is

being advanced in an effort to overcome the normal rule about the state's right to exercise discretionary authority over immigration. The seriousness of the claim is not affected, at the level of principle, by the number of claimants.²⁵

One common way to try to find a principled basis for limiting the number of people who might qualify as refugees is to say that refugee status should be reserved for those who can only be helped through relocation. Those who can be helped where they are should not be considered refugees.²⁶ In my view, this approach implicitly confuses two distinct sorts of questions. The first is "What is the best solution to a particular problem?" The second is "Should a person who has fled because of this problem be granted asylum as a refugee?"

It is certainly true that expanding the refugee regime would not do much to solve problems like global poverty, civil war, or ethnic conflict. We can normally do more to assist people suffering from deprivations of their basic human rights by improving the situation where they are rather than by enabling them to move somewhere else, and that is what we should do. Human beings need physical security, peace, food, shelter, medicine, education, and economic opportunities. It is normally better for everyone if they can satisfy these needs in their home states, rather than by finding a new home in another country. But the question we are faced with when someone arrives seeking asylum is not what is the best way to address these broad problems but rather whether this particular person deserves to be considered a refugee with a right to start a new life in our state or whether we should send her back to her home state.²⁷

Think again of Gustavo Gutierrez. The best solution to the problem that has forced him to flee would be for the Mexican state to succeed in asserting its authority so that the drug gangs were no longer in position to threaten the lives of police officers on a routine basis. That is clearly the solution that Gutierrez himself would prefer. As he says, he did not want to leave Mexico. He had a good life there. But while that is a preferable solution, it is not one that is actually on offer. The choice that Canada faces is whether to grant Gutierrez asylum or whether to send him back under circumstances in which his life will be in grave danger.

Some may object that granting people asylum will undermine local resistance to injustice and oppression by giving people an easy way out. But that sort of objection understates the costs of leaving (as Gutierrez's story reminds us) and overstates what it is reasonable to ask people to bear in an effort to bring about change. We can admire those who risk torture and death for the sake of freedom and justice but we should not require it of anyone.

Consider another case. In the Congo over the past decade five million more people have died than we would normally expect and several hundred thousand women have been raped.²⁸ These terrible ills have been produced by the collapse of any stable political order and by a series of ongoing, mutating

civil conflicts linked in part to external actors and interests. The international community has been unable or unwilling to find a solution to the humanitarian disaster there. If one were to ask what other states should do to protect the basic human rights of the inhabitants of the Congo, no one would suggest that the best course would be to move tens of millions of Congolese to other states. To recognize people fleeing the Congo as refugees will do little or nothing to solve the underlying problems or to improve the situation of those who remain. Nevertheless, we do have to decide how to respond to those who escape.

Suppose that some Congolese women make their way out of the Congo and into a neighboring state. No one doubts that UNHCR should provide them with assistance, shelter, and a safe haven. But suppose that instead of reaching a neighboring state, they made their way onto a plane that took them to a democratic state in Europe or North America. Should they be given an opportunity to stay in that state or should they be sent back to the Congo where they would be in danger of being raped or killed or starved to death? I think the answer to that question is just as obvious, and that is the kind of question we have to answer in deciding who is a refugee. The fact that protecting these few women will not solve the underlying problem in the Congo is irrelevant. As I noted at the outset in discussing the case of Jewish refugees, protecting refugees almost never solves the underlying problem that has given rise to their flight. But that is not a reason to refuse them refuge. The question of whether or not some person deserves to be considered a refugee is distinct from the question of what is the best solution for a larger problem.

What Is Owed to Refugees?

In thinking about the second question, what is owed to refugees, we have to distinguish between the immediate aftermath of flight and the longer term. The existing refugee regime reflects such a distinction in practice. The first priority is to secure the safety of the refugees and to protect their basic human rights. For these purposes, emergency arrangements such as refugee camps are often appropriate. But this is not sufficient as a permanent solution. In the long run, if refugees are unable to return home safely, they need a new home.

The Convention adopts this approach. It asserts that, in principle, people who are recognized as refugees and who cannot return safely to their country of origin within a reasonable time should be given a new home and an opportunity to make a new life on the same terms as the members of the society they have joined. In effect, the Convention says that it is not enough to provide refugees with physical safety. People have a right to membership in a society. If they

cannot any longer be members of their country of origin, they must be given access to membership in some other state.

The idea of a right to membership implicitly accepts the principle that rights are relative to the regime. A refugee who settles in a poor state will have many fewer rights and opportunities than one who settles in a rich one, even if both are treated as full members of the society where they have settled. Given the premises of this chapter, these differences are not unjust. As I noted at the outset, we are presupposing in this chapter that the ordinary inequalities of the modern world do not give rise to a right to refugee status with its moral claim to entry to a new society. Refugees are treated fairly (except by their country of origin) so long as they enjoy safety, protection of their basic human rights, and the same rights as other members of the society where they live.

The idea that refugees have a moral right to membership in some society is distinct from the arguments about social membership advanced in Part I of this book. The arguments about social membership become relevant, however, once refugees have been admitted and have settled in a new society. The Convention's approach fits well with the arguments I advanced in earlier chapters about the rights that democratic states ought to grant to those whom it admits and about the ways in which membership claims grow over time. Refugees normally have no membership claims in their new state at the outset, but they acquire them over time. Moreover, a democratic state cannot legitimately try to keep people from becoming members by isolating them from others in society. A rich democratic state cannot create camps where refugees are prevented from having contact with the rest of the population and are provided only with basic levels of food, clothing, and shelter, even if the provision of such basic levels of support would be equal to what the refugees could have expected if their membership rights had been respected in their country of origin. If a democratic state admits refugees, it must provide the refugees with most of the rights that others living in the society enjoy. Over time, it must accept them as members.

One implication of this idea of a right to membership is that there is a limit to how long refugees can be kept in a temporary status. The basic justification for granting someone admission as a refugee is that it is not safe for her to go home. Sometimes circumstances change, and an unsafe situation becomes safe. That removes the original justification for granting the refugee entry. If this transformation takes place relatively soon after the refugee's arrival, it may be reasonable to expect the refugee to return home.²⁹ But over time, that changes. When the communist regimes in Eastern Europe collapsed and those states adopted democratic institutions, it would not have been reasonable to expect all those who had fled over previous decades to return home just because it was now safe to do so. As is the case with immigrants admitted on a temporary basis, refugees become members over time. Within a few years at most, what happens in their

country of origin should become irrelevant to the question of whether refugees have a right to remain in the place where they have started a new life. If things become better in their country of origin and they want to go home, they should be free to do so. But no one should force them to leave.

I have been focusing so far on people recognized as refugees. Not all of those who arrive as asylum claimants gain such recognition. Indeed in most democratic states, the majority of asylum claimants do not. What then?

In principle, if people don't qualify as refugees, they have no basis for a moral claim to stay. After all, we are presupposing the moral legitimacy of the state's discretionary control over immigration and are only considering here how that might be constrained by a duty to admit refugees.

In practice, this greatly oversimplifies the issue, in part because restrictive interpretations of the Convention can generate moral complications. Democratic states often determine that an asylum claimant does not qualify for refugee status under the Convention, because she does not meet all of its formal requirements, but also that she cannot be returned to her country of origin because she would face serious threats to her life or freedom if she were sent back. The principle of non-refoulement sets a much broader constraint on the ability of democratic states to return people to their home countries than the principle that states should grant asylum to people recognized as refugees under the Convention.

Most democratic states have some sort of quasi-refugee status that they grant to people from countries with high levels of internal armed conflict or countries devastated by a natural disaster. In that sense, they often implicitly endorse the UNHCR's more expansive definition of who is a refugee. These people don't qualify for refugee status under the Geneva Convention, but it is not safe for them to go home. In such cases, people are permitted to remain but often with fewer rights than those officially recognized as refugees. From a normative perspective, we can see that one function of this sort of alternative refugee status is to compensate for the limitations of an overly restrictive formal definition of who is a refugee under the Convention.

Leave aside the legal technicalities for a moment. From a normative perspective, it is the non-refoulement constraint that matters morally. Whenever a state acknowledges that it would be wrong to send someone back to her home country, it is implicitly recognizing that person as a refugee in my sense of the term, that is, someone whose situation generates a strong moral claim to admission (or continuing presence in) a state in which she is not a citizen, despite the absence of any morally significant personal tie to those living there. As with recognized refugees, those who are allowed to stay under one of these more restrictive designations become members over time and should be recognized as such.

Sometimes states indicate that those permitted to stay on some basis other than the Convention's definition are being allowed to remain only on a temporary

basis. In the United States, for example, one alternative to formal refugee status is actually called “temporary protected status.” But the arguments advanced above about the moral relevance of the passage of time apply just as much to people who have a real need for refuge that does not meet the Convention definition as it does to people who do qualify as refugees under the Convention. If we let them stay long enough, they become members and should be allowed to remain. No one should be expected to live in limbo indefinitely.

Allocating Responsibilities for Refugees

I have been discussing what democratic states owe to the refugees whom they admit, but most refugees do not seek asylum in rich democratic states or get resettled there. They flee to states near their country of origin. They often wind up in refugee camps. Some are able to gain some sort of membership status in the state to which they have fled, but most cannot. Many stay in the refugee camps for years. This clearly represents a terrible failure to meet the moral claims of refugees. So, one of the questions we have to consider is whether democratic states ought to admit more refugees.

What is the nature and extent of the obligation of democratic states to admit refugees? That is the crucial question for this book, but we can address that question effectively only in the context of a broader discussion of how responsibility for refugees should be assigned.

Let's start again with the way the current refugee regime assigns responsibility to take in refugees. As we have seen, it imposes no duty on states to accept refugees for resettlement. The principle of non-refoulement, however, forbids a state from sending refugees back to their country of origin so long as they would be at risk there or to any other state where they are likely to face persecution. Thus, the current regime places the obligation to care for a refugee on the state where the refugee first arrives and claims asylum.³⁰ That state remains responsible for the refugee, unless it can find another state that is willing to take her in for resettlement.

Is there a moral logic behind this way of assigning responsibility for refugees? I think there is. In my view, the non-refoulement principle is an indispensable element in any just refugee regime, though, as we shall see, it is not a sufficient principle by itself and it generates certain problems.

The Moral Logic of Non-refoulement

One crucial background presupposition of the current refugee regime is the principle of state sovereignty. As we saw in chapter 6, the principle of state

sovereignty entails that states are normally responsible for what goes on in their own territory and not responsible, or at least not nearly as responsible, for what goes on in the territory of other states. From this perspective, it is precisely the fact that a person seeking asylum has made it to our territory that matters morally. Her physical presence creates a degree of moral responsibility that did not previously exist. The arrival of the refugees implicates us directly and immediately in their fate. They will no longer be at great risk, if we do not return them.³¹

Given the principle of state sovereignty, the Convention is right to insist that every state has a special responsibility to make sure that no one within its jurisdiction is sent to a place (including her home country) where she will be at great risk. This does not mean that non-refoulement is adequate as the sole basis for allocating the responsibility to care for refugees, but it does set a constraint upon the morally acceptable alternatives.

What are the problems with non-refoulement? The most obvious objection is that it does not assign the responsibility to take in refugees on the basis of equitable principles but instead allows the allocation of refugee admissions to be determined by where people seek asylum. This clearly has the potential to create disproportionate burdens if the refugees cluster their asylum requests on a relatively few states. Some states may be expected to take in more than their fair share. We find concerns expressed about excessive burdens for two sorts of states: neighboring poor ones and distant rich democratic ones.

Disproportionate Burdens and Neighboring States

Let's start with the former. As an empirical matter, we know that the vast majority of refugees flee to neighboring states simply because that is the easiest way to escape. This means that relatively poor states are being expected to bear the burden of accommodating large numbers of refugees in addition to dealing with their own problems. Is that fair?

No, although to a certain extent it may be unavoidable, and it makes moral sense in some respects to expect nearby states to bear a disproportionate share of the responsibilities of sheltering refugees in the short run. First, the neighboring states are the only ones that most refugees are able to reach immediately. Second, other things being equal, having refugees stay nearby (at first) increases the likelihood that they will be able to return home.

The underlying normative assumption of the modern international order is that a person should be living in a state where she is a citizen, unless some other state invites her in. So, the first and strongest moral claim that refugees have is against their home state. That state has a duty to change its policies or to get its

affairs in order so as to make it possible for the refugees to return home and to live there free from fear of persecution.

That does happen sometimes. A crisis breaks out and people flee but within six months or a year, things settle down. They are able to return home, and they do. Repatriation is always the preferred solution of the United Nations and of other states, so long as the refugees can return home safely. As a general rule, it is easier for refugees to return home if they have not gone too far away.

Thus, the moral justification for expecting nearby states to bear a disproportionate share of refugee admissions is twofold. First, refugees are most likely to flee to a neighboring state, and this triggers the state's responsibility not to return the refugees to a place where they will be at great risk. Second, repatriation is the morally preferable solution and the likelihood of repatriation is increased if refugees settle nearby, at least initially.

This justification is limited in two ways, however. First, the underlying moral responsibility for refugees falls upon the international state system as a whole, since the problem of refugees is a byproduct of this way of organizing the world politically. While neighboring states can reasonably be expected to bear a disproportionate share of the burden of providing refugees with an initial place to stay, it is not reasonable to expect them to bear a disproportionate share of the economic costs of caring for refugees. Indeed, their provision of territorial shelter should arguably free them from any expectations of further contributions. The economic costs of caring for refugees should be borne by other states or international organizations.

Second, the fact that a state has a moral responsibility not to return a refugee who has arrived on its territory back to a dangerous situation does not mean that it should be the one to provide that refugee with a new home. The contemporary refugee regime lumps these two responsibilities together (except for voluntary resettlement), but as we shall see, there are good reasons in principle for separating them. Furthermore, even though geographical proximity is quite relevant to the question of what state should provide a temporary shelter for refugees, it is not as relevant to the question of what state should provide a new home to refugees who have no reasonable prospect of returning to their country of origin in the near term. As the likelihood of repatriation diminishes, the moral case for keeping the refugees nearby also weakens. Thus, while it may be reasonable to expect neighboring states to bear a disproportionate share of the responsibility for admitting refugees in the short run, it is unjust to extend that disproportionate expectation to the long run. Leaving non-refoulement as the only normative principle governing the allocation of refugee admissions does precisely that. That is why relying on non-refoulement alone is unfair to the neighboring states.

Disproportionate Burdens and Rich Democratic States

Turn now to the second concern. Why might the principle of non-refoulement create disproportionate burdens for rich democratic states? For two reasons, the first involving refugees and the second involving asylum claimants who do not qualify as refugees.

Too Many Genuine Refugees?

First, refugees might reasonably say to themselves that if they have to start life over somewhere new it would be better to do so in a place with more long-term opportunities for themselves and especially for their children. Many refugees would not have the resources to act upon this sort of calculation, but the principle of non-refoulement creates incentives for refugees to seek asylum in a rich democratic state rather than somewhere else. If enough did so, it would mean that rich democratic states would be asked to admit more than their fair share of refugees (at least if we assume that a fair distribution would have some basis other than relative wealth and the refugees' own preferences for determining where refugees should go).

I use the hypothetical tense in my discussion of this issue because in my view this concern about rich democratic states being unfairly burdened with too many refugees is only a potential problem rather than an actual one (in contrast to the actual burden borne by neighboring states who clearly do admit and shelter a disproportionate share of refugees). As I observed in my initial discussion of asylum, all of the rich democratic states have adopted techniques of exclusion to make it much more difficult for people to get to their territory and claim asylum. Given the general effectiveness of these techniques, it is not plausible to claim that the actual distribution of refugees burdens rich states unfairly, though many people probably believe that it does.

While many people in democratic states worry about being expected to admit more than their fair share of refugees, the much more important issue is the moral wrong involved in the use of techniques of exclusion to keep the numbers within bounds. Visa controls, carrier sanctions, and the other techniques of exclusion are indiscriminate mechanisms. They are just as likely to exclude genuine refugees as those without valid claims. These techniques fail the fundamental test that I set out at the beginning of the chapter that no policy is justifiable if it would have led to the exclusion of Jewish refugees fleeing the Nazis. (Indeed, visa controls played an important role in preventing Jewish refugees from reaching safety in the late 1930s.) Democratic states cannot meet their moral responsibilities to refugees by establishing a system to protect refugees that they then prevent refugees from using.

The Problem of Failed Asylum Claimants

Some will argue that the use of the techniques of exclusion is unavoidable because of the high number of requests for asylum from people who do not qualify as refugees under the Geneva Convention. This is the second potential source of disproportionate burdens for rich democratic states. Strictly speaking, this does not involve a disproportionate share of refugee admissions, but it is an issue that is directly connected to the question of the responsibility of democratic states to admit refugees, so it is important to discuss it here.

As I noted earlier, the number of asylum claims in Europe and North America increased dramatically in the 1980s and declined only after the techniques of exclusion had been adopted. Many, indeed most, of the people who seek asylum in rich democratic states are not recognized as refugees under the Geneva Convention.

Some people are tempted to leap from the fact that most asylum claimants do not succeed in gaining recognition as refugees to the conclusion that the real problem with non-refoulement is that it creates incentives for people to file asylum claims that they know have little merit in an attempt to gain entry to democratic states with the goal of using the time during which their cases are being considered to gain a foothold in society and to find some way to stay on after their claim for asylum is denied.

This is the classic picture of the “asylum abuser,” someone who is really just an economic migrant with no strong moral claim to entry and who is seeking to get into a rich democratic state through a mechanism that is supposed to be reserved for refugees. This picture informs much of the popular discourse around refugees in democratic states, especially in Europe, and it generates a great deal of moral outrage.

There are undoubtedly some claimants who fit this picture of the asylum abuser, and, given the conventional assumption (which I am not challenging in this chapter) that states are morally entitled to restrict the entry of those who are only suffering from the “ordinary inequalities of the modern world,” the moral outrage against them is, in a certain sense, understandable. They are taking spaces that should be reserved for real refugees and making it more difficult to maintain a system that is to provide refugees with protection. If only the asylum abusers refrained from their opportunistic behavior, many will say, there would be no need to use the techniques of exclusion to limit the number of asylum claimants.

While these concerns are understandable, it would be a mistake to suppose that most people whose claims for asylum fail fit this picture of asylum abusers or that better behavior by asylum claimants would eliminate the pressures to use the techniques of exclusion. Most people seeking asylum are not lawyers. They often have little idea about what legal principles govern the refugee system and

whether the reasons that have led them to flee their country of origin will be considered sufficient to qualify them for refugee status under the Convention.³² The fact that an asylum claim is rejected does not prove that the application was fraudulent.

Consider again the case of Gustavo Gutierrez. Under some interpretations of the Convention, he does not qualify as a refugee because the kind of threat he faces does not meet the Convention's requirements. Indeed, that is why his claim was initially denied. But even if that legal interpretation prevails, it would be absurd to describe him as an asylum abuser. His fears are real. He could not reasonably be expected to anticipate the ruling. Even if he did, would he be obliged to stay home in Mexico and wait to be killed?

Most asylum applications have some basis in dangers and hardships that the claimant faces. Most people do not leave their home country and file an asylum claim lightly. There are almost always push factors, things driving them out, as well as pull factors, things attracting them to the new place. So, the picture of the failed claimant as *ipso facto* an asylum abuser is a gross distortion of reality.³³ As I noted before, democratic states often feel obliged not to deport failed asylum claimants because of the risks those claimants would face if they were sent home. From a normative perspective, people like this should be considered genuine refugees, not asylum abusers, whatever their legal status under the Geneva Convention.

What about applicants who lie in their applications and destroy documents to make it harder to deport them? Can't we at least say that people who do this are abusing the asylum system? Not necessarily. Real refugees are rightly terrified of political authorities. How can they be expected to trust the authorities in the state in which they are seeking asylum, especially in a context in which they know there is a general suspicion of asylum applicants? They correctly perceive many of the officials with whom they interact to be hostile and suspicious. They are afraid, not without reason, that if they say the wrong thing, their application will be denied and they will be sent back. They do not know what the wrong thing might be in a complex determination process filled with legal technicalities. So, they talk with other applicants, trying to learn what works and shaping what they say to fit what they think the authorities want to hear.

Recall again my initial suggestion that we measure our approach to refugees today against the standard of how we should have responded to Jews fleeing Nazi Germany. Would it have been reasonable to expect Jewish refugees not to lie or destroy documents if they thought that it was necessary to do so to gain safety elsewhere? Should their lying have been grounds for denying them refuge? Real refugees whose lives will be in danger if they are sent home have stronger incentives than economic migrants to lie and destroy documents. It is wrong

to assume that such behavior is proof of a character flaw. In sum, outrage about asylum abusers is largely misplaced.

Some people suggest that the solution to the large volume of asylum applications that are ultimately denied is to streamline the process in which asylum claims are heard and to find other ways to reduce the incentives to file claims with little chance of success. If those who do not qualify as refugees could be identified quickly and sent home, it would reduce the incentives for those with weak claims to apply and might ultimately eliminate the need for the techniques of exclusion.³⁴

While some procedural reforms may be appropriate and may help to eliminate a few extreme cases, the obstacles to reducing the incentives to apply for asylum have deep roots in democratic norms and principles. Let me mention just three such constraints.

First, in every democratic state there are standard legal procedures for assessing contested claims. These legal procedures are complex, costly, and time-consuming because of the need to permit the parties to gather evidence, construct arguments, and press appeals. The democratic understanding of due process means that we have to allow asylum claimants to use the same sorts of processes.

Second, the opportunity to work while one's claim is being considered is itself a powerful incentive to apply for asylum even for people with little hope of success. One could reduce this incentive by detaining asylum claimants but that is very expensive. Even more important, it conflicts with the democratic commitment to human freedom which makes it hard to justify lengthy pre-determination detention, simply as a method for deterring asylum seekers.

Third, it is extremely difficult to deport people who do not qualify under the Convention. This, too, reinforces the incentives for applicants to try.

In sum, there is no way to reform the current asylum process that will substantially reduce the incentives to apply, at least not without violating deep democratic norms.³⁵ Yet it was the large volume of asylum claims that led democratic states to adopt the morally objectionable techniques of exclusion.

Reallocating Responsibilities for Refugees

So far in this section we have seen that there is a moral logic to the principle of non-refoulement but also that the almost exclusive reliance on this principle in the current refugee regime generates two problems with respect to the allocation of responsibilities to admit refugees. The primary problem is that the vast majority of refugees wind up in neighboring states, not only in the short run which would be acceptable, but also over the long term. This places an unfair burden on the neighboring states and also means that the moral claims of long-term

refugees to membership in some society are rarely met. The second problem concerns the incentives for people to seek asylum in rich democratic states. I do not think these incentives actually result in rich democratic states taking in more refugees than they should, but fear of this possibility does have a number of pernicious consequences. First and foremost, it has led these states to adopt techniques of exclusion that prevent many genuine refugees from being able to gain asylum. Second, it makes it easier to construct everyone seeking refugee status as an asylum abuser. Third, it requires rich democratic states to spend significant resources on refugee determination processes.

These are two different problems, and they require different solutions, although perhaps the solutions would be combined in an ideal refugee regime. The first problem could be addressed by making it a strict duty for states to take in an appropriate number of refugees for resettlement. The second problem could be addressed by breaking the link between where one requests asylum and where one receives it. Let me say something more about each proposed solution.

Resettlement as a Strict Duty

As I mentioned at the outset of the chapter, it is a sad fact that repatriation is not a realistic possibility for many refugees. So, one crucial component of a better refugee regime would be to make resettlement a formal duty with the binding character that non-refoulement has now rather than a discretionary option for states that choose to be generous. The duty of non-refoulement would continue, of course, for reasons discussed above.

The principle of non-refoulement generates relatively clear guidelines for the allocation of responsibility for admitting refugees (even if some issues at the margins can be contested). Seeking to allocate responsibility for long-term refugees more fairly creates many more complications and ambiguities. Let me briefly mention some of the relevant considerations that we would have to take into account if we wanted to allocate the responsibility for refugee admissions fairly among states.³⁶

I noted at the outset that sometimes states are causally responsible in some way for the fact that people need to leave their homes and become refugees. That sort of causal connection is obviously a relevant consideration in thinking about who should admit the refugees for resettlement.

Still another factor is what the refugees themselves want. They are not just passive victims to be assisted in whatever way the receiving states deem best. They are human beings whose agency deserves respect. Respecting their agency does not mean that they are entitled to gain refuge wherever they choose, however.³⁷ They are certainly entitled to expect that immediate families will not be divided in the process of relocation. Moreover, most refugee movements involve

groups rather than isolated individuals, and in such cases the refugees will normally want to be able to share the challenges of adjusting to a new social context with others who have similar backgrounds and experiences and who can provide mutual support and a sense of community.

It is clearly appropriate to take into account the receiving state's absorptive capacity (that is, its ability to take in refugees and to settle them effectively). What affects this absorptive capacity?³⁸ One obvious factor is the size of the existing population in the receiving state. It would certainly not be fair to expect the Netherlands with its population of several million to take in the same number of refugees as the United States with its population of 330 million. But it is easier to see what is extremely unfair than it is to say precisely what fairness requires.

Population density may be a relevant factor because of its effect on housing and the environment, though it is much less salient in the modern world where most people live in cities than it was in a world where most people were agricultural workers. From an ecological perspective, dense urban patterns of human living may be less harmful than ones in which people are more dispersed.

Another important consideration is the state's economic capacity. This is partly a function of a state's overall wealth and partly a function of its economic dynamism (that is, of its ability to generate jobs and education for refugees and the housing and other goods that they will need to live). Some argue that rich states should be expected to take in more refugees than poor ones because they can more easily afford it. Others object that what it will cost to care for refugees depends in part on the circumstances of the host country and its normal standard of living, since refugees are supposed to live as members of the receiving society. So, it will be more expensive to care for refugees in rich states than in poor ones. This opens the door to discussions of whether it would be morally preferable for rich states to fulfill at least part of their responsibilities to refugees through resource transfers to poor receiving states rather than through admitting refugees to rich states. Some object that this idea denigrates refugees.³⁹

What about similarities or differences between refugees and the existing population with respect to things like culture, religion, and ethnicity? As an empirical matter, it is almost certainly the case that a state's willingness to take in refugees will depend in part on the extent to which the current population identifies with the refugees and their plight. Moreover, other things being equal, it will be easier for the refugees themselves to adapt to the new society and for the receiving society to include them, the more the refugees resemble the existing population with respect to language, culture, religion, history, and so on. It would serve no one's interests to ignore the question of fit. It is important, however, not to elevate this consideration into something that justifies exclusion or marginalization of refugees on the basis of race, culture, or religion, and as

we saw in earlier chapters this is a significant danger when such factors become principles of selection.

In the same vein, it seems reasonable to say that states like the United States, Canada, and Australia which have a long history of admitting immigrants and of coping with diversity can be expected to take in more refugees (other things being equal) than states which do not have such a history. As I have argued earlier in the book, however, every democratic state will receive some immigrants and has a responsibility to include those immigrants as full members of society. So, it would be wrong to use a history of insularity as a justification for refusing to resettle any refugees.

The discussion so far shows that there are a number of considerations that ought to be taken into account in allocating responsibility to resettle refugees. Doubtless there are others that I have not mentioned. Determining the relative weight to be given to these various considerations is bound to be complex and contested. I will not attempt to offer any synthesis here. One might wonder whether agreement on concrete guidelines to allocate responsibility would ever be possible given the range of issues and possible disagreements, but the challenges to reaching agreement are no worse in this case than they are in reaching agreement on many complex issues which almost always involve a variety of contested and competing considerations.

Would the adoption of a formal duty to take in refugees for resettlement in accordance with the sorts of criteria I have mentioned require an international body with enforcement powers? Not necessarily. For resettlement to be established as a formal duty like non-refoulement, states would certainly have to agree to some sort of formal covenant. But it need not entail anything more than that. Individual states could be responsible for interpreting and enforcing the commitments in a covenant on resettlement, just as they are responsible for the interpretation and enforcement of the existing Geneva Convention on Refugees. I leave open the question of whether it would be preferable to create an international body with stronger powers to promote the resettlement of long-term refugees. At this point, it would be a tremendous advance for most states even to acknowledge that they have a binding responsibility to resettle refugees and for them to engage in public debates about the appropriateness of different criteria. I doubt very much that any rich democratic state would be able to make a plausible case that it is taking in its fair share of refugees for resettlement today under any theory of fair shares that was subjected to public scrutiny and debate.⁴⁰

The deepest obstacles to implementing a better allocation of responsibility for the resettlement of refugees do not derive from our uncertainty about how to resolve intellectual disagreements about what is fair but rather from our (collective) reluctance to do what fairness requires. I will explore this issue below. For the moment, the main point is to see that making resettlement a formal duty and

taking into account the sorts of considerations I have identified (however those considerations were ultimately balanced), would provide a more just way of allocating responsibility for long-term refugees than the current refugee regime's exclusive reliance on non-refoulement, geographical proximity, and occasional generosity.

Breaking the Link between Claim and Place

What about the second problem, the incentives for people to seek asylum in rich democratic states and the negative consequences that flow from that? In principle, again, the solution is relatively simple. The key is to break the link between where a refugee initially files a claim for asylum and where she receives safe haven, both in the short term and in the long run.⁴¹

The state where a refugee claims asylum has a responsibility to ensure that the refugee is not sent back into danger but not necessarily a responsibility to provide her with a new home. Refugees have a moral right to a safe place to live, but they do not have a moral entitlement to choose where that will be. As we have just seen, this does not mean that refugees' preferences about where they relocate carry no moral weight, but rather that their preferences should not be regarded as the only relevant consideration.

People have incentives to seek asylum in places where they will be better off economically than they were at home, regardless of the strength of their refugee claims.⁴² If there were no connection between the place where one requests asylum and the place where one receives protection, however, these incentives would disappear. Why travel thousands of miles to file a refugee claim if that does not enhance one's chances of being able to live in the state where the claim is filed? Moreover, if the connection were broken, rich states would no longer have any reason to try to prevent people from filing asylum claims on their territory because filing a claim would not gain the applicant a foothold on residence. If rich states stopped using the techniques of exclusion that they employ now, it would eliminate one of the biggest moral objections to the current asylum regime—that many refugee claimants cannot access it.

If there were no clear advantage to be gained from acquiring refugee status beyond the acquisition of a right to live safely in a new country (and not necessarily the place where one sought asylum), people would have fewer incentives to make opportunistic use of the system. As a result, there would be much less reason to worry about defining who is a refugee. (The poor states who now receive most of the world's refugees rarely expend any effort in determining whether the new arrivals in their states are really refugees.) Rich democratic states would have no need for elaborate determination systems designed to keep people from acquiring refugee status without proper justification, if gaining that status did

not guarantee residence in their own state. In principle, the money now spent on determination could be reallocated to assist refugees.

While this sort of approach sounds attractive in theory, there are good reasons to be wary of it in practice. In breaking the link between the place where one files for asylum and the place where one receives it, the proposed changes would take away the rights refugees now enjoy when they qualify for asylum in Western states to receive protection in those states. Because their presence in our community makes us responsible for their fate (for reasons discussed in relation to the principle of non-refoulement), we should not send refugees elsewhere for protection unless we can be confident that their basic human rights will be adequately protected wherever they wind up. The asylum claimants may not have a moral claim to enjoy the perquisites of living in a wealthy society, but they do have a right to not to suffer any deprivation in their basic human rights. In a world in which state sovereignty is still the key principle, how are we to ensure that the human rights of the refugees are protected in some other state?

Even if we could be confident of the destination state's good intentions, who will provide the material resources and the supervision of the treatment of refugees needed to ensure that their basic human rights are met on an ongoing basis? In principle, states in North America and Europe should be able to use the money saved on determination systems to meet the material requirements. The reforms would require fundamental changes in the Geneva Convention, however. Once freed of the commitments and constraints created by the Convention, why would the rich states continue their promised level of support? It is nice to imagine that the billions now spent on refugee determination systems would be spent instead on food, clothing, and shelter for refugees, but why wouldn't the money be used to reduce taxes instead? In a world where a billion people live in absolute poverty without rich states being moved to respond to their needs in any significant way, why imagine that they would respond to the needs of refugees in a more adequate way?

It is possible to imagine a refugee regime that incorporates the protections provided by non-refoulement in the current regime but that distributes the responsibility to admit refugees for resettlement more fairly and that removes the incentives to file asylum claims in rich democratic states, thus eliminating the need for morally objectionable techniques of exclusion as well as expensive systems for evaluating asylum claims. Unfortunately, it would not be easy to create such a regime. As we have just seen, any attempt to separate the place where a person files a claim for asylum from the place where she receives asylum is likely in practice to undermine existing protections for refugees without delivering the promised benefits. The other proposed reform—making resettlement a formal duty—carries fewer risks of perversion but, I fear, even less likelihood of success. To see why that is the case, we have to consider our fourth question.

The Limits to Our Obligations to Refugees

The fourth and final question about our duties to admit refugees is the question of limits to obligation. One of the most striking features of the refugee regime created by the Geneva Convention is that it sets no limits to the obligation of states to protect refugees seeking asylum. States are permitted to turn away people who do not qualify as refugees, but not those who meet the Convention's standards, no matter how many of them there are. To be sure, even the commitments in the Geneva Convention are constrained by the responsibility of states to maintain public order. No one expects a state to admit so many refugees that it can no longer function. But this is a minimal constraint.⁴³

I speak here of principle. In practice, as we have seen, democratic states use techniques of exclusion that they know will prevent real refugees (as well as others) from arriving, thus limiting the demands that are actually made of them to admit refugees. However, the techniques of exclusion do not technically violate the principle of non-refoulement (at least for the most part). Democratic states do not acknowledge openly that these techniques exclude refugees who would otherwise be entitled to admission, nor do they claim openly that there are too many refugees with valid claims.

My proposal to make resettlement a moral duty would add to the demands being made upon democratic states with respect to the admission of refugees. Are these demands more than it is reasonable to expect democratic states to bear? To put the question I am asking another way, when, if ever, is a democratic state morally entitled to say to refugees: "We have done enough. We have to protect the interests and needs of our own citizens and residents. We recognize that you have genuine claims, that your physical security and vital subsistence needs will be jeopardised if we do not admit you, but we are going to refuse to do so."

Many people think that there is some point at which a democratic state's concern for its own interests and its own population may make it legitimate to shut the doors, even on people who clearly qualify as refugees. David Miller acknowledges that refugees have strong moral claims to admission, but he argues that these claims have limits:

There can be no guarantee...that every bona fide refugee will find a state willing to take her in....At the limit, therefore, we may face tragic cases where the human rights of the refugees clash with a legitimate claim by the receiving state that its obligation to admit refugees has already been exhausted.⁴⁴

When is this limit reached? When are we justified in turning away genuine refugees? This turns out to be a troubling question, to which neither Miller nor any

other theorist I have read offers either clear guidance or a satisfactory answer. My own answer is “almost never.”

Given the moral presuppositions of the state system, it is certainly reasonable for a state to give priority to securing the basic rights of its own citizens and residents, over comparably urgent basic rights of outsiders.⁴⁵ If one takes the moral claims of refugees seriously, however, it is not clear why their claims to an admission which is necessary to protect their most basic rights should be subordinated to much less vital interests of members of the receiving state.

People sometimes say that the question of legitimate limits to the duty to admit refugees must ultimately be left to states themselves to decide. Miller’s statement is again typical:

The final judgement must be left with the members of the receiving community who may decide that they have already done their fair share of refugee resettlement.⁴⁶

The considerations that Miller says should go into determining a state’s “fair share” are similar in many ways to the ones I advanced above in my discussion of the allocation of responsibility for admitting refugees. He seems to think, however, that we are obliged to take at face value a state’s judgment about the extent of its responsibilities for refugees, about what constitutes its own fair share.

The difficulty with this sort of position, as we have seen repeatedly in this book, is that it conflates the question of who ought to make a decision with the question of whether a given decision is justifiable. The fact that a state has the moral right to make a decision does not entail the view that its decision is justifiable or that it is immune from criticism. Having the right to make a decision is not the same as having a right to act arbitrarily or with complete discretion. Even if no other party has or should have authority to overrule a decision, we may still be in a position to criticize it. For example, one may think that it is appropriate that the Supreme Court of the United States should have the final say on what the Constitution requires and still think that it has made a decision which is legally and morally indefensible in a particular case such as *Plessy v. Ferguson* or *Bush v. Gore*.

When the United States refused to admit Jewish refugees from the *St. Louis*, those who defended the decision asserted that America had already done its fair share of refugee resettlement, especially given the difficult economic circumstances of the time. When I criticize that decision and assert that the American response to Jewish refugees was a profound moral failure, I am not claiming that there ought to have been some supranational authority that decided how many refugees the United States would admit. I am simply saying that Americans should have made a different decision, that their collective moral judgment was

deeply flawed. The mere fact that the members of a potential receiving society think they have already done enough to meet their obligations to refugees is not, in itself, sufficient to establish that they have done enough.

Recall the approach that I proposed at the outset, that we ask what any proposed principles would have implied for our response to Jewish refugees fleeing Hitler. I have assumed from the outset that my readers will agree that turning away those refugees was wrong, that no appeal to the limits to our obligations would have justified closing the door on them. If someone wants to accept that premise but still wants to defend the possibility that the exclusion of genuine refugees in some other case would be justifiable, that person should explain what distinguishes the legitimate case of exclusion from the indefensible one.

I do not claim that it is impossible to imagine circumstances in which the exclusion of refugees might be defensible. I have already acknowledged the public order constraint, and it is possible that there would be other circumstances in which admitting more refugees would bring such high costs to the basic interests of those in the receiving society that exclusion would be justifiable. As Hume reminds us, one of the background conditions for justice is limited scarcity. If everyone were in dire need, it might be unreasonable to expect people to do more than look out for their own.

In the real world, however, this is a purely hypothetical speculation. I do not see how any democratic state in Europe or North America today could make the case that it has taken in so many refugees that it is now morally entitled to turn real refugees away. Indeed, if the argument I have advanced is correct, all of these states have a moral duty to resettle (more) refugees and are failing to meet that duty.

As I have already pointed out, the vast majority of refugees find shelter in neighboring states. Those states would have a much stronger basis to cry “Enough!” and some have occasionally done so, though even then, generally without sufficient grounds. For the most part, however, they have let the refugees in. There is a certain irony here. Immigrants from poor, illiberal, authoritarian, and religiously conservative states are often constructed as threats to the admirable values and practices of democratic states. When it comes to the admission of refugees, however, the former states have made room for millions of human beings in desperate need while most of the latter have devoted their energies to keeping refugees out.

I do not mean to romanticize the refugee-receiving states. To some degree their openness to refugees has been a matter of their inability to keep the refugees out rather than their willingness to let them in (though even poor states have soldiers with guns). Some states allow refugees in for political reasons and some (like Iran) simultaneously admit large numbers of refugees from elsewhere

and generate large numbers of their own refugees. Nevertheless, the contrast between the numbers admitted in North and South is stark.

The desire to set limits to our obligation to admit refugees is understandable, given the background presuppositions of the state system. Each state is supposed to protect the basic human rights of those within its own jurisdiction. If every state did this, we would not have to worry about admitting refugees at all. The responsibility to admit refugees is a secondary, derivative duty. Our state has a responsibility to admit refugees only because some other state has failed to carry out its own primary moral duty.⁴⁷ So, in a way, it makes sense that states resent being asked to take in refugees. This does not make it legitimate to exclude the refugees, however, or, worse still, to blame them. Anger at Nazis for creating a refugee problem should not have been transformed, as it sometimes was, into resentment of Jews.

Another concern that underlies the quest for limits is the fear that, without such limits, those states that are willing to fulfil their obligations to refugees could face an endless ratcheting up of their responsibilities. As we have just seen, admitting refugees is a secondary moral duty arising from the failure of some states to fulfil their primary moral duty. But suppose that we had a fairer allocation of responsibilities for refugees, including a formal duty to admit refugees for resettlement, and then other states failed to fulfil this duty (that is, failed to admit their fair share of refugees for resettlement). Would the states that were willing to meet their secondary responsibilities then be faced with a tertiary responsibility? Would they be obliged to take up the slack, admitting still more refugees for resettlement than required by their initial fair share, because the refugees' moral claims to membership in some society would otherwise go unmet? I see no clear answer to this question.

Some have tried to justify the adoption of the techniques of exclusion by rich democratic states along these lines, suggesting that it is a reasonable response to the dynamic of cascading moral failures that threatened to impose greater burdens on the ones who continued to fulfill their responsibilities. The problem with this line of argument is that there is little evidence that states adopting the techniques of exclusion have tried to ensure that they were receiving their fair share of refugees through the resettlement process. (Sweden may be the exception that proves the rule.)

Some will be inclined to view the ratcheting up issue as a collective action problem. While there are similarities with respect to the challenges of coordination, information, and enforcement that we face in dealing with collective action problems, there is one fundamental difference that makes the creation of a satisfactory refugee regime much more difficult: the absence of any common interest. Treating refugees justly serves relatively few state interests.

Morality and Self-Interest

What makes the issue of refugees especially difficult is that it involves a deep conflict between interests and morality. If we think about ordinary morality, it is striking how many moral principles, habits, and practices fit very well with self-interest, as conventionally understood, so long as one takes a long-term or “enlightened” view of self-interest.⁴⁸ Indeed, a lot of ordinary morality could be seen as an aid to self-interest in the sense that it prevents the emergence of the collective action problems that arise when people act only on the basis of a narrow and immediate view of self-interest. For example, it is a familiar point that capitalist market systems function much better in contexts where most people are honest most of the time, and the prevailing culture discourages graft, corruption, and theft. It is not necessary for there to be perfect compliance for people to see that these sorts of moral norms and habits are a public good, that they make everyone’s lives better off. This recognition reinforces the norms, making it even more likely that honesty will be the best policy most of the time.

As a general matter, it is much easier to get people to follow a course of action recommended on moral grounds when it fits with self-interest in the way I have just outlined than when it does not. Finding ways to present moral arguments that draw attention to the links between morality and interest make it more likely that the moral arguments will be accepted. This approach is common in politics, and it can do a lot of good in guiding policies in ways that make them more ethical.

This applies to the ethics of immigration as well as to other areas. Take an example from one of the earlier chapters: providing public education and basic health care to the children of migrants who settle without authorization. This is the right thing to do from a purely moral perspective, but it is easier to persuade people to go along with the idea because it is so clearly in everyone’s interest not to have children growing up in our society without a basic education or with medical conditions that might pose a risk to others.

One could make similar arguments about the collective interests served by adopting citizenship rules that include the children of immigrants in the political community, by providing the same economic and social rights to residents as to citizens, by creating a societal culture in which all feel included and respected, and by granting immediate family members a right to join citizens and residents. Even providing legal rights to irregular migrants is often in the interests of ordinary citizens for reasons I laid out in chapter 7. In all these cases, the requirements of justice and prudence largely coincide or, at least, correspond closely enough that it is possible to persuade people to do the right thing.

That is not always the case. Morality cannot be entirely reduced to enlightened self-interest. Sometimes morality and self-interest do not reinforce one

another, even in the long run. Any morality worth the name will contain views of right and wrong, or good and bad that *may* clash with self-interest, even enlightened self-interest, under some circumstances.

I am afraid that refugee policy is today one of those areas where the gap between what morality requires and what serves even long run self-interest is so great that interest can do very little work in supporting morality. During the Cold War, this was somewhat different. The openness of the West to refugees from communism was often trumpeted as one of the marks of the superiority of capitalism over communism. The connection between morality and interest in this area was maintained in part by the fact that the communists rarely permitted people to leave so that the Western states did not have to take in many refugees, and in part by the fact that the movement of asylum claimants from poor to rich countries had not yet begun so that the West could not be accused of hypocrisy in excluding them.

Today, it is much harder to show what interests are served by openness to refugees. One can try to link concern for refugees with self-interest by appealing to a collective self-image. Both Canada and the United States pride themselves on being generous because they take in more refugees than most other states. This sort of appeal has some purchase but also significant limits. It is fine so long as the demands posed by the intake of refugees are perceived not to be too burdensome, but it is vulnerable to changes in both circumstances and perceptions. One can also appeal to a form of self-interest by encouraging identification with refugees, but this becomes harder the more the refugees are removed from most of the existing population by cultural or geographical distances.

I am not suggesting that discussions of refugee policy should ignore the connections between morality and self-interest. On the contrary, as I have pointed out, it is appropriate to try to think of ways to reduce the incentives to make opportunistic use of the asylum system and to reduce the incentives to employ techniques of exclusion. Where we can, we should seek a better alignment of interests and morality. The real problem, in my view, is that the admission of refugees does not really serve the interests of rich democratic states.

The fact that morality sometimes requires actions that do not contribute to self-interest does not matter very much so long as it does not require any great sacrifice of self-interest either. The admission of refugees raised few political issues when the numbers were small. When the number of asylum claimants increased, however, the tension between morality and self-interest became greater. In the modern world, there are many millions of people who clearly qualify as refugees under any reasonable definition of the term and many of them need permanent new homes outside their states of origin. There is now, I fear, a deep conflict between what morality requires of democratic states with

respect to the admission of refugees and what democratic states and their existing populations see as their interests.

I have argued in this chapter that democratic states have a moral duty to provide refugees with a safe place to live in the aftermath of their flight and to provide them with a new home if they are unable to return safely to their state of origin within a reasonable time. I have argued further that the refugee regime created by the Geneva Convention meets some of these duties but also that it suffers from a number of important moral flaws. I have shown how it would be possible in theory to construct a better refugee regime that preserved the virtues of the Geneva Convention while remedying its flaws, and, in particular, one that allocated responsibilities for refugees more fairly. But this would require an expansion of existing commitments toward refugees, especially with respect to resettlement. That sort of expansion would not extend the obligations to refugees beyond reasonable limits, but given the ways in which it would conflict with the interests of states, we cannot be too optimistic that democratic states will be willing to do what they ought to do in admitting refugees. Needless to say, I hope that my pessimism is misplaced.

Chapter 10

1. I draw my information on Gutierrez and the quotation from Kennedy 2010.
2. The literature on the failure of European and North American states to respond to Jewish refugees is vast. See, among others, Abella and Troper 1983, Breitman and Kraut 1987, Caestecker and Moore 2010, Cohen 1985, Feingold 1970, Gilbert 2007, London 2000, Marrus 1985, Morse 1968, Rosen 2007, Sherman 1970. For evidence of both the anti-Semitism and the national security worries of high officials in the US Army with respect to Jewish refugees, see Bendersky 2000.
3. For the story of the *St. Louis* and details about what happened to its passengers, see Ogilvie and Miller 2006. Canada's role in this tragedy is discussed in Abella and Troper 1983.
4. Rawls 1971: 19.
5. The best work on refugees by a political theorist is Gibney 2004. Other important recent works include Schuster 2003, Boswell 2005, and Price 2009. The literature on refugees in international law is vast. Two of the leading works are Hathaway 2005 and Goodwin-Gill and McAdam 2007. I unavoidably ignore many of the nuances and complexities that have been discussed in the legal literature.
6. If borders were open and everyone had the right to migrate anywhere, states might still have special responsibilities for refugees, but the problem would look quite different.
7. See, for example, Walzer 1983, Meilaender 2001, Miller 2007. Wellman 2008 is an exception.
8. For a fuller discussion of these three rationales, see Carens 1991.
9. See Walzer 1983 for an initial articulation of this line of argument. Shacknove (1988) and, more recently, Souter (2013) develop the argument in more detail. For a more qualified analysis of the connection between causality and moral responsibility, see Blake 2013.
10. For a particularly helpful exploration of the causes of refugee movements, even if now a bit dated, see Zolberg et al. 1989.
11. In some cases, like Vietnam and Iraq, the causal connection between our action and the existence of refugees is relatively clear and can be linked to particular states, although even in those cases there is still disagreement about the extent to which we are obliged to admit refugees. In other cases, like global warming and environmental refugees, the causal connection is more diffuse and contested. In still others, the cause of a particular refugee flow is even more disputed. For example, someone who sees existing refugee movements primarily as a byproduct of the world capitalist order or, slightly more narrowly, as a byproduct of efforts by dominant powers to maintain their hegemony, will assign moral responsibilities differently from someone who sees these refugee flows as the outgrowth of internal conflicts within particular states. Similarly, one might consider the extent to which contemporary refugee flows in Africa and Asia are attributable to the legacy of colonialism and the extent to which they are due to independent, intervening causes. How one assesses that issue would affect one's sense of the moral responsibility of the former colonial powers for these refugees.
12. I am appealing here to a parallel to Rawls's idea of the overlapping consensus that undergirds commitment to democratic principles. See Rawls 2005.
13. UNHCR 2011. This *Resettlement Handbook* not only provides a detailed report on UNHCR's resettlement programs and policies but also a lucid description and analysis of the issues related to resettlement.
14. The summary in the text leaves aside a great many legal complications. See Hathaway 2005 and Goodwin-Gill and McAdam 2007 for a more detailed discussion.
15. The visa controls and related documentation were largely designed to exclude people who might overstay a visa, becoming irregular migrants rather than temporary visitors. However, exclusion of refugee applicants was also a clear and explicit goal of these policies. If it were not, the likelihood that one might have a strong claim for asylum would be a reason for granting a visa rather than denying it.
16. The Balkans crisis in the 1990s was an obvious exception to this generalization.
17. For a more complete description and critique of these techniques of exclusion, see Gibney 2006.
18. Brownlie 1992: 65.

19. Gustavo Gutierrez's claim rests on the supposition that the danger he faces goes far beyond what we can reasonably call the ordinary failures of law enforcement.
20. For a discussion of this approach in Canada and of some of its limitations in practice, see MacIntosh 2010.
21. For an excellent recent discussion of the history of such efforts and a suggested definition of his own, see Gibney 2004. Shacknove (1985) provides a classic, highly influential scholarly defense of this sort of approach. Zolberg et al. (1989) offer another important example. For thoughtful attempts to defend the Convention's definition against its critics, see Martin 1991 and Price 2009.
22. This figure of ten million refugees does not include almost five million registered Palestinian refugees who are the responsibility of another agency, the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).
23. UNHCR 2011: 19.
24. The attempts by Martin (1991) and Price (2009) to defend the current Convention definition are motivated to an important extent by the desire to maintain political support for the admission of refugees by keeping the numbers within bounds that democratic publics are willing to accept. Later in the chapter I explore further some of the problems with setting such limits to our obligations to refugees.
25. This point is developed very effectively in Shacknove 1985.
26. For various formulations of this view, see Zolberg et al. 1989, Martin 1991, Price 2009, Lister 2013.
27. Some think that reducing extreme global poverty is a more urgent moral priority than protecting refugees. That is a position that I am inclined to accept, for the most part, but that is no reason not to think about our responsibilities to refugees.
28. Most of the deaths have resulted from disease and malnutrition generated as byproducts of the violence.
29. Whether it is actually reasonable to expect a refugee to return home will depend not only on whether it is safe there and how long she has been away but also on what the refugee suffered before escaping and what she will face upon her return. I leave those complications aside in the text.
30. The formulation in the text collapses two criteria that are often distinct: first arrival and first claim. Technically, the Convention requires those seeking asylum to submit their claim in the first state in which they arrive where they can be safe and can get a fair hearing for their claim under the Convention. European states have made great efforts to send potential asylum claimants back not to their country of origin but to another country that the potential claimant has passed through, the so-called safe third country. This has led to debates about what countries are "safe," especially given huge variations in recognition rates and in procedural practices. Germany has invested substantial amounts of money in building up the refugee determination systems in Eastern Europe so that Germany could claim that potential refugees can receive a fair hearing in those Eastern European states.
31. Singer and Singer (1988) contend that this argument about the moral responsibility created by the filing of an asylum claim within a state's borders rests on a false distinction between acts and omissions. I think their argument implicitly and inappropriately denies the relevance of institutional arrangements (like state sovereignty) in the assignment of moral responsibility. At the same time, I would agree with Singer and Singer that existing institutional arrangements sometimes unduly limit the extent of our moral responsibilities. For a critique of Singer and Singer's position on asylum, see my earlier, but limited, discussion in Carens 1992.
32. For a sensitive imagining of the complexities of actual cases from the agent's perspective, see Martin 1990.
33. For an examination of the determinants of asylum migration to Western Europe, see Neumayer 2005.
34. See Zolberg et al. 1989 and Martin 1991 for typical statements of this view.
35. For a much more detailed elaboration of this claim, see Carens 1997.
36. A helpful recent overview of some of the issues considered in the following sections can be found in Kritzman-Amir 2008. For other discussions of some of the relevant considerations

- on which I have drawn, see Carens 1994, Hathaway and Neve 1997, Schuck 1997, Gibney 2007, and Miller 2007.
37. See the discussion in Gibney 2007.
 38. For an excellent discussion of some of the factors that affect a state's capacity to take in refugees, see Gibney 2004.
 39. For an illuminating discussion of these issues, see Gibney 2007.
 40. I should leave open the possibility that Sweden would be an exception.
 41. In developing this line of argument I draw upon ideas from Hathaway and Neve 1997 and Schuck 1997.
 42. This migratory logic applies to the flow of asylum seekers to Europe and North America, as I have discussed in the text, but it also contributes to the increasing movement of people from poor states to those in the middle.
 43. It is striking that the Convention's almost absolute prohibition on the exclusion of refugees seeking asylum is echoed by Michael Walzer one of the foremost advocates of the state's right to exercise discretionary control over immigration. Walzer discusses the case of the forcible return of over a million displaced people to the Soviet Union in the wake of World War II. These people asked to be allowed to remain in the West, but their pleas were ignored, largely for political reasons having to do with the relationship between the Western allies and the Soviet Union. Most of them were either executed immediately upon their return or sent to gulags where they perished. Walzer argues that the Western allies knew or should have known what fate lay in store for these refugees and that they should have permitted them to stay, despite the high political and economic costs this would have entailed in a context where relations with the Soviet Union were of vital importance and European states faced enormous economic difficulties in the wake of the war. When it comes to requests for asylum then, Walzer rejects the idea that the obligation to take in refugees is legitimately constrained by the receiving state's interests. Like the Geneva Convention, Walzer treats the claim of asylum as virtually absolute, even in the face of very high costs. He says that there may be some limit to the duty to admit refugees seeking asylum but also that he does not know how to specify what that limit would be. See Walzer 1983: 51.
 44. Miller 2007: 227.
 45. Miller suggests that we think in terms of a hierarchy of a state's duties with the "negative duty to refrain from infringing basic rights" by its own actions at the top, followed by the "positive duty to secure the basic rights" of its own citizens and residents. Below these two duties come the "positive duty to prevent rights violations by other parties" and finally "the positive duty to secure the basic rights of people when others have failed in their responsibility" (Miller 2007: 47). I have implicitly accepted a version of this hierarchy in the text, but the question remains why an acknowledged duty to secure the basic rights of people whom others have failed should ever be overridden by the state's duty or perhaps mere goal of advancing interests of its members that are not comparably fundamental.
 46. Miller 2007: 227.
 47. Ironically, it is a state's failure to protect the basic rights of its own citizens rather than those of noncitizens within its jurisdiction that triggers this new responsibility for refugees. Noncitizens who are forced to flee are entitled to return to their home state and so no other state normally has any special responsibility for them.
 48. I qualify self-interest by the phrase "as conventionally understood," because it is always possible to define self-interest in terms of what morality requires or permits. Given such a definition, there could never be a conflict between self-interest and morality. This is a philosophical move with a pedigree that stretches back to Plato, and it has a good deal to be said for it, but it would simply define away the issues that I want to explore, so I set it aside here.

Chapter 11

1. Some people may wonder how I can reconcile this claim with my defense of birthright citizenship in chapter 2, but I think the two positions are perfectly compatible for reasons I will explain in chapter 13.

Sarah Song

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12**Are Refugees Special?***Chandran Kukathas*

The stranger has no friend, unless it be a stranger¹

12.1 Prologue: The Morality of Hospitality

His vessel crushed by Poseidon's storm after leaving Kalypso's island, Odysseus finds himself washed up on the shores of Phaiakia and, eventually, the guest of the hospitable King, Alkinoos, to whom he tells the long story of the journey that led him from Troy to Ogygia. After reaching, and quickly leaving, the land of the lotus-eaters, Odysseus relates, he and his crew came to the "country of the lawless outrageous Cyclopes." Of the inhabitants he had this to say:

These people have no institutions, no meetings for counsels;
rather they make their habitations in caverns hollowed
among the peaks of the high mountains, and each one is the law
for his own wives and children, and cares nothing about the others.²

Yet when he found himself trapped in the cave of Polyphemus, he had no choice but to address his suspicious host, who demanded to know what these strangers were after, "recklessly roving as pirates do," and wondered if they too proposed to "venture their lives as they wander, bringing evil to alien people?"³ Odysseus at once tried to reassure the son of Poseidon that he and

¹ Sa'di, *The Gulistan or Flower Garden*, of Shaikh Sadi of Shiraz, translated by James Ross (London: J.M. Richardson, 1823 [1258]), p. 297.

² Homer, *The Odyssey of Homer*, translated and with an introduction by Richmond Lattimore (New York: Harper Collins, 1991), Book IX, verses 113–15; p. 140.

³ Homer, *The Odyssey of Homer*, Book IX, 254–5; pp. 143–4.

his men intended no one any harm, and to remind him that, as strangers, they might well be considered guests:

... but now in turn we come to you and are suppliants
at your knees, if you might give us a guest present or otherwise
some gift of grace, for such is the right of strangers. Therefore
respect the gods, O best of men. We are your suppliants,
and Zeus the guest god, who stands behind all strangers with honours
due them, avenges any wrong toward strangers and suppliants.⁴

The Cyclopes, of course, had no intention of showing the wanderers any hospitality, proposing only to eat them.

That Polyphemus should come to the nasty end that he did at the hands of the stranger, "Nobody," is entirely in keeping with the understanding of civilized life that lies at the core of Homer's *Odyssey*. A vital part of being civilized is knowing the duties of hospitality—and the duties owed to strangers in particular. The Cyclopes, the Laistrygonians, and Circe, among others, do not understand these duties—and come to grief. The Phaiakians, however, are model hosts, and their land is a civilized place where all is in order.

Indeed, when society is well ordered and in balance, norms of hospitality are also in balance: respected by hosts and not abused by guests. Ithaca, the Kingdom of Odysseus, however, is in a mess, the disorder of the state symbolized by the overrunning of the household by Penelope's suitors, who abuse the hospitality of their reluctant hostess while demanding a decision which will make one of them king. The task performed by the central figure of Homer's epic is to keep the household and the kingdom intact, preserving the most important values of civilized life, until Odysseus can return to settle the issue of succession.

The moral world of ancient Greece described in Homer's poetry is undoubtedly a long way away from our own. Yet there is something important, nonetheless, about the idea that hospitality and the treatment of strangers is fundamental to civilized life, and the key to the possibility of a well-ordered society. It does not seem out of place in Sa'di's thirteenth century Persia; or, for that matter, in our own time. It seems right to say that we owe a duty of hospitality to strangers, particularly when they come to us in distress: and we owe the most when they can offer us the least. "For I was an hungry, and ye gave me meat: I was thirsty and ye gave me drink: I was a stranger, and ye took me in."⁵

Intuitively compelling though this might be, however, the skeptical question must be posed: can such a norm serve us in modern society? We live, after all, in a world of many more people and many more strangers. Can a Homeric

ethics really serve us when the size of the earth's population, combined with the number of dislocating conflicts and the volume of population displacement, threaten to strain the resources and the tolerance of host peoples? As Rousseau observed, "Wherever strangers are rare, they are welcome. Nothing makes one more hospitable than seldom needing to be. It is the abundance of guests which destroys hospitality. In the time of Homer people hardly travelled, and travelers were well received everywhere."⁶

It must be conceded that the skeptic may have a point: perhaps Homeric ethics cannot be ours. Yet the ethical and political point of Homer's tale ought not to be lost either. The norms of civilized society are importantly bound up with the treatment of strangers. Our conduct before, and treatment of, those we do not immediately count among our own has an important relation to, and bearing upon, the quality of our civilization. And this reflection ought not to be lost sight of when we turn to consider what kind of an ethics we do need to deal with the strangers of the modern world, particularly when they appear before us in large numbers, fleeing persecution or tragedy and seeking refuge in places they hope will prove hospitable. What kind of an ethics do we need to deal with those so displaced—the strangers who come as refugees?

The answer we have settled upon is a political ethics according to which the movement of peoples is a matter for states to manage, with a view to protecting the interests of the state and its members, while granting special dispensation on humanitarian grounds to those whose reasons for moving are deemed special. The question addressed in this chapter is whether or not this political ethics is defensible—whether the idea of a system in which movement is controlled (and more importantly, *restricted*) but exceptions are made is either feasible or morally justifiable. Its main purpose is to cast doubt on this idea by showing that it depends upon distinctions that cannot be sustained and upon the establishment of institutions that cannot do what they proclaim. It does so by focusing on the case of refugees, who are widely regarded by states, political actors generally, immigration advocates, and theorists alike as deserving of special treatment.

12.2 Refugees as Exceptions

Modern reflection on the ethics of our relations with strangers begins with the existence of a world of states, and of individuals as members of states (with the notable exception of a small but significant minority who remain stateless). The world today is demarcated by political boundaries and so borders

⁴ Homer, *The Odyssey of Homer*, Book IX, 266–71: p. 144.

⁵ St. Matthew, Chapter 25 Verse 35.

⁶ Jean-Jacques Rousseau, *Emile, or On Education*, Introduction, translation and Notes by Allan Bloom (New York: Basic Books, 1979), ch. V: p. 413.

that are increasingly closely policed. While there is movement across borders all the time, that movement is almost always complicated. To move one has generally to acquire a passport and secure a status, whether as a tourist, or a student, or a worker, or any one of dozens of possible types of person who is eligible to be granted entry into a state. Though some borders are easier to cross than others—or at least, easier for *some* people to cross—the presumption in the modern world is that “thou shall not cross” without proper authorization. Only a few borders come close to being absolutely shut, but none are fully open. The purpose of borders is to keep people out: to deny them membership of the state, or to limit their rights when they do enter, or to bar them from physical entry altogether. The ethical issue at stake is the matter of how closed or open those borders should be: who should be allowed in and who kept out? Whatever the preponderance of opinion among philosophers, the view of the state is generally that people should be kept out unless it is to the advantage (or at least, not to the disadvantage) of the state that they be admitted. No one has a right to be admitted, and the principle of free movement, if it holds at all, applies only within states, and not between states.

Nevertheless, all but the most insistent of defenders of closed borders or restricted immigration make an exception for refugees. However strong they consider the reasons for limiting the numbers, or controlling the types, of immigrants—strangers—entering a country, they concede that refugees are a special case. Michael Walzer, for example, maintains that a people’s right to control membership of the state to which they belong must nonetheless be sensitive to the plight of refugees.⁷ David Miller similarly argues, after making the case for immigration limits, that refugees “have a very strong, but not absolute, right to be admitted to a place of safety, a right now widely recognized in both law and political practice.”⁸ This is not to say that either of these theorists thinks that the claims of refugees are so great as to trump the interests of states or citizens. In the end, their views are not far from that advanced by Andrew Altman and Christopher Wellman, who argue that while states have a general “samaritan duty” to help people who land on their doorstep seeking asylum, this does not extend so far as to constitute an obligation to grant them admission or membership.⁹ Nonetheless, these authors also concede that the duty to “help rescue from peril,” when it can only be discharged by admission to membership of the state, would issue in a duty to admit asylum seekers,

⁷ Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Oxford: Blackwell, 1983), pp. 43–51.

⁸ David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), p. 227. See also David Miller, “Immigration: The Case for Limits” in Andrew I. Cohen and Christopher Heath Wellman (eds.), *Contemporary Debates in Applied Ethics* (Oxford: Blackwell, 2005), pp. 193–206 at pp. 202–3.

⁹ Andrew Altman and Christopher Heath Wellman, *A Liberal Theory of International Justice* (Oxford: Oxford University Press, 2011), p. 181.

even though they think this duty holds “only if nothing was done to remedy the situation in the home state and no other state was willing to grant permanent residence.”¹⁰

The thought that lies behind these views is that there is a very strong presumption in favor of a state having the right to, and being justified in, limiting entry into its territory. States may wish to restrict immigration for any of a number of reasons: to protect their citizens from criminals or subversives, to give some of their citizens an advantage in labor-market or business competition—or more generally to ensure it does not share too much of its wealth with outsiders, and to protect its cultural integrity. States are justified in doing so even if the costs to foreigners—would-be immigrants and non-immigrants alike (and indeed citizens who would stand to gain from immigration)—are substantial. (Thus no state thought it was under any obligation to open its borders even a little to the Haitians whose country was devastated by the 2010 earthquake that killed at least 46,000, injured more than 200,000, and left 1.5 million homeless.¹¹ Many stepped up with generous offers of aid, in cash and in kind, but also strengthened their border surveillance to keep fleeing Haitians out.) Yet, the thought continues, states ought to be more open to some kinds of people: those fleeing persecution, fearing for their lives. Confronted by such cases, the argument goes, states ought to relax the presumption in favor of keeping people out when the benefits of admitting them are outweighed by the costs—or at least engage in some form of recalculation that weighs the interests of the potential immigrants a little more heavily. People seeking asylum are special—not so special, perhaps, as to be regarded simply as ends in themselves, but special enough to be viewed as more substantial concerns in the calculus of value than immigrants of any other stripe. Theorists such as Walzer, Miller, Altman, and Wellman think that exceptions have to be made for special categories (and possibly for special circumstances), but the presumption in favor of states controlling movement remains.

Of course, there are many other things that could be done besides admitting asylum seekers into the state. The samaritan’s duty might embrace any of a variety of possibilities, as Altman and Wellman maintain. The general duty is to rescue people from peril, and this duty can be discharged in any number of ways. It could be discharged by “sending the asylum-seekers to another state that has agreed to let them in; by establishing through military intervention a safe-haven in the asylum-seekers’ home state and returning them there; by

¹⁰ Altman and Wellman, *A Liberal Theory of International Justice*, p. 181. The buck lingers here.

¹¹ These are the more conservative figures from the U.S. Agency for International Development, rather than the official numbers published by the Haitian government. According to the Human Development Index, Haiti is the poorest country in the Americas, with an annual per capita income of a little over US\$600 a year.

letting them in and granting them asylum until such time as they can be safely settled in another state or their home state." Only when all else fails does the duty to admit asylum seekers kick in. But these people are special—for in the case of refugees such a duty can eventually arise in a way that it cannot with respect to other aspiring immigrants.

Yet all this said, there is something troubling about the thought that refugees are special, and that there are certain distinctive features of their situation that impose upon us duties we do not owe others. It is troubling, first, because it suggests that we draw a line distinguishing our obligations in a way that may not make much sense, morally speaking. Second, the institutional implications of this way of approaching the plight of asylum seekers are unfortunate for it proposes that we treat them as supplicants who must prove their worthiness, thereby opening up the way for matters of humanitarian necessity to be transformed into questions of political expediency. More generally, the very idea that duties towards refugees might be special duties owed by the state is troubling because, if we understand the state properly, it is hard to see how refugees will ever be given proper moral consideration. After all, the category of refugee was created by states not so much to enable us to fulfill our duties to the distressed and unfortunate as to make it easier for us to evade them.

If this is true, then those who argue that the existing arrangements under which states are widely seen to be justified in limiting the free movement of people, while having obligations only to make exceptions for special categories of person, should just give up the fiction that the plight of refugees is a serious ethical concern. It would be more accurate and honest to concede that it is simply a matter of indifference, for, ultimately, strangers just don't count—no matter what their predicament.

To see this we should begin by looking more closely at the way the distinction between refugees and other potential migrants is drawn, to try to understand how the case for differential duties might be made—and why it cannot be sustained. We should turn then to consider why institutionalizing this distinction is unlikely to achieve the ethical ends that are supposed to be the point of this development. The historical record provides ample evidence to bear this out. From here we can turn to consider more directly the reasons why making the state the bearer of ethical duties is not likely to serve the interests of the refugees or asylum seekers to any significant degree, and is more likely to harm those interests. Out of this analysis comes just one conclusion that seems plausible: the interests of refugees and asylum seekers can only be served by an opening of state borders. To the extent that this prospect is utopian, so too is the prospect of humane treatment of those almost everyone says is special.¹²

¹² For some reflections on how the attempt to reform the institutions of refugee protection may itself be utopian, see William Maley, "A New Tower of Babel? Reappraising the Architecture of

12.3 Refugees versus Immigrants

To see the problem with making a moral distinction between refugees and immigrants, it would be useful to start with the definition of refugee deployed by the 1951 *United Nations Convention Relating to the Status of Refugees*, which came into force in 1954 and now has more than 120 state signatories. The Convention states that a refugee is any person who,

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. (Article 1A2)

What is most glaring about this definition is who it excludes: those fleeing their circumstances for reasons other than persecution; those who have fled but not crossed an international boundary; and those whose flight from persecution has taken them across borders but who have been persecuted for reasons other than race, religion, nationality, or social or political membership. Most Cambodians trying to escape from the Khmer Rouge did not count as refugees.

The matter of definition has been a contentious issue from the start and there have been many proposals to revise the Convention's understanding to try to include more people who seem also to be candidates for refugee status: people fleeing war, or famine, or environmental disaster, to name some obvious cases. Thus the Organization of African Unity adopted a very different definition, according to which a refugee was a person who "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of nationality" (OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted September 10, 1969 (UNTS no.14691), Article 1(2)).¹³ Bosnians fleeing civil war are thus captured by this definition in a way that they are not by the 1951 UN Convention. Yet even this definition has its limitations, since it excludes internally displaced people, and a better account may be the one offered by Matthew Gibney, who suggests that refugees are "those people who require a

Refugee Protection" in Edward Newman and Joanne van Selm (eds.), *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (Tokyo: United Nations Press, 2003), pp. 306–29.

¹³ See the discussion in Andrew Shacknove, "Who is a Refugee?", *Ethics* 95:2 (1985), 274–84 at pp. 275–6.

new state of residence, either temporarily or permanently, because if forced to return or stay at home they would, as a result of either the inadequacy or brutality of their state, be persecuted or seriously jeopardize their physical security or vital subsistence needs.¹⁴ One particular merit of this definition is that it also includes as refugees those forced to flee in anticipation of rightly foreseeable repression. It also includes refugees *sur place*: persons who were not refugees when they left their countries, but are unable to return home because events in their country since their original temporary departure have left them with a well-founded fear of persecution should they do so.

The problem, however, is not the quality of the definition but the pursuit of the distinction that gives the definition its point. The purpose of distinguishing between refugees and immigrants is to limit and control the movement of people in a world in which free movement is not tolerated. If only some are allowed to move, the question is: who? States allow people to move in and out for a variety of reasons, most of them economic or political. Economic considerations may include the need to meet the domestic demand for labor (both skilled and unskilled), the desire to attract foreign investment capital, and the concern to change the demographic structure of the population. The importance of such economic concerns makes states less likely to welcome the poor, the illiterate, the disabled, the unskilled, the unhealthy, and the elderly.¹⁵ Political considerations lie behind the weight given to different economic concerns. Business interests generally favor more immigration since capital benefits when there is a larger pool of labor; while labor fears that immigrants will either outcompete domestic workers or depress the general level of wages by entering the labor market. Immigration policy will always attempt to placate these two contending economic interests. But other political considerations will also obtrude. Different groups will want preferential treatment for particular classes of migrant: universities will want favorable treatment for students, families with relatives overseas will want to privilege family reunion, ethnic communities will want their own national or cultural groups given special treatment if immigrant places are limited, and lovers will want exceptions made for potential marriage partners. In a world of controlled borders, refugees must either compete with other immigrants for a limited number of places or show that the case for their admission should not be considered as a

¹⁴ Matthew Gibney, "Liberal Democratic States and Responsibilities for Refugees," *American Political Science Review* 93:1 (1999), 169–81 at pp. 170–1. See also Matthew Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge University Press, 2004).

¹⁵ A quick glance at the "points tests" administered by the Australian and Canadian governments to would-be immigrants makes the nature of the calculus very plain: there are more points to be gained for having greater language proficiency, more years of study, a sum of money to transfer, and a longer life expectancy as a potential future tax-payer. Ill health and any criminal record cancel out the points gained by having some of the other desirable assets.

part of the general case for immigrant admission: that they really are special. But how is this to be done?

It may look as though the best strategy here is simply to insist that the refugee question is a humanitarian issue, and that refugees should not be viewed as economic migrants but people whose human rights have been violated and need to be restored. Thus Yael Tamir suggests that "a clear distinction should be drawn between the rights of refugees and the rights of immigrants. Although certain restrictions on immigrants could be justified, they could never rescind the *absolute obligation* to grant refuge to individuals for as long as their lives are at risk."¹⁶ This is an argument many refugee advocates have decided to make, in part for fear that if refugees were viewed as migrants they would be easy prey for governments looking to reduce immigration numbers.¹⁷ But this strategy is sustainable only if such a distinction can really be drawn.¹⁸ Unfortunately, this looks very unlikely.

One way of drawing the distinction might be to follow Tamir and say that there is an absolute obligation to grant refuge to individuals whose lives are at risk. Yet there are many difficulties with this approach. To begin with, even if we put to one side the question of whether this, or any other, obligation can be "absolute," the problem is that human circumstances are never absolute but relative. Lives may be at risk, but all lives are never equally at risk, and the degree of risk that is a cause for alarm is a matter of moral judgment. It may have been riskier to be a Jew in pre-war Berlin than to be a Hazara in Afghanistan today, but it is probably riskier to be a Hazara in Kabul than to be a *Reformasi* activist in Malaysia. The risks borne by those whose lives are at risk also vary, since some face the prospect of being killed, others face possible imprisonment, and some the loss of economic, civil, and political rights. Lives can be at risk in many ways and to varying degrees. It would not be plausible to argue that *any* level of risk triggers a right to be granted refuge; but there is no naturalistic way of determining what level of risk might.

Assuming, however, that the principle of granting refuge to those whose lives are at risk can be given some substantive content, it would have to be shown why this should favor those seeking asylum rather than those moving for reasons other than flight from persecution. Many economic migrants, after all, move because their lives, or the lives of their loved ones, are at risk. Adverse economic conditions, environmental catastrophe, or simply the poverty of their surrounding circumstances may mean that they face destitution unless they move, for their plight cannot be addressed by domestic institutions or

¹⁶ Yael Tamir, *Liberal Nationalism* (Princeton, NJ: Princeton University Press, 1993), p. 159.

¹⁷ See the discussion in Liza Schuster, *The Use and Abuse of Political Asylum in Britain and Germany* (London: Frank Cass, 2004), pp. 33–4.

¹⁸ Though I don't want to get carried away here: in politics, truth can all too often be readily overcome by interest or power.

the help of fellow citizens. There are many refugees whose plight is more serious than that of most economic migrants; yet there are also many would-be economic migrants who face greater threats to their well-being than do some refugees. Not all economic migrants are in the same boat; nor are all refugees.

At this point the problem of definition becomes particularly acute. We could try to bolster the claim that the plight of the refugee is more serious than that of the economic migrant by narrowing the definition of refugee—perhaps appealing to a conservative reading of the 1951 Convention so that only those outside their home countries fearing persecution for very particular reasons might qualify. The trouble here is that refugee protection is bought at a high price: excluding, for example, those fleeing war zones or famine or even genocidal violence from being considered refugees. The more narrowly the term is defined the easier it might be to make refugees special, but only because there would be many fewer of them. However, if we consider this unpalatable, and think the definition should be expanded to include a greater number of types of displaced people, the difference between refugees and economic migrants will be even harder to draw.

Any attempt to show empirically that refugees, or displaced people more generally, suffer in ways that economic migrants do not, will founder on the rocks of this particular dilemma. The root of the problem is that the source of injustice, or of human suffering, is not always easy to locate. The aspiration to find the explanation that distinguishes the refugee from the human being who moves merely (*merely!*) to improve his lot is in many cases motivated by a noble concern to address the needs of those who are most vulnerable or suffer most. But, for better or for worse, suffering is dispersed too erratically for our political concepts to handle.

12.4 Institutional Solutions

One possible response to this analysis is to say that it will not do to get too caught up in conceptual niceties, for it is well known that in political life philosophical purity is not really attainable. The tragic reality of the plight of refugees, asylum seekers, or displaced people more generally, cannot be denied: the evidence is overwhelming. Even if we cannot quite account for it conceptually, the swarms of people moving in response to the predations of genocidal rulers, or rushing across borders to avoid bombs and marauding armies, supply evidence enough of a distinct phenomenon. What is needed is an institutional response that recognizes that there is a problem that must be addressed.

The institutional response we have made is that embodied in the regime defined by the 1951 Convention. However imperfectly, the argument goes, it

rightly draws the distinction between refugees and immigrants. Our best bet might be simply to try to work within its terms in an effort to secure what we can for the victims of repressive states and war.¹⁹ A regime of human rights that recognizes the rights of refugees might lack the full theoretical justification philosophers seek, but it could just work—by giving refugees the legal and moral resources they need to protect or secure their vital interests.

Unfortunately, this simply won't do. International regimes, to be sure, are political constructions rather than philosophical ones; but this is not to the advantage of the refugee or asylum seeker. On the contrary, what is all too evident is that the purpose of the institutional identification of refugees in international law was never solely to attend to the plight of the distressed and dispossessed but largely to serve the interests of states.

The 1951 UN Convention on Refugees has its origins in the Second World War, which saw hundreds of thousands of people displaced by the conflict, many of them victims and survivors of the Holocaust. Britain became home to many of these people, primarily from Eastern Europe, who were unable to return to their countries of origin. The government labeled them "displaced persons" rather than refugees, since they thought the term refugee might imply that the persons in question would not return to their home countries.²⁰ In 1947 the International Refugee Organization was formed and its definition of displaced persons as victims of Nazi, fascist, or quisling regimes or "persons who were considered refugees before the outbreak of the Second World War, for reasons of race, religion, nationality or political opinion" later formed the basis of the 1951 Convention understanding of refugees as persons fleeing persecution. But already the British and American governments were hesitant about using the term "refugee" for fear that it might amount to a concession that the persons in question could not return. Many people were thus allowed to stay in Britain, for example, as "European Volunteer Workers," who were supposedly admitted to help alleviate labor shortages.²¹ At the very outset, even with the memory of the Holocaust fresh in the mind, the thoughts of government officials turned to the problem of how to keep people out.

On the whole, the history of the state's treatment of refugees is not an inspiring one. In the years between the wars the nations of Europe were more troubled by the inconvenience of refugee movements and invented new mechanisms to restrict their mobility. The outflow of Jewish refugees from Nazi Germany in the 1930s was met with grim resistance by states that

¹⁹ For further discussion of statelessness and refugees, see the chapters by Joseph Carens and David Owen in this volume.

²⁰ Tony Kushner and Katharine Knox, *Refugees in an Age of Genocide: Global, Local, and National Perspectives during the Twentieth Century* (London: Frank Cass, 1999), p. 217.

²¹ Kushner and Knox, *Refugees in an Age of Genocide*, p. 218.

expressed support for the principle of granting asylum but refused to grant refugees rights to any such thing. Twentieth-century states, it turned out, "were governed by Machiavellian self-interest, and liberalism served only to disguise this brutal reality."²²

The workings of the refugee regime since the establishment of the 1951 Convention can scarcely be said to have served the interests of refugees well. Some of this is best explained by the particular interests of states, which have continued to see refugees as a problem whose impact has to be minimized rather than a moral responsibility to be discharged. Thus while the number of conventional instruments devised for the purpose of refugee protection has increased, the commitment of states to that end has, if anything, declined. The upsurge in the numbers of refugees worldwide as a result of the many political conflicts in the postwar era led to states increasingly adopting measures to restrict opportunities to seek asylum. Agnès Hurwitz identifies five kinds of policies used to achieve this end. First, there are measures to restrict access to the territory of the state by imposing fines on companies transporting undocumented aliens, by requiring visas from nationals of refugee producing countries, by posting immigration officers abroad, and by interdicting vessels at sea to prevent them from allowing refugee passengers to make landfall. Second, there are measures to limit access to asylum procedures, for example by imposing strict time limits for the lodging of asylum claims, invoking the concept of "safe country of origin" to require that claims for refugee status be processed elsewhere, and creating international zones in airports. Third, states have adopted a narrower interpretation of Article 1 of the Refugee Convention, and invented weaker forms of protection, such as temporary or subsidiary protection. Fourth, states have tried to create "safe havens" in the regions or countries of the refugee's origin in order to discourage or prevent attempts to seek asylum. Fifth, states have restricted access to welfare benefits and placed refugees in detention in order to deter arrivals.²³

In pursuing these strategies states have effectively blurred the distinction between refugees and economic migrants by treating all asylum seekers with suspicion. Even as they have maintained the centrality of the distinction between refugees and migrants to their policies, they have weakened it by treating asylum seekers as undocumented would-be immigrants unless they can show otherwise—while making it ever more difficult for refugee claims to be established. When immigration officers have gone to refugee camps they have often gone with the aim of picking and choosing the most economically

²² Schuster, *Use and Abuse of Political Asylum*, p. 89.

²³ Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford: Oxford University Press, 2009), pp. 18–19.

attractive potential migrants—doctors and engineers rather than women and children traumatized by war or violence.

What has emerged over the years, in what is supposed to be a refugee protection regime, is a security-driven discourse that has led to the adoption of greater and greater measures designed to "contain" the refugee problem by restricting the opportunities of asylum seekers to gain refugee status and, ultimately, admission to the state.

Of the practices used to delay, if not prevent altogether, the possibility of asylum seekers or refugees gaining admission, two are worth dwelling upon a little more carefully. The first is the confining or detaining of asylum seekers waiting to learn if they will be brought to a more permanent place of safety or waiting to learn if their application for refugee status has been successful. The enforcement of immigration controls generally has led to the development of an extensive system of prisons to deal with undocumented workers, visa overstayers, and illegal aliens of all kinds.²⁴ For many victims of forced displacement, the search for asylum begins in refugee camps where they exist on the edge of the social world in conditions which are often little better than prison. What is too seldom recognized or acknowledged is that refugee camps have become, in effect, one of the four solutions to the refugee problem adopted by the United Nations High Commission for Refugees. The first three, official, solutions are: repatriation, integration in the country of asylum, and resettlement in a third country. In 2007 UNHCR reported that there were some 6.5 million people residing in refugee camps around the world (not including camps of Palestinian refugees, or those for internally displaced people in places like Sudan). Under the refugee regime, vast numbers of people live in makeshift accommodation, often in remote and inhospitable parts of the world, with plastic sheeting for extra coverings, and food that is rationed by agencies which have themselves to go begging to raise the funds to feed people who have fled for their lives. The camps are not a happy advertisement for the success of the institutionalization of refugee protection.

Yet this barely begins to get at the nature of the problem with the institutional response to the plight of the refugee or asylum seeker. Regardless of the conditions in the camps,²⁵ the people looking for help find themselves not at

²⁴ For graphic accounts of what this means in practice, see David C. Brotherton and Philip Kretsedemas (eds.), *Keeping Out the Other: A Critical Introduction to Immigration Enforcement Today* (New York: Columbia University Press, 2008).

²⁵ A part of the tragedy of many of the camps is the fact of abuse of the people herded into them for protection by the very people designated as their humanitarian protectors. Discussing the sexual abuses perpetrated in camps in Guinea, Liberia, and Sierra Leone, Michel Agier and Françoise Bouchet-Saulnier observed: "Designed to bring help and protection to people in danger, in some cases humanitarian action has contributed to enclosing people in spaces of exception, spaces of irresponsibility. Far from protecting the international public order, the continued existence of these spaces has reintroduced inhumanity at the heart of all societies." See their chapter, "Humanitarian Spaces, Spaces of Exception" in Fabrice Weissman (ed.), *In the*

the doorstep of agencies straining to help them but of a vast and impersonal bureaucratic structure that demands that they show—prove—that they have a case. Asylum seekers confront this problem no matter what their circumstances, and regardless of the physical or emotional state they are in. To some extent this is inescapable: bureaucratic procedures, once in place, cannot simply be waived away because some people claim that they are inappropriate or unreasonable or do not apply to them. But the human cost is worth dwelling upon. Consider the case of France, one of the countries most active in the negotiations surrounding the establishment of the 1951 Convention (but also the toughest of the early signatories since it always viewed asylum seekers as potential competitors in the French labor market). When France began to place stronger restrictions on immigration in 1974, its policy on asylum seekers became stricter and stricter as the imperative to stop the flow became increasingly urgent. Over the period of the seventies, eighties, and nineties the percentage of refugee applications granted fell from a peak of 95 percent in 1976 to 28 percent in 1989, until by 2003 only three applicants in twenty were successful.²⁶ Crucially, however, those who were eventually granted leave to remain in the country as bona fide refugees had first to undergo searching examinations of their histories by border agents who were also under pressure to reduce the credibility of the applicants' testimonies.

Over the years the legal and bureaucratic obstacles to presenting a case for asylum have increased and applicants have been turned into objects of suspicion, dehumanized not only by their subjection to a bewildering array of scrutinizing procedures but by the reduction of their life histories to a series of objective statements on certificates that will be used to determine whether or not the candidate merits selection. The subjective experience of the refugee is played down, discarded, or never inquired into as the emphasis is placed on whether clinical evidence is available to corroborate claims of torture or abuse that led to flight and escape. The following extract from a letter from the file of legal correspondence collated by the nongovernmental organization COMEDE supplies a striking illustration.

Dear Sir,

I write in respect of the Commission of Appeal hearing on [date]. In order for you to obtain refugee status, you *must* send me a medical certificate testifying to the

Shadow of "Just Wars": Violence, Politics and Humanitarian Action, quoted in Didier Fassin, "Heart of Humaneness: The Moral Economy of Humanitarian Intervention" in Didier Fassin and Mariella Pandolfi (eds.), *Contemporary States of Emergency: The Politics of Military and Humanitarian Interventions* (New York: Zone Books, 2010), pp. 269–93 at p. 292, n.52.

²⁶ Didier Fassin and Richard Rechtman, *The Empire of Trauma: An Inquiry into the Condition of Victimization* (Princeton, NJ: Princeton University Press, 2009), p. 256.

traces left on your body as a result of the torture and abuse inflicted on you, particularly with respect to your eye. Please do not hesitate to contact me if you have any difficulty.

Yours sincerely...²⁷

The dehumanizing character of the institutional apparatus that has grown up around the world to address the refugee "problem" is further evident in the conditions under which those seeking asylum are detained in those countries that incarcerate applicants until their cases are settled. In Australia the inmates of the detention centers have been driven to suicide, self-mutilation, and even to the extreme of sewing up their lips to express their sense of powerlessness.²⁸

Institutionalizing the distinction between immigrant and refugee has been considered by some to be the best, or only, way of promoting the interests of asylum seekers and ensuring that their special claims were appropriately considered. The reality, however, is that the institutional distinction has accomplished no such thing. Governments have consistently seen refugees as competitor economic migrants and have therefore constantly implied that those seeking admission to a country on humanitarian grounds were nothing more than queue-jumpers trying to get around the immigration laws. As time has gone on, the institutional structures they have devised have simply made it more and more difficult for asylum seekers to bring their claims forward, and to gain the protection they seek. Institutionally, refugees have turned out not to be very special at all.

12.5 In Search of a Solution

Refugees have been identified as special for a very special reason. Nation-states and their defenders wish to maintain that immigration can rightly be restricted to the extent that the state is an ethical community that requires protection, and freedom of movement threatens to undermine it.²⁹ Yet the arbitrariness of such an arrangement is difficult to ignore since the opportunities people enjoy to live reasonably prosperous lives in safety differ so dramatically from one part of the world to the next—particularly when some

²⁷ Quoted in Didier Fassin, *Humanitarian Reason: A Moral History of the Present* (Berkeley: University of California Press, 2011), p. 114.

²⁸ See Kathy Marks, "Refugee Camp Children Sew Their Lips in Protest," *The Independent*, January 22, 2002, <<http://www.independent.co.uk/news/world/australasia/refugee-camp-children-sew-their-lips-in-protest-664504.html>>.

²⁹ For a passionate analysis of the transformative effects of immigration, and its costs and dangers, see Paul Scheffer, *Immigrant Nations*, translated by Liz Waters (Cambridge: Polity Press, 2011). For an even more passionate critique of immigration from an American perspective (albeit by an English immigrant to the United States), see Peter Brimelow, *Alien Nation: Common Sense about America's Immigration Disaster* (New York: Harper, 1996).

people are effectively denied the freedom to improve their conditions by moving to places where they might improve their lot. The birthright lottery might be a fact of life, but it is difficult to justify.³⁰ For this reason, liberal political theorists in particular have argued for a solution that combines limiting immigration but compensating for the restriction on free movement by greater transfers of wealth to the poor in other nations. There is a "tragic conflict" between the goal of nation-building on the one hand and the liberal commitment to equality on the other. But perhaps the tragedy can be avoided by careful, constructive planning, to transfer wealth from the rich to the poor abroad through appropriately devised global institutions.³¹ As Robert Goodin puts it, "if rich countries do not want to let foreigners in, then the very least they must do is send much more money to compensate them for their being kept out."³² Theorists such as Will Kymlicka, Thomas Pogge, and Martha Nussbaum, in different ways, advocate a transformation of global institutions, and the development of mechanisms of global redistribution, to combine nation-building with a concern for global equality.³³ The problem with refugees is that transfers of wealth cannot help those whose suffering is rooted in the breakdown of the institutions in their homelands, or the unwillingness of the powers that dominate those institutions to accept them as members of good standing. In such circumstances, it looks like an exception has to be made for this class of people, who can best be helped not by a transfer of funds but by emigration. The answer, it seems, is to allow some people to move more easily as asylum seekers or refugees rather than migrants, and to develop institutions that facilitate this.

As we have seen, however, there are two problems with this solution. First, the distinction between immigrants and asylum seekers or refugees cannot easily be drawn; and second, the history of the development of an institutional framework to deal with the plight of refugees does not suggest that it is even remotely possible to do justice to the people in question. Making

³⁰ See Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge, MA: Harvard University Press, 2009).

³¹ For a discussion of the idea of such a dilemma, see Kok-Chor Tan, *Justice Without Borders: Cosmopolitanism, Nationalism and Patriotism* (Cambridge: Cambridge University Press, 2004), pp. 123–32.

³² Robert E. Goodin, "If People Were Money . . ." in Brian Barry and Robert Goodin (eds.), *Free Movement: Ethical Issues in the Transnational Migration of People and Money* (University Park, PA: Pennsylvania State University Press, 1992), pp. 6–22 at p. 9. Goodin is, however, an advocate of open borders. See Goodin, "What's so Special about our Fellow Countrymen?," *Ethics* 99:4 (1989), 663–86.

³³ See Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (Oxford: Oxford University Press, 2001); Thomas Pogge (ed.), *Global Justice* (Oxford: Blackwell, 2004); Thomas Pogge, *World Poverty and Human Rights* (Oxford: Polity, 2002); Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge, MA: Harvard University Press, 2011).

refugees special neither makes sense conceptually, nor looks possible practically on the evidence we have to date.

If this is right, and there is indeed a trade-off between the ideals of nation-building and the humane treatment of the displaced people of the world, then we must either give up some of our concern with nation-building or simply admit that we are prepared to leave a great number of vulnerable people to their fate. If the fate of the wretched of the world is something we cannot ignore, however, then this means, more concretely, that we should open borders to immigrants of all kinds, thus removing the barriers to the free movement of asylum seekers and other kinds of immigrants alike. Trying to make fine-grained judgments about which kinds of distress merit concern is conceptually problematic; and trying to put these distinctions to work institutionally is more or less pointless. At best, this approach serves to do little more than assuage some consciences that something is being done. But it would be more honest simply to plead indifference.

This is not to suggest that we should simply throw our hands up in the air, and wait for the advent of a borderless world to solve the problem. Border controls are a reality, as is the existence of a refugee regime shaped by the 1951 Convention. Undoubtedly some good can be done by revising the Convention, pressing for more generous interpretations of its rules, persuading state authorities to make it easier for asylum seekers to gain the right to work, improving the conditions in detention centers (if authorities are unwilling to close them down altogether). We must, after all, be realistic, as we are repeatedly told we must. Yet we can do all this without buying into the fiction that we can readily draw the distinction between refugees and all other migrants, or that once such a distinction is made we can devise and run institutions that will serve the interests of the desperate and the destitute.

12.6 Epilogue: The Morality of Hospitality

Modern democratic societies host many people whose status in society is uncertain, asylum seekers, refugees, and undocumented migrants among them. In her study of the treatment of aliens in the democratic state, Seyla Benhabib observes that such people are effectively treated as criminals by existing polities. "The right to universal hospitality is sacrificed on the altar of state interest."³⁴ She goes on to suggest that we

³⁴ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), p. 177.

...need to decriminalize the worldwide movement of peoples, and treat each person, whatever his or her political citizenship status, in accordance with the dignity of moral personhood. This implies acknowledging that crossing borders and seeking entry into different polities is not a criminal act but an expression of human freedom and the search for human betterment in a world which we have to share with our fellow human beings.³⁵

Benhabib develops the argument that leads to this view through an analysis of Kant's understanding of the universal right of hospitality enjoyed by all peoples of the world. For all its humanity, however, Benhabib finds Kant's perspective wanting. While it recognizes an imperfect duty to help and offer shelter to those in danger of life and limb, and is generally sympathetic to the rights of all people to travel and sojourn in different lands, the structure that has emerged that enshrines Kant's thinking to some degree nonetheless views matters from the perspective of the state, rather than of world society. While it may not be possible to have a world of open borders, a case can be made for more porous ones. We can build on Kant's appreciation of the importance of hospitality, but not become trapped by sharp distinctions between citizens and aliens, members and foreigners. The aim should be to develop improved understandings of membership and citizenship which take seriously the need to incorporate those who move into the democratic polity—even if they cannot be granted the full range of citizen rights on first entry.

While I am very sympathetic to Benhabib's stance, and recognize her awareness of the tension between the demands of democratic representation on the one hand and the requirements of open admission on the other, I am not sure that a solution can be found that does not require a serious diminution in the importance of the state, and of membership of states. The problem is that states, while not merely reflections of the relations of power and the strength of particular interests in society, are nonetheless substantially precisely that. To the extent that individuals engage with any society for the first time through a confrontation with the state, they are unlikely to be met with hospitality rather than hostility. The very point of the state is to protect interests; the problem is how to widen its purview so that it serves the interest of all its members rather than the interests of those who can capture it. To turn the state into an institution that takes seriously the interests of those who are not even members might be more difficult still.

If refugees and asylum seekers are to be welcomed into any society, and shown a measure of hospitality, this will not be because the polity is welcoming but because society is so. Hospitality is, as Homer shows us in the *Odyssey*, a human relation rather than an institutional one. To the extent that we try to

³⁵ Benhabib, *The Rights of Others*, p. 177.

design institutions that perform a function that only people can, it seems unlikely that our efforts will meet with much success.³⁶

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³⁶ I wish to thank Sarah Fine, Lea Ypi, Mollie Gerver, and Liza Schuster for helpful comments on an earlier draft of this chapter.

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13**In Loco Civitatis****On the Normative Basis of the Institution of Refugeehood and Responsibilities for Refugees***David Owen*

Hannah Arendt was perhaps the first to outline the thought of the refugee as an exemplary figure for a political order organized as a plurality of territorially bounded sovereign states. Exemplary in the sense not only that the refugee is best conceived as a distinctively modern political artifact of the international order of states, but also that the *exceptional* status of refugee is one of the political media through which the ongoing reproduction of the normative structure of this order of governance is accomplished. This normative order being characterized, most basically, by the governmental norms of (1) allocating authority over, and primary responsibility for, national citizenries to states as sovereign political agents who determine their own membership rules, and (2) non-intervention by states with respect to each other's territorial jurisdiction.¹ Arendt's thought has been both supported and elaborated by recent historical studies of the institution of refugeehood, but its

¹ As Nevzat Soguk has shown in *States and Strangers: Refugees and the Displacements of Statecraft* (Minneapolis: University of Minneapolis Press, 1999)—his historical analysis of the emergence and development of the figure of the refugee—the constitution of refugee regimes, like the constitution of nationality regimes, can be productively conceived as governmental practices of statecraft through which the belonging of citizens within the territorial or national order of the state is constituted and the powers of the state with respect to its citizens are legitimated in terms of its role as the agent responsible for securing their liberty and welfare. In similar vein, Emma Haddad's *The Refugee in International Society: Between Sovereigns* (Cambridge: Cambridge University Press, 2008), a study of the history of the refugee, stresses the centrality of the refugee to our global political order as an inevitable but unanticipated feature of international society which both problematizes that order and, through the international refugee regime, reproduces it.

•2•

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“NEGATIVE” RIGHTS AND “POSITIVE” RIGHTS

Many Americans would probably be initially inclined to think that rights to subsistence are at least slightly less important than rights to physical security, even though subsistence is at least as essential to survival as security is and even though questions of security do not even arise when subsistence fails. Much official U.S. government rhetoric routinely treats all “economic rights,” among which basic subsistence rights are buried amidst many non-basic rights, as secondary and deferrable, although the fundamental enunciation of policy concerning human rights by the then Secretary of State did appear to represent an attempt to correct the habitual imbalance.¹ Now that the same argument in favor of basic rights to both aspects of personal survival, subsistence and security, is before us, we can examine critically some of the reasons why it sometimes appears that although people have basic security rights, the right, if any, to even the physical necessities of existence like minimal health care, food, clothing, shelter, unpolluted water, and unpolluted air is somehow less urgent or less basic.

Frequently it is asserted or assumed that a highly significant difference between rights to physical security and rights to subsistence is that they are respectively “negative” rights and “positive” rights.² This position, which I will now try to refute, is considerably more complex than it at first appears. I will sometimes refer to it as the position that subsistence rights are *positive* and therefore

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secondary. Obviously taking the position involves holding that subsistence rights are positive in some respect in which security rights are negative and further claiming that this difference concerning positive/negative is a good enough reason to assign priority to negative rights over positive rights. I will turn shortly to the explanation of this assumed positive/negative distinction. But first I want to lay out all the premises actually needed by the position that subsistence rights are positive and therefore secondary, although I need to undercut only some—strictly speaking, only one—of them in order to cast serious doubt upon the position's conclusions.

The alleged lack of priority for subsistence rights compared to security rights assumes:

1. The distinction between subsistence rights and security rights is (a) sharp and (b) significant.³
2. The distinction between positive rights and negative rights is (a) sharp and (b) significant.
3. Subsistence rights are positive.
4. Security rights are negative.

I am not suggesting that anyone has ever laid out this argument in all the steps it actually needs. On the contrary, a full statement of the argument is the beginning of its refutation—this is an example of the philosophical analogue of the principle that sunlight is the best antiseptic.⁴

In this chapter I will concentrate on establishing that premises 3 and 4 are both misleading. Then I will suggest a set of distinctions among duties that accurately transmits the insight distorted by 3 and 4. Insofar as 3 and 4 are inaccurate, considerable doubt is cast upon 2, although it remains possible that someone can specify some sharply contrasting pair of rights that actually are examples of 2.⁵ I will not directly attack premise 1.⁶

Now the basic idea behind the general suggestion that there are positive rights and negative rights seems to have been that one kind of rights (the positive ones) require other people to act positively—to “do something”—whereas another kind of rights (the negative ones) require other people merely to refrain from acting in certain ways—to do nothing that violates the rights. For example, according to this picture, a right to subsistence would be posi-

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tive because it would require other people, in the last resort, to supply food or clean air to those unable to find, produce, or buy their own; a right to security would be negative because it would require other people merely to refrain from murdering or otherwise assaulting those with the right. The underlying distinction, then, is between acting and refraining from acting; and positive rights are those with correlative duties to act in certain ways and negative rights are those with correlative duties to refrain from acting in certain ways. Therefore, the moral significance, if any, of the distinction between positive rights and negative rights depends upon the moral significance, if any, of the distinction between action and omission of action.⁷

The ordinarily implicit argument for considering rights to subsistence to be secondary would, then, appear to be basically this. Since subsistence rights are positive and require other people to do more than negative rights require—perhaps more than people can actually do—negative rights, such as those to security, should be fully guaranteed first. Then, any remaining resources could be devoted, as long as they lasted, to the positive—and perhaps impossible—task of providing for subsistence. Unfortunately for this argument, neither rights to physical security nor rights to subsistence fit neatly into their assigned sides of the simplistic positive/negative dichotomy. We must consider whether security rights are purely negative and then whether subsistence rights are purely positive. I will try to show (1) that security rights are more “positive” than they are often said to be, (2) that subsistence rights are more “negative” than they are often said to be, and, given (1) and (2), (3) that the distinctions between security rights and subsistence rights, though not entirely illusory, are too fine to support any weighty conclusions, especially the very weighty conclusion that security rights are basic and subsistence rights are not.

In the case of rights to physical security, it may be possible to *avoid violating* someone’s rights to physical security yourself by merely refraining from acting in any of the ways that would constitute violations. But it is impossible to *protect* anyone’s rights to physical security without taking, or making payments toward the taking of, a wide range of positive actions. For example, at the very least the protection of rights to physical security necessitates police forces; criminal courts; penitentiaries; schools for training

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police, lawyers, and guards; and taxes to support an enormous system for the prevention, detection, and punishment of violations of personal security.⁸ All these activities and institutions are attempts at providing social guarantees for individuals' security so that they are not left to face alone forces that they cannot handle on their own. How much more than these expenditures one thinks would be necessary in order for people actually to be reasonably secure (as distinguished from merely having the cold comfort of knowing that the occasional criminal is punished after someone's security has already been violated) depends on one's theory of violent crime, but it is not unreasonable to believe that it would involve extremely expensive, "positive" programs. Probably no one knows how much positive action would have to be taken in a contemporary society like the United States significantly to reduce the levels of muggings, rapes, murders, and other assaults that violate personal security, and in fact to make people reasonably secure.

Someone might suggest that this blurs rights to physical security with some other type of rights, which might be called rights-to-be-protected-against-assaults-upon-physical-security. According to this distinction, rights to physical security are negative, requiring others only to refrain from assaults, while rights-to-be-protected-against-assaults-upon-physical-security are positive, requiring others to take positive steps to prevent assaults.

Perhaps if one were dealing with some wilderness situation in which individuals' encounters with each other were infrequent and irregular, there might be some point in noting to someone: I am not asking you to cooperate with a system of guarantees to protect me from third parties, but only to refrain from attacking me yourself. But in an organized society, insofar as there were any such things as rights to physical security that were distinguishable from some other rights-to-be-protected-from-assaults-upon-physical-security, no one would have much interest in the bare rights to physical security. What people want and need, as even Mill partly recognized, is the protection of their rights.⁹ Insofar as this frail distinction holds up, it is the rights-to-be-protected-against-assaults that any reasonable person would demand from society. A demand for physical security is not normally a demand simply to be left alone, but a demand to be protected against

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harm.¹⁰ It is a demand for positive action, or, in the words of our initial account of a right, a demand for social guarantees against at least the standard threats.

So it would be very misleading to say simply that physical security is a negative matter of other people's refraining from violations. Ordinarily it is instead a matter of some people refraining from violations and of third parties being prevented from violations by the positive steps taken by first and second parties. The "negative" refraining may in a given case be less significant than the "positive" preventing—it is almost never the whole story. The end-result of the positive preventative steps taken is of course an enforced refraining from violations, not the performance of any positive action. The central core of the right is a right that others not act in certain ways. But the mere core of the right indicates little about the social institutions needed to secure it, and the core of the right does not contain its whole structure. The protection of "negative rights" requires positive measures, and therefore their actual enjoyment requires positive measures. In any imperfect society enjoyment of a right will depend to some extent upon protection against those who do not choose not to violate it.

Rights to subsistence too are in their own way considerably more complex than simply labeling them "positive" begins to indicate. In fact, their fulfillment involves at least two significantly different types of action. On the one hand, rights to subsistence sometimes do involve correlative duties on the part of others to provide the needed commodities when those in need are helpless to secure a supply for themselves, as, for example, the affluent may have a duty to finance food supplies and transportation and distribution facilities in the case of famine. Even the satisfaction of subsistence rights by such positive action, however, need not be any more expensive or involve any more complex governmental programs than the effective protection of security rights would. A food stamp program, for example, could be cheaper or more expensive than, say, an anti-drug program aimed at reducing muggings and murders by addicts. Which program was more costly or more complicated would depend upon the relative dimensions of the respective problems and would be unaffected by any respect in which security is "negative" and subsistence is "positive." Insofar as any argument for giving priority to the fulfillment of "nega-

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tive rights" rests on the assumption that actually securing "negative rights" is usually cheaper or simpler than securing "positive rights," the argument rests on an empirical speculation of dubious generality.

The other type of action needed to fulfill subsistence rights is even more difficult to distinguish sharply from the action needed to fulfill security rights. Rights to physical subsistence often can be completely satisfied without the provision by others of any commodities to those whose rights are in question. All that is sometimes necessary is to protect the persons whose subsistence is threatened from the individuals and institutions that will otherwise intentionally or unintentionally harm them. A demand for the fulfillment of rights to subsistence may involve not a demand to be provided with grants of commodities but merely a demand to be provided some opportunity for supporting oneself.¹¹ The request is not to be supported but to be allowed to be self-supporting on the basis of one's own hard work.

What is striking is the similarity between protection against the destruction of the basis for supporting oneself and protection against assaults upon one's physical security. We can turn now to some examples that clearly illustrate that the honoring of subsistence rights sometimes involves action no more positive than the honoring of security rights does. Some cases in which all that is asked is protection from harm that would destroy the capacity to be self-supporting involve threats to subsistence of a complexity that is not usually noticed with regard to security, although the adequate protection of security would involve analyses and measures more complex than a preoccupation with police and prisons. The complexity of the circumstances of subsistence should not, however, be allowed to obscure the basic fact that essentially all that is being asked in the name of subsistence rights in these examples is protection from destructive acts by other people.

SUBSISTENCE RIGHTS AND SCARCITY

The choice of examples for use in an essentially theoretical discussion that does nevertheless have implications for public policy presents an intractable dilemma. Hypothetical cases and actual cases each have advantages and disadvantages that are mirror im-

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ages of each other's. A description of an actual case has the obvious advantage that it is less susceptible to being tailored to suit the theoretical point it is adduced to support, especially if the description is taken from the work of someone other than the proponent of the theoretical point. Its disadvantage is that if the description is in fact an inaccurate account of the case in question, the mistake about what is happening in that case may appear to undercut the theoretical point that is actually independent of what is happening in any single case. Thus the argument about the theoretical point may become entangled in arguments about an individual instance that was at most only one supposed illustration of the more general point.

Hypothetical cases are immune to disputes about whether they accurately depict an independent event, since, being explicitly hypothetical, they are not asserted to correspond to any one real case. But precisely because they are not constrained by the need to remain close to an independent event, they may be open to the suspicion of having been streamlined precisely in order to fit the theoretical point they illustrate and having thereby become atypical of actual cases.

The only solution I can see is to offer, when a point is crucial, an example of each kind. It is vital to the argument of this book to establish that many people's lack of the substance of their subsistence rights—of, that is, the means of subsistence like food—is a deprivation caused by standard kinds of threats that could be controlled by some combination of the mere restraint of second parties and the maintenance of protective institutions by first and third parties, just as the standard threats that deprive people of their physical security could be controlled by restraint and protection against non-restraint. So I will start with a hypothetical case in order to clarify the theoretical point before introducing the partly extraneous complexity of actual events, and then I will quote a description of some actual current economic policies that deprive people of subsistence. The hypothetical case is at the level of a single peasant village, and the actual case concerns long-term national economic strategies. Anyone familiar with the causes of malnutrition in underdeveloped countries today will recognize that the following hypothetical case is in no way unusual.¹²

Suppose the largest tract of land in the village was the property

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of the descendant of a family that had held title to the land for as many generations back as anyone could remember. By absolute standards this peasant was by no means rich, but his land was the richest in the small area that constituted the universe for the inhabitants of this village. He grew, as his father and grandfather had, mainly the black beans that are the staple (and chief—and adequate—source of protein) in the regional diet. His crop usually constituted about a quarter of the black beans marketed in the village. Practically every family grew part of what they needed, and the six men he hired during the seasons requiring extra labor held the only paid jobs in the village—everyone else just worked his own little plot.

One day a man from the capital offered this peasant a contract that not only guaranteed him annual payments for a 10-year lease on his land but also guaranteed him a salary (regardless of how the weather, and therefore the crops, turned out—a great increase in his financial security) to be the foreman for a new kind of production on his land. The contract required him to grow flowers for export and also offered him the opportunity, which was highly recommended, to purchase through the company, with payments in installments, equipment that would enable him to need to hire only two men. The same contract was offered to, and accepted by, most of the other larger landowners in the general region to which the village belonged.

Soon, with the sharp reduction in supply, the price of black beans soared. Some people could grow all they needed (in years of good weather) on their own land, but the families that needed to supplement their own crop with purchases had to cut back their consumption. In particular, the children in the four families headed by the laborers who lost their seasonal employment suffered severe malnutrition, especially since the parents had originally worked as laborers only because their own land was too poor or too small to feed their families.

Now, the story contains no implication that the man from the capital or the peasants-turned-foremen were malicious or intended to do anything worse than single-mindedly pursue their own respective interests. But the outsider's offer of the contract was one causal factor, and the peasant's acceptance of the contract was another causal factor, in producing the malnutrition that

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would probably persist, barring protective intervention, for at least the decade the contract was to be honored. If the families in the village had rights to subsistence, their rights were being violated. Society, acting presumably by way of the government, ought to protect them from a severe type of active harm that eliminates their ability even to feed themselves.

But was anyone actually harming the villagers, or were they simply suffering a regrettable decline in their fortunes? If someone was violating their rights, who exactly was the violator? Against whom specifically should the government be protecting them? For, we normally make a distinction between violating someone's rights and allowing someone's rights to be violated while simply minding our own business. It makes a considerable difference—to take an example from another set of basic rights—whether I myself assault someone or I merely carry on with my own affairs while allowing a third person to assault someone when I could protect the victim and end the assault. Now, I may have a duty not to allow assaults that I can without great danger to myself prevent or stop, as well as a duty not to assault people myself, but there are clearly two separable issues here. And it is perfectly conceivable that I might have the one duty (to avoid harming) and not the other (to protect from harm by third parties), because they involve two different types of action.¹³

The switch in land-use within the story might then be described as follows. Even if one were willing to grant tentatively that the villagers all seemed to have rights to subsistence, some of which were violated by the malnutrition that some suffered after the switch in crops, no individual or organization can be identified as the violator: not the peasant-turned-foreman, for example, because—let us assume—he did not foresee the “systemic” effects of his individual choice; not the business representative from the capital because—let us assume—although he was knowledgeable enough to know what would probably happen, it would be unrealistically moralistic to expect him to forgo honest gains for himself and the company he represented because the gains had undesired, even perhaps regretted, “side-effects”; not any particular member of the governmental bureaucracy because—let us assume—no one had been assigned responsibility for maintaining adequate nutrition in this particular village. The

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local peasant and the business representative were both minding their own business in the village, and no one in the government had any business with this village. The peasant and the representative may have attended to their own affairs while harm befell less fortunate villagers, but allowing harm to occur without preventing it is not the same as directly inflicting it yourself. The malnutrition was just, literally, unfortunate: bad luck, for which no one could fairly be blamed. The malnutrition was, in effect, a natural disaster—was, in the obnoxious language of insurance law, an act of God. Perhaps the village was, after all, becoming overpopulated.¹⁴

But, of course, the malnutrition resulting from the new choice of crop was not a natural disaster. The comforting analogy does not hold. The malnutrition was a social disaster. The malnutrition was the product of specific human decisions permitted by the presence of specific social institutions and the absence of others, in the context of the natural circumstances, especially the scarcity of land upon which to grow food, that were already given before the decisions were made. The harm in question, the malnutrition, was not merely allowed to happen by the parties to the flower-growing contract. The harm was partly caused by the requirement in the contract for a switch away from food, by the legality of the contract, and by the performance of the required switch in crops. If there had been no contract or if the contract had not required a switch away from food for local consumption, there would have been no malnutrition as things were going.¹⁵ In general, when persons take an action that is sufficient in some given natural and social circumstances to bring about an undesirable effect, especially one that there is no particular reason to think would otherwise have occurred, it is perfectly normal to consider their action to be one active cause of the harm. The parties to the contract partly caused the malnutrition.

But the society could have protected the villagers by countering the initiative of the contracting parties in any one of a number of ways that altered the circumstances, and the absence of the appropriate social guarantees is another cause of the malnutrition. Such contracts could, for example, have already been made illegal. Or they could have been allowed but managed or taxed in order to compensate those who would otherwise predictably be

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damaged by them. Exactly what was done would be, *for the most part*, an economic and political question.¹⁶ But it is possible to have social guarantees against the malnutrition that is repeatedly caused in such standard, predictable ways.

Is a right to subsistence in such a case, then, a positive right in any important ways that a right to security is not? Do we actually find a contrast of major significance? No. As in the cases of the threats to physical security that we normally consider, the threat to subsistence is human activity with largely predictable effects.¹⁷ Even if, as we tend to assume, the motives for deprivations of security tend to be vicious while the motives for deprivations of subsistence tend to be callous, the people affected usually need protection all the same. The design, building, and maintenance of institutions and practices that protect people's subsistence against the callous—and even the merely over-energetic—is no more and no less positive than the conception and execution of programs to control violent crimes against the person. It is not obvious which, if either, it is more realistic to hope for or more economical to pursue. It is conceivable, although I doubt if anyone really knows, that the two are more effectively and efficiently pursued together. Neither looks simple, cheap, or "negative."

This example of the flower contract is important in part because, at a very simple level, it is in fact typical of much of what is happening today among the majority of the people in the world, who are poor and rural, and are threatened by forms of "economic development" that lower their own standard of living.¹⁸ But it is also important because, once again in a very simple way, it illustrates the single most critical fact about rights to subsistence; where subsistence depends upon tight supplies of essential commodities (like food), a change in supply can have, often by way of intermediate price effects, an indirect but predictable and devastating effect on people's ability to survive. A change in supply can transport self-supporting people into helplessness and, if no protection against the change is provided, into malnutrition or death. Severe harm to some people's ability to maintain themselves can be caused by changes in the use to which other people put vital resources (like land) they control. In such cases even someone who denied that individuals or organizations have duties to supply commodities to people who are helpless to obtain them for them-

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selves, might grant that the government ought to execute the society's duty of protecting people from having their ability to maintain their own survival destroyed by the actions of others. If this protection is provided, there will be much less need later to provide commodities themselves to compensate for deprivations.

What transmits the effect in such cases is the local scarcity of the vital commodity. Someone might switch thousands of acres from food to flowers without having any effect on the diet of anyone else where the supply of food was adequate to prevent a significant price rise in response to the cut in supply. And it goes without saying that the price rises are vitally important only if the income and wealth of at least some people is severely limited, as of course it is in every society, often for the rural majority. It is as if an abundant supply sometimes functions as a sponge to absorb the otherwise significant effect on other people, but a tight supply (against a background of limited income and wealth) sometimes functions as a conductor to transmit effects to others, who feel them sharply.

It is extremely difficult merely to mind one's own business amidst a scarcity of vital commodities. It is illusory to think that this first commandment of liberalism can always be obeyed. The very scarcity draws people into contact with each other, destroys almost all area for individual maneuver, and forces people to elbow each other in order to move forward. The tragedy of scarcity, beyond the deprivations necessitated by the scarcity itself, is that scarcity tends to make each one's gain someone else's loss. One can act for oneself only by acting against others, since there is not enough for all. Amidst abundance of food a decision to grow flowers can be at worst a harmless act and quite likely a socially beneficial one. But amidst a scarcity of food, due partly to a scarcity of fertile land, an unmalicious decision to grow flowers can cause death—unless there are social guarantees for adequate nutrition. A call for social guarantees for subsistence in situations of scarcity is not a call for intervention in what were formerly private affairs.

TWO THESES ABOUT ECONOMIC DEPRIVATION

Our actual case is an economic strategy now being followed in a considerable number of Latin American nations. As already men-

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tioned, it also differs from the hypothetical, but very typical, example of the flower contract by being a matter of macro-economic strategy. And the actual case differs as well in a respect that is crucial to some of the policy recommendations in chapter 7: the precise relation between the economic decisions and the resulting deprivations of subsistence. In order to be able to characterize this relation accurately we need to draw an important distinction before we look at the description of the case.

“Systemic” deprivation—deprivation resulting from the confluence of many contributing factors—of the kind already seen in the case of the flower contract may or may not be systematic. That is, deprivations that are the result of the interaction of many factors may be (a) accidental—even unpredictable—and relatively easily remediable coincidences in an economic system for which there is no plan or for which the plan does not include the deprivations; or the deprivations may be (b) inherent—perhaps predictable—and acceptable, whether or not positively desirable, elements in a consciously adopted or endorsed economic plan or policy. In the former case they are not systematic but, as I will call them, *accidental*, and in the latter case they are systematic or, I will say, *essential*: essential elements in the strategy that produces them. Essential deprivations can be eliminated only by eliminating the strategy that requires them. Accidental deprivations can be eliminated by making less fundamental changes while retaining the basic strategy, since they are not inherent in the strategy.

The thesis that particular deprivations are accidental often seems to be the explanation recommended by common sense, although we may not ordinarily think explicitly in terms of this distinction. Well-informed people are aware, for example, that the “Brazilian miracle” has left large numbers of the poorest Brazilians worse off than ever, that the Shah’s “White Revolution” made relatively small inroads upon malnutrition and infant mortality, that President and Prime Minister Marcos’s “New Society” is a similar failure, etc.¹⁹ But, especially if one assumes that those who dictate economic strategy are reasonable and well-intentioned people, one may infer that these repeated failures to deal with the basic needs of the most powerless are, in spite of the regularity with which they recur, unfortunate but unpredictable by-products of fundamentally benevolent, or anyhow enlightened, economic plans.

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Alternatively, one might infer that the continuing deprivations are inherent in the economic strategies being used, and that would lead to the second kind of thesis: that the continuance of the deprivations is essential to the economic strategies. Since this thesis may be less familiar, I would like to quote an example of it at some length. Because this particular formulation is intended by the analyst, Richard Fagen, to apply only to Latin America (with the exception of Cuba and, of course, to varying degrees in various different countries), a thesis concerning essential deprivation would naturally have to be formulated differently for Africa, Asia, and elsewhere. The following is intended, then, only as one good example, formulated in specifics to cover only a single region, of the second type of thesis:

—Aggregate economic growth in Latin America over the past decade has been above world averages. The per capita income in the region now exceeds \$1,000. . . .

—The actual situation with respect to income distribution and social equity is, in general, appalling. Fifty percent of the region's citizens have incomes of less than \$200 per year; one-third receive less than \$100. The top five percent of the population controls one-third of the total income. The emphasis on industrialization and export-led growth almost everywhere reinforces and accelerates the neglect of agriculture—at least agriculture in basic foodstuffs for domestic consumption. . . .

—Related to the income distribution and social equity issues is the problem of unemployment. In some countries as many as one out of three persons in the working-age population is unable to find a job of any sort. . . .

—The kind of development that has taken place is reflected in the structure of external indebtedness. Current estimates are that the countries of the region now owe approximately \$80 billion in public and publicly guaranteed debt alone. . . .

—The Latin American state is everywhere involved in economic development and management. It is usually the prime borrower abroad, often an important investor at home, frequently a chief partner of foreign capital, and al-

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ways a source of regulations on everything from wages to import quotas. State capitalism has come to Latin America with a vengeance, and even the governments that claim to give the freest play to market forces are in fact constantly intervening to establish the rules under which "free markets" will be allowed to operate.

The above sketch of Latin American development aids in understanding the nature of contemporary authoritarianism. . . . The linkages are complex, but very largely determine the public policies that will be followed. Creditors want to be paid in dollars or in other international currencies. The international financial institutions are critically concerned with the debtor country's balance of payments. A sharp increase in exports—acknowledged to be the best way to achieve a more favorable balance and repay the debt—is very difficult to achieve in the short run. Also difficult to accomplish is a dramatic increase in capital inflows—except by borrowing even more.

This leaves imports as a natural target for those who would save hard currency. But in order to cut imports—or at least that sector of imports that is least important to ruling elites, economic managers, and most national and international business—mass consumption must be restricted. Since quotas and tariffs are seen as inappropriate policy instruments, to a large extent consumer demand must be managed through restrictions on the real purchasing power of wage-earners—and increases in unemployment.

When coupled with cutbacks in government expenditures (typically in public works and welfare-enhancing subsidies), a huge proportion of the adjustment burden is thus transferred to the working class. In an inflationary economy, the proportional burden is even greater. Needless to say, where minimal possibilities of political expression exist, this kind of adjustment medicine does not go down easily. Repression of trade unions as effective organizations and workers as individuals is in this sense "necessary" for those in charge of managing the economy and for their friends and allies abroad.

Many of these same persons may decry the extreme and

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brutal measures used in countries such as Brazil, Uruguay, Argentina, Bolivia and Chile to establish and maintain control over the labor movement and hold wages well below the inflationary spiral. Some may even take comfort in the fact that, once the most extreme measures have been used, a partial relaxation of control seems possible at a later date. But minimal honesty requires that the repression in both its physical and financial dimensions be seen as an organic aspect of what is now the prevailing mode of economic development in Latin America. Social and economic human rights do not fare well in such an environment. . . .

What has evolved in Latin America (and by implication in some other areas of the Third World) is a political-economic model that has *no* historical precedent in the now more developed capitalist world. For lack of a more concise phrase, this model can be called illiberal state capitalism, a situation in which state intervention in the economy is substantial, but governmental policies tend to reinforce rather than soften or ameliorate income inequalities, class distinctions, and regional disequilibria.²⁰

I take it to be evident that in various countries throughout the world deprivation is sometimes accidental and sometimes essential, and that one has no reason at all to expect that either thesis is applicable to all cases. Each continent, or rather each country, and often each regime, must be analyzed on its own. But it is fairly clear that current regimes include a number of instances of what Fagen calls "illiberal state capitalism" and that in these cases people are deprived of subsistence (and liberty) by their own government's choice of economic strategy.

In this brief theoretical work I obviously cannot attempt to establish under which governments deprivations of subsistence are essential and under which they are accidental, although I have already mentioned some cases I take to be strikingly evident. Illiberal state capitalism is only one prominent source of strategies of essential deprivation, and for us here the main point is the distinction between essential and accidental deprivation, whatever the detailed explanation for which one occurs. Especially when we come in chapter 7 to look at specific recommendations for U.S. foreign policy, it will be crucial to keep this underlying distinction between these two explanations of deprivation in mind. In most

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cases the formulation of policy must take the source of deprivations into account. A government that engages in essential deprivation—that follows an economic strategy in which deprivations of subsistence are inherent in the strategy—fails to fulfill even any duty merely to avoid depriving. Such systematic violation of subsistence rights is surely intolerable. Such a government is a direct and immediate threat to its own people, and they are entitled to resist it in order to defend themselves. But I am getting ahead of the theoretical story.

We turned to the actual case of illiberal state capitalism in Latin America with its macroeconomic strategies of essential deprivation, as well as to the hypothetical case of the village flower contract, which is a kind of contract encouraged by—but not dependent upon—strategies of essential deprivation, in order to see some illustrations of the inaccuracy of the philosophical doctrine that subsistence rights, like all economic rights, are positive, because their fulfillment consists largely of actively providing people with commodities like food. From these cases it is now, I hope, quite clear that the honoring of subsistence rights may often in no way involve transferring commodities to people, but may instead involve preventing people's being deprived of the commodities or the means to grow, make, or buy the commodities. Preventing such deprivations will indeed require what can be called positive actions, especially protective and self-protective actions. But such protection against the deprivation of subsistence is in all major respects like protection against deprivations of physical security or of other rights that are placed on the negative side of the conventional negative/positive dichotomy. I believe the whole notion that there is a morally significant dichotomy between negative rights and positive rights is intellectually bankrupt—that premise 2, as stated in the first section of this chapter, is mistaken. The cases we have considered establish at the very least that the dichotomy distorts when it is applied to security rights and subsistence rights—that premises 3 and 4 were mistaken. The latter is all that needed to be shown.

AVOIDANCE, PROTECTION, AND AID

Still, it is true that sometimes fulfilling a right does involve transferring commodities to the person with the right and sometimes it

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merely involves not taking commodities away. Is there not some grain of truth obscured by the dichotomy between negative and positive rights? Are there not distinctions here that it is useful to make?

The answer, I believe, is: yes, there are distinctions, but they are not distinctions between rights. The useful distinctions are among duties, and there are no one-to-one pairings between kinds of duties and kinds of rights. The complete fulfillment of each kind of right involves the performance of multiple kinds of duties. This conceptual change has, I believe, important practical implications, although it will be only in chapter 7 that the implications can begin to be illustrated. In the remainder of this chapter I would like to tender a very simple tripartite typology of duties. For all its own simplicity, it goes considerably beyond the usual assumption that for every right there is a single correlative duty, and suggests instead that for every basic right—and many other rights as well—there are three types of duties, all of which must be performed if the basic right is to be fully honored but not all of which must necessarily be performed by the same individuals or institutions. This latter point opens the possibility of distributing each of the three kinds of duty somewhat differently and perhaps confining any difficulties about the correlativity of subsistence rights and their accompanying duties to fewer than all three kinds of duties.

So I want to suggest that with every basic right, three types of duties correlate:

- I. Duties to *avoid* depriving.
- II. Duties to *protect* from deprivation.
- III. Duties to *aid* the deprived.

This may be easier to see in the case of the more familiar basic right, the right to physical security (the right not to be tortured, executed, raped, assaulted, etc.). For every person's right to physical security, there are three correlative duties:

- I. Duties not to eliminate a person's security—duties to *avoid* depriving.
- II. Duties to protect people against deprivation of security by other people—duties to *protect* from deprivation.

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- III. Duties to provide for the security of those unable to provide for their own—duties to *aid* the deprived.

Similarly, for every right to subsistence there are:

- I. Duties not to eliminate a person's only available means of subsistence—duties to *avoid* depriving.
- II. Duties to protect people against deprivation of the only available means of subsistence by other people—duties to *protect* from deprivation.
- III. Duties to provide for the subsistence of those unable to provide for their own—duties to *aid* the deprived.

If this suggestion is correct, the common notion that *rights* can be divided into rights to forbearance (so-called negative rights), as if some rights have correlative duties only to avoid depriving, and rights to aid (so-called positive rights), as if some rights have correlative duties only to aid, is thoroughly misguided. This misdirected simplification is virtually ubiquitous among contemporary North Atlantic theorists and is, I think, all the more pernicious for the degree of unquestioning acceptance it has now attained. It is duties, not rights, that can be divided among avoidance and aid, and protection. And—this is what matters—every basic right entails duties of all three types. Consequently the attempted division of rights, rather than duties, into forbearance and aid (and protection, which is often understandably but unhelpfully blurred into avoidance, since protection is partly, but only partly, the enforcement of avoidance) can only breed confusion.

It is impossible for any basic right—however “negative” it has come to seem—to be fully guaranteed unless all three types of duties are fulfilled. The very most “negative”-seeming right to liberty, for example, requires positive action by society to protect it and positive action by society to restore it when avoidance and protection both fail. This by no means implies, as I have already mentioned, that all three types of duties fall upon everyone else or even fall equally upon everyone upon whom they do fall. Although this tripartite analysis of duties is, I believe, perfectly general, I will focus here upon the duties correlative to subsistence rights: subsistence duties.

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THE GENERALITY OF THE TRIPARTITE ANALYSIS

However, perhaps a brief word on the general issue is useful before turning to a fairly detailed analysis of the threefold duties correlative to the rights that most concern us: subsistence rights. Obviously theses of three ascending degrees of generality might be advanced:

All subsistence rights involve threefold correlative duties.

All basic rights involve threefold correlative duties.

Most moral rights involve threefold correlative duties.

I subscribe to all three theses, and I believe that the remainder of this book offers significant support for all three. But naturally the support will be most thorough for the first thesis and least thorough for the last. For the most part I am content to leave matters at that, because the only point that I am concerned fully to establish is the priority of subsistence rights, that is, their equal priority with all other basic rights. Consequently, the arguments need, strictly speaking, to be thorough only for subsistence rights. But a contrasting pair of observations are also in order.

On the one hand, the argument here is from the particular to the general, not the converse. It is not because I assumed that normal rights involve some, or threefold, duties that I concluded that subsistence rights involve some, and threefold, duties. I explored subsistence rights, as we are about to do, and found that they can be fully accounted for only by means of admitting three kinds of correlated duties. I looked at the same time at security rights and, as we will do in chapter 3, at rights to liberty and found again that an adequate explanation involves all three kinds of multiply interrelated duties, thus coming to suspect that all basic rights, at the very least, require the same tripartite analysis of the duty side of the coin.

On the other hand, on the basis of these detailed examinations of these three rights I am indeed tempted to recommend that the most general thesis be made analytically true, that is, that any right not involving the threefold duties be acknowledged to be an exceptional case. If the account of a right given at the beginning of chapter 1 were made a strict definition, then it would do just this. If a right provides the rational basis for a justified demand

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that the actual enjoyment of the substance of the right be socially guaranteed against standard threats, then a right provides the rational basis for insisting upon the performance, as needed, of duties to avoid, duties to protect, and duties to aid, as they will shortly be explained. This picture does seem to me to fit all the standard cases of moral rights.²¹ If, however, someone can give clear counter-examples to the final step of generalization (the move from duties for basic rights to duties for moral rights generally), I can see little cause for concern, provided the admission of rights that lack some kinds of correlative duties, to the realm of non-basic rights, is not allowed to devalue the coinage of rights generally.

SUBSISTENCE DUTIES

The first type of subsistence duty is neither a duty to provide help nor a duty to protect against harm by third parties but is the most nearly “negative” or passive kind of duty that is possible: a duty simply not to take actions that deprive others of a means that, but for one’s own harmful actions, would have satisfied their subsistence rights or enabled them to satisfy their own subsistence rights, where the actions are not necessary to the satisfaction of one’s own basic rights and where the threatened means is the only realistic one.²² Duties to avoid depriving require merely that one refrain from making an unnecessary gain for oneself by a means that is destructive for others.

Part of the relation between these subsistence duties to avoid depriving (type I) and subsistence duties to protect from deprivation (type II) is quite straightforward. If everyone could be counted upon voluntarily to fulfill duties to avoid, duties to protect would be unnecessary. But since it would be naive to expect everyone to fulfill his or her duties to avoid and since other people’s very survival is at stake, it is clearly necessary that some individuals or institution have the duty of enforcing the duty to avoid. The duty to protect is, then, in part a secondary duty of enforcing the primary duty of avoiding the destruction of people’s means of subsistence. In this respect it is analogous to, for example, the duty of the police to enforce the duty of parents not to starve their children.

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The natural institution in many societies to have the task of enforcing those primary duties that need enforcement is the executive branch of some level of government, acting on behalf of the members of society other than the offending individuals or institutions. Which level of government takes operating responsibility is largely a practical matter and might vary among societies. Where the source of harm is, for example, a transnational corporation, protection may need to be provided by the home government or even by multilateral government action.²³ But clearly if duties to avoid depriving people of their last means of subsistence are to be taken seriously, some provision must be made for enforcing this duty on behalf of the rest of humanity upon those who would not otherwise fulfill it. Perhaps it would be worth considering non-governmental enforcement institutions as the bearers in some cases of the secondary duty to protect, but the primary institution would normally appear to be the government of the threatened person's own nation. It is normally taken to be a central function of government to prevent irreparable harm from being inflicted upon some members of society by other individual members, by institutions, or by interactions of the two. It is difficult to imagine why anyone should pay much attention to the demands of any government that failed to perform this function, if it were safe to ignore its demands.

Duties to aid (type III) are in themselves fairly complicated, and only one kind will be discussed here. At least three sub-categories of duties to aid need to be recognized. What they have in common is the requirement that resources be transferred to those who cannot provide for their own survival. First are duties to aid (III-1) that are attached to certain roles or relationships and rest therefore upon only those who are in a particular role or relationship and are borne toward only those other persons directly involved. Some central cases are the duties of parents toward their own young children and the duties of grown children toward their own aged parents. Naturally, important issues can arise even with regard to such relatively clear duties as the duty to provide food to the helplessly young and to the helplessly old, but I have nothing to add here regarding these duties, which are not universal. By their not being universal I mean that although all parents may normally have certain duties toward their own children, no child can jus-

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tifiably hold that all people, or even all parents, have *this* sort of duty toward it. All people may of course have other duties toward the child, including universal ones, and possibly including one of the other two sub-categories of duties to aid that are to be mentioned next.

The only difference between the second and third sub-categories of duties to aid is the source of the deprivation because of which aid is needed. In the second case (III-2) the deprivation is the result of failures to fulfill duties to avoid depriving and duties to protect from deprivation—some people have acted in such a way as to eliminate the last available means of subsistence for other people and the responsible government has failed to protect the victims. Thus, the need for assistance is the result of a prior twofold failure to perform duties, and the victims have been harmed by both actions and omissions of actions by other people.

In the third case (III-3) the deprivation is not the result of failures in duty and, in just this sense, the deprivation is “natural,” that is, the deprivation suffered is not a case of harm primarily caused by other people. The clearest case of a natural deprivation calling for aid is a natural disaster like a hurricane or an earthquake. As always, questions arise at the borderline between cases—for example, was the death toll increased because the weather bureau or civil defense organization failed to protect with timely warnings? But uncontroversial central cases in which no human beings are much to blame are perfectly familiar, even if not so frequent as we might like to believe.

Where supplies of the necessities of life, or of the resources needed to grow or make the necessities, are scarce, duties of types I and II take on increased importance. The results of the fulfillment only of I and II would already be dramatic in the poorer areas of the world, in which most of the earth's inhabitants eke out their existences. It is easy to underestimate the importance of these two kinds of subsistence duties, which together are intended to prevent deprivation. But to eliminate the only realistic means a person has for obtaining food or other physical necessities is to cause that person, for example, the physical harm of malnutrition or of death by starvation. When physical harm but not death is caused, the effect of eliminating the only means of support can be every degree as serious as the effect of a violation of physical secu-

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rity by means of a bodily assault. The physical effects of malnutrition can be irreversible and far more profound than the physical effects of many an assault in fact are. And when starvation is caused, the ultimate effect of eliminating the only means of support is precisely the same as the effect of murder. Those who are helpless in the face of insuperable obstacles to their continued existence are at least one level worse off than those who are defenseless in the face of assaults upon their physical security. The defenseless will at least be able to maintain themselves if they are provided with protection against threatening assaults. If protected but otherwise left alone, they will manage. But the helpless, if simply left alone—even if they should be protected against all assaults upon their security—will die for lack of the means of subsistence. They will merely, in Coleridge's phrase, "die so slowly that none call it murder."²⁴

Now of course differences between deprivations of security and deprivations of subsistence can also be noted, as already mentioned. Normally in a violation of physical security by means of assault or murder, the human agent's central intention is indeed to bring about, or at least includes bringing about, the physical harm or death that is caused for the victim, although obviously one also can injure or kill inadvertently. In the case of the elimination of the means of physical subsistence, the human agent's central intention may at least sometimes be focussed on other consequences of his or her action, such as the increased security of income that would result from a multi-year salaried contract to grow flowers rather than a precarious annual attempt to grow food. The harm to the victims may be entirely unintended. Such difference in intention between the two cases is undoubtedly relevant to any assessment of the moral stature respectively of the two persons who partly cause the harm in the two cases. But for the two victims the difference between intended physical harm and unintended physical harm may matter little, since the harmfulness of the action taken may be the same in both cases and may be even greater where unintended.

Nevertheless, it may be arbitrary to assign a role of *the* perpetrator to any one person or group in a case of the deprivation of subsistence. The deprivations in question may in fact be "systemic": the product of the joint workings of individual actions and

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social institutions no one of which by itself caused the harm. But what follows from this is not that no one is responsible (since everyone is). What follows is that the distinction between duties to avoid (I) and duties to protect (II), which is relatively clear in the abstract, blurs considerably in concrete reality.²⁵ The division of labor between individual restraint and institutional protection can be worked out in any of several acceptable ways, the full details of which would go considerably beyond the scope of this book, but between the two kinds of duties, individuals ought not to be deprived by the actions (intentional or unintentional) of others of all hope of sustaining themselves.

This means, however, that duties to protect (II) are not simply secondary duties to enforce the primary duty to avoid (I). We can mark as II-1 the duties to protect that are merely secondary duties to enforce the duty to avoid. But duties to protect also encompass the design of social institutions that do not leave individuals with duties to avoid, the fulfillment of which would necessitate super-human qualities. This task of constructing institutions can be marked as II-2. In the original example of the flower contract, some would judge that the peasant receiving the offer to switch out of food production, in the circumstances stipulated, could reasonably have been expected to foresee the consequences of the switch and to refrain from making it. But it is probably more realistic neither to expect him to have the information and comprehension necessary to foresee the consequences nor to expect him to choose not to reduce his own insecurity—and certainly an example could readily be constructed in which an individual could not reasonably be expected to know in advance the probable bad consequences for others of his or her action or to give them more weight than improvements in his or her own precarious situation.²⁶

For such cases, in which individual restraint would be too much to ask, the duty to protect (II-2) includes the design of laws and institutions that avoid reliance upon unreasonable levels of individual self-control. Many actions that are immoral ought nevertheless not to be made illegal. But one of the best possible reasons for making an act illegal is its contributing to harm as fundamental as the deprivation of someone's last available means of subsistence. And a number of intermediate steps between total

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prohibition and complete tolerance of an action are possible, such as tax laws that create disincentives of various strengths against the kind of action that would contribute to the deprivation of subsistence from others and create alternative sources of increased economic security for oneself. Social institutions must, at the very least, be designed to enable ordinary human beings, who are neither saints nor geniuses, to do each other a minimum of serious harm.

In sum, then, we find that the fulfillment of a basic right to subsistence involves at least the following kinds of duties:

- I. To avoid depriving.
- II. To protect from deprivation
 1. By enforcing duty (I) and
 2. By designing institutions that avoid the creation of strong incentives to violate duty (I).
- III. To aid the deprived
 1. Who are one's special responsibility,
 2. Who are victims of social failures in the performance of duties (I), (II-1), (II-2) and
 3. Who are victims of natural disasters.

THE SYSTEMATIC INTERDEPENDENCE OF DUTIES

Fulfillment of a basic right (and, I think, of most other moral rights as well) requires, then, performance by some individuals or institutions of each of these three general kinds of correlative duties. Duties to avoid depriving possibly come closest to failing to be essential, because duties to protect provide for the enforcement of duties to avoid. Even if individuals, organizations, and governments were otherwise inclined to violate rights to security, for example, by failing to fulfill their respective duties to avoid, forceful fulfillment of duties to protect by whomever they fell upon—presumably a national government—could probably produce behavior in compliance with duties to avoid. But reliance on duties to protect rather than duties to avoid would constitute heavy reliance on something like national police power rather than self-restraint by individuals, corporations, and lower-level governments, and would involve obvious disadvantages even

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if—probably, especially if—the police power were adequate actually to enforce duties to avoid upon a generally reluctant society. Unfortunately this much power to protect would also be enormous power to deprive, which is a lesson about police that even dictators sometimes have to learn the hard way.

Since duties to avoid and duties to protect taken together have only one purpose, to prevent deprivations, the reverse of what was just described is obviously also possible: if everyone who ought to fulfill duties to avoid did so, performance of duties to protect might not be necessary. Law-enforcement agencies could perhaps be disbanded in a society of restrained organizational and individual behavior. But although reliance entirely upon duties to protect is undesirable even if possible, a safe complete reliance upon duties to avoid is most improbable in the absence of at least minimal performance of duties to protect. Organizations and individuals who will voluntarily avoid deprivation that would otherwise be advantageous to them because they know that their potential victims are protected, cannot be expected to behave in the same way when they know their potential victims are without protection.

The general conclusions about duties to avoid and duties to protect, then, are, first, that strictly speaking it is essential for the guarantee of any right only that either the one or the other be completely fulfilled, but, second, that for all practical purposes it is essential to insist upon the fulfillment of both, because complete reliance on either one alone is probably not feasible and, in the case of duties to protect, almost certainly not desirable.

What division of labor is established by one's account of duties between self-restraint and restraint by others, such as police forces, will obviously have an enormous effect upon the quality of life of those living in the social system in question. I do not want to pursue the questions involved in deciding upon the division, except to note that if either duties to avoid or duties to protect are construed too narrowly, the other duty then becomes unrealistically broad. For example, if a government, in the exercise of its duty to protect, fails to impose constraints upon agribusinesses designed to prevent them from creating malnutrition, the prevention of malnutrition will then depend upon the self-restraint of the agribusinesses. But much evidence suggests that individual

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agribusinesses are unwilling or unable to take into account the nutritional effect of their decisions about the use of land, local credit and capital, water, and other resources. This is especially true if the agribusiness is producing export crops and most especially if it is investing in a foreign country, the nutritional level of whose people is easily considered irrelevant.²⁷ If indeed a particular type of corporation has demonstrated an inability to forgo projects that produce malnutrition, given their setting, it is foolish to rely on corporate restraint, and whichever governments have responsibility to protect those who are helpless to resist the corporation's activity—host governments, home government or both—will have to fulfill their duties to protect. If, on the other hand, the corporations would restrain themselves, the governments could restrain them less. How to work this out is difficult and important. The present point is simply that between the bearers of the two duties, the job of preventing deprivation ought to get done, if there is a right not to be deprived of whatever is threatened. And the side that construes its own role too narrowly, if it actually has the power to act, may be as much at fault for contributing to the violation of rights as the side that fails to take up all the resulting slack.

However, as I have already indicated, the duty to protect ought not to be understood only in terms of the maintenance of law-enforcement, regulatory, and other closely related agencies. A major and more constructive part of the duty to protect is the duty to design social institutions that do not exceed the capacity of individuals and organizations, including private and public corporations, to restrain themselves. Not only the kinds of acute threats of deprivation that police can prevent, but the kinds of chronic threats that require imaginative legislation and, sometimes, long-term planning fall under the duty to protect.²⁸

Nevertheless, it is duties to aid that often have the highest urgency, because they are often owed to persons who are suffering the consequences of failures to fulfill both duties to avoid and duties to protect, that is, they are duties of type III-2. These people will have been totally deprived of their rights to subsistence if they are then not aided either. This greater urgency does not, of course, mean that duties to aid are more compelling overall than the first two types of duty, and indeed it is specifically against

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duties to aid that complaints that the correlative duties accompanying subsistence rights are too burdensome may seem most plausible. It is important to notice that to the extent that duties to avoid and to protect are fulfilled, duties to assist will be less burdensome. If the fulfillment of duties to protect is sufficiently inadequate, duties to assist may be overwhelming and may seem unrealistically great, as they do today to many people. For example, because the Dutch colonial empire failed to protect the people of Java against the effects of the Dutch schemes for agricultural exports, the nutritional problems of the majority of Indonesians today strike some people as almost beyond all solution.²⁹ The colossal failure of the Dutch colonial government in its duties to protect (or, even, to avoid deprivation) has created virtually Sisyphean duties to aid. These presumably fall to some degree upon the Dutch people who are today still profiting from their centuries of spoils. But whoever precisely has these duties to aid—there are plenty to go around—their magnitude has clearly been multiplied by past dereliction in the performance of the other two kinds of duties by the Dutch, among others. We will return in chapter 5 to some aspects of the difficult question of how to allocate duties to aid, especially when (chapter 6) they cross national boundaries.

This much, however, is already clear. The account of correlative duties is for the most part a more detailed specification of what the account of rights calls social guarantees against standard threats. Provisions for avoidance, protection, and aid are what are needed for a reasonable level of social guarantees. Making the necessary provisions for the fulfillment of subsistence rights may sometimes be burdensome, especially when the task is to recover from past neglect of basic duties. But we have no reason to believe, as proponents of the negative/positive distinction typically assert, that the performance of the duties correlative to subsistence rights would always or usually be more difficult, more expensive, less practicable, or harder to “deliver” than would the actual performance of the duties correlative to the rights that are conventionally labeled negative and that are more often announced than in fact fulfilled. And the burdens connected with subsistence rights do not fall primarily upon isolated individuals who would be expected quietly to forgo advantages to themselves for the sake

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of not threatening others, but primarily upon human communities that can work cooperatively to design institutions that avoid situations in which people are confronted by subsistence-threatening forces they cannot themselves handle. In spite of the sometimes useful terminology of third parties helping first parties against second parties, etc., it is worth noting, while assessing the burden of subsistence duties, that the third-party bearers of duties can also become the first-party bearers of rights when situations change. No one is assured of living permanently on one side of the rights/duties coin.

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1. See the Introduction.
2. For a forceful re-affirmation of this view in the current political context (and further references), see Hugo Adam Bedau, "Human Rights and Foreign Assistance Programs," in *Human Rights and U.S. Foreign Policy*, ed. by Peter G. Brown and Douglas MacLean (Lexington, Mass: Lexington Books, 1979), pp. 29-44. Also see Charles Frankel, *Human Rights and Foreign Policy*, Headline Series No. 241 (New York: Foreign Policy Association, 1978), especially pp. 36-49, where Frankel advanced a "modest list of fundamental rights" that explicitly excluded economic rights as "dangerously utopian." A version of the general distinction has recently been re-affirmed by Thomas Nagel—see "Equality," in *Mortal Questions* (New York: Cambridge University Press, 1979), pp. 114-115. An utterly unrealistic but frequently invoked version of the distinction is

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in Maurice Cranston, *What Are Human Rights?* (London: The Bodley Head, 1973), chapter VIII. An interesting attempt to show that the positive/negative distinction is compatible with economic rights is John Langan, "Defining Human Rights: A Revision of the Liberal Tradition," Working Paper (Washington: Woodstock Theological Center, 1979). For a provocative and relevant discussion of "negative responsibility" (responsibility for what one fails to prevent), see Bernard Williams, "A Critique of Utilitarianism," in *Utilitarianism: For & Against* (New York: Cambridge University Press, 1973), pp. 93 ff.

3. Naturally my use of the same argument for the basic status of both security and subsistence is at least an indirect challenge to (1) (b). No question is raised here, however, about (1) (a): the thesis that subsistence and security are sharply distinguishable. People who should be generally sympathetic to my fundamental thesis that subsistence rights are basic rights, do sometimes try to reach the same conclusion by the much shorter seeming route of denying that security and subsistence are importantly different from each other. For example, it is correctly observed that both security and subsistence are needed for survival and then maintained that both are included in a right to survival, or right to life. Though I am by no means hostile to this approach, it does have three difficulties that I believe can be avoided by my admittedly somewhat more circuitous path of argument. First, it is simply not correct that one cannot maintain a clear and useful distinction between security and subsistence, as, in fact, I hope to have done up to this point. Second, arguments for a general right to life that includes subsistence rights appear to need some premise to the effect that the right to life entails rights to at least some of the means of life. Thus, they face the same "weakness of too much strength"—straining credulity by implying more than most people are likely to be able to believe—that we tried to avoid at the end of chapter 1. A right-to-the-means-of-life argument might be able to skirt the problem equally well by using a notion of a standard threat to life, analogous to our notion of a standard threat to the enjoyment of rights, but this alternative tack seems, at best, no better off. Third, the concept of a right to life is now deeply infected with ambiguities concerning whether it is a purely negative right, a purely positive right, or, as I shall soon be maintaining with regard to both security and subsistence, an inseparable mixture of positive and negative elements. The appeal for many people of a right to life seems to depend, however, upon its being taken to be essentially negative, while it can fully include subsistence rights only if it has major positive elements.

4. I think one can often show the implausibility of an argument by an exhaustive statement of all the assumptions it needs. I have previously

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attempted this in the case of one of John Rawls's arguments for the priority of liberty—see “Liberty and Self-Respect,” *Ethics*, 85:3 (April 1975), pp. 195-203.

5. I have given a summary of the argument against 3 and arguments against thinking that either the right to a fair trial or the right not to be tortured are negative rights in “Rights in the Light of Duties,” in Brown and MacLean, pp. 65-81. I have also argued directly against what is here called 2b and briefly introduced the account of duties presented in the final sections of this chapter. My goal, which I have no illusions about having attained, has been to do as definitive a job on positive and negative rights as Gerald C. MacCallum, Jr. did on positive and negative liberty in his splendid article, “Negative and Positive Freedom,” *Philosophical Review*, 76:3 (July 1967), pp. 312-334.

6. See note 3 above.

7. Elsewhere I have briefly queried the moral significance of the action/omission distinction—see the essay cited in note 5 above. For a fuller discussion, see Judith Lichtenberg, “On Being Obligated to Give Aid: Moral and Political Arguments,” Diss., City University of New York, 1978.

8. In FY 1975 in the United States the cost of the “criminal justice system” was \$17 billion, or \$71 per capita, *New York Times*, July 21, 1977, p. A3. In several countries that year the total annual income was less than \$71 per capita. Obviously such isolated statistics prove nothing, but they are suggestive. One thing they suggest is that adequate provisions for this supposedly negative right would not necessarily be less costly than adequate provisions for some rights supposed to be positive. Nor is it evident that physical security does any better on what Frankel called the test of being “realistically deliverable” (45) and Cranston called “the test of practicability” (66). On Cranston’s use of the latter, see chapter 4.

9. “To have a right, then, is, I conceive, to have something which society ought to defend me in the possession of”—John Stuart Mill, *Utilitarianism* (Indianapolis: Bobbs-Merrill Co., 1957), p. 66 (chapter V, 14th paragraph from the end).

10. This is not a point about ordinary language, in which there is obviously a significant difference between “leave me alone” and “protect me against people who will not leave me alone.” My thesis is that people who are not already grinding axes for minimal government will naturally and reasonably think in terms of enjoying a considerable degree of security, will want to have done whatever within reason is necessary, and will recognize that more is necessary than refraining campaigns—campaigns urging self-restraint upon would-be murderers, muggers, rapists, et al. I am of course not assuming that existing police and penal institutions are

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the best forms of social guarantees for security; I am assuming only that more effective institutions would probably be at least equally complex and expensive.

11. Therefore, as we shall see below, the complete fulfillment of a subsistence right may involve not the actual provision of any aid at all but only the performance of duties to avoid depriving and to protect against deprivation.

12. The literature on underdeveloped countries in fact abounds in actual cases that have the essential features of the so-called hypothetical case, and I have simply presented a stylized sketch of a common pattern. Most anecdotes are in the form of "horror stories" about transnational corporations switching land out of the production of the food consumed by the local poor. See, for example, Robert J. Ledogar, *Hungry for Profits: U.S. Food and Drug Multinationals in Latin America* (New York: IDOC, 1976), pp. 92-98 (Ralston Purina in Colombia) and Richard J. Barnet and Ronald E. Müller, *Global Reach: The Power of the Multinational Corporations* (New York: Simon and Schuster, 1974), p. 182 (carnations in Colombia). For a gargantuan case on a regional scale involving cattle-ranching, see Shelton H. Davis, *Victims of the Miracle: Development and the Indians of Brazil* (New York: Cambridge University Press, 1977). To a considerable extent the long-term development policy of Mexico for at least thirty of the last forty years has followed this basic pattern of depriving the rural poor of food for subsistence for the sake of greater agricultural production of other crops—see the extremely careful and balanced study by Cynthia Hewitt de Alcantara, *Modernizing Mexican Agriculture: Socioeconomic Implications of Technological Change 1940-1970*, Report No. 76.5 (Geneva: United Nations Research Institute for Social Development, 1976); and Judith Adler Hellman, *Mexico in Crisis* (New York: Holmes & Meier Publishers, Inc., 1978), chapter 3. For a sophisticated theoretical analysis of some of the underlying dynamics, see Jeffery M. Paige, *Agrarian Revolution: Social Movements and Export Agriculture in the Underdeveloped World* (New York: Free Press, 1975), which has case studies of Angola, Peru, and Vietnam.

13. That is, they are conceptually distinct; whether this distinction makes any moral difference is another matter. See above, note 7, and the distinctions at the beginning of this chapter.

14. The increasingly frequent and facile appeal to "overpopulation" as a reason not to prevent preventable starvation is considered in chapter 4.

15. This much of the analysis is derived from the following important article: Onora O'Neill, "Lifeboat Earth," in *World Hunger and Moral Obligation*, edited by William Aiken and Hugh La Follette (Englewood

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Cliffs: Prentice-Hall, Inc., 1977), pp. 140-164. I return to discussion of the causal complexity of such cases below, pp. 58-60.

16. For example, land-use laws might prohibit removing prime agricultural land from food production. Alternatively, land might be allowed to be used in the manner most beneficial to the national balance of payments with tax laws designed to guarantee compensating transfers to increase the purchasing power of the villagers (e.g., food stamps), etc. I return in chapter 5 to the question of how to apportion the duties to prevent such social disasters.

17. There are of course non-human threats to both security and subsistence, like floods, as well. And we expect a minimally adequate society also to make arrangements to prevent, to control, or to minimize the ill effects of floods and other destructive natural forces. However, for an appreciation of the extent to which supposedly natural famines are the result of inadequate social arrangements, see Richard G. Robbins, *Famine in Russia 1891-92* (New York: Columbia University Press, 1975); and Michael F. Lofchie, "Political and Economic Origins of African Hunger," *Journal of Modern African Studies*, 13:4 (December 1975), pp. 551-567. As Lofchie says: "The point of departure for a political understanding of African hunger is so obvious it is almost always overlooked: the distinction between drought and famine. . . . To the extent that there is a connection between drought and famine, it is mediated by the political and economic arrangements of a society. These can either minimize the human consequences of drought or accentuate its effects" (553). For a demonstration that the weather and other natural factors actually played fairly minor roles in the Great Bengal Famine, see the analysis by Amartya Sen cited in note 17 to chapter 4, and chapter 4 generally. To treat the *absence* of adequate social arrangements as a cause of a famine precipitated by a natural event like a drought or a flood, as these writers and I do, is to assume that it is reasonable to have expected the absent arrangements to have been present.

18. See note 12 above.

19. See below, chapter 7, notes 26-28.

20. Richard R. Fagen, "The Carter Administration and Latin America: Business as Usual?" *Foreign Affairs*, 57:3 (America and the World 1978), pp. 663-667. These policies are very similar to those imposed as conditions for loans by the International Monetary Fund. See William Goodfellow, "The IMF and Basic Human Needs Strategies," Paper prepared for Seminar on "Basic Human Needs: Moral and Political Implications of Policy Alternatives," Woodstock Theological Center, Georgetown University, February 26, 1979; mimeo., p. 4.

With Fagen's analysis, compare Guillermo A. O'Donnell, *Modern-*

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ization and Bureaucratic-Authoritarianism, Politics of Modernization Series, No. 9 (Berkeley: University of California, Institute of International Studies, 1973); Fernando Henrique Cardoso and Enzo Faletto, *Dependency and Development in Latin America*, expanded and emended version (Berkeley: University of California Press, 1979), pp. 177-216; and Albert O. Hirschman, "The Turn to Authoritarianism in Latin America and the Search for Its Economic Determinants," in David Collier, ed., *The New Authoritarianism in Latin America* (Princeton: Princeton University Press, 1979), pp. 61-98. Also see Steven Jackson, Bruce Russett, et al., "An Assessment of Empirical Research on *Dependencia*," *Latin American Research Review*, 14:3 (1979), pp. 7-28.

21. On whether an adequate definition can be literally exceptionless, see note 2 to chapter 1.

22. I take the need for the qualification "not necessary to the satisfaction of one's own basic rights" to be fairly obvious. However admirable self-sacrifice may be, it is surely not a basic duty owed to people generally, and the surrender of one's right to subsistence—or security—would in many circumstances constitute a literal sacrifice of oneself, that is, one's life. Unfortunately, the content of a duty does not dictate the identity of its bearers. Chapter 5 discusses how to assign in a reasonable way the responsibility for fulfilling various duties.

23. How to bring transnational corporations under some constraints in order to prevent great social harms, like violations of basic rights, is one of our great political challenges. See the discussion in chapter 7 of recommendation (4) and the relevant notes.

24. I am, of course, not proposing that we start calling it murder, but I am proposing that we acknowledge the parallels and act in appropriately parallel ways.

25. Without becoming anti-intellectual, or even atheoretical, we theorists might remember that a crystal-clear abstract distinction may not only have no positive practical value but may sometimes contribute to vice. Writing about an entirely different matter, Barrie A. Paskins has put the general point eloquently: "We can imagine and describe cases in which we would think torture justified and unjustified. We can state the grounds on which we are making the discrimination. But what we cannot do is this: *we cannot provide for ourselves, or for those who must act for us in real situations, any way of making our notional distinctions in reality*. What might be claimed about the imaginary example is not that something significantly analogous could not occur but that in reality we cannot enable those who must act to recognize the case for what it is and other cases, by contrast, for what they are. In a real situation we can never be certain that the case in hand is of this kind rather than another.

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A too vivid imagination blinds us to the dust of war that drifts into the interrogation centre." Barrie A. Paskins, "What's Wrong with Torture?" *British Journal of International Studies*, 2 (1976), p. 144. I think this is a profound methodological point with strong implications concerning the now virtually incorrigible habit among moral and political philosophers of relying upon imaginary cases and concerning the "strict compliance" situations and "ideal theory" discussed by John Rawls and Kantians generally. I am trying to develop the methodological point in an essay with the working title, "Extreme Cases."

26. On the rationality of peasants, see James C. Scott, *The Moral Economy of the Peasant: Rebellion and Subsistence in Southeast Asia* (New Haven: Yale University Press, 1976), chapters 1 and 2.

27. See note 12 above.

28. I am indebted to John Langan for having emphasized this point. For a different argument, see his paper cited in note 2 above, p. 25.

29. For the classic account, see Clifford Geertz, *Agricultural Involution: The Processes of Ecological Change in Indonesia* (Berkeley: University of California Press for the Association of Asian Studies, 1963), chapters 4 and 5. Although various aspects of Geertz's analysis are naturally no longer accepted, the main points relevant here still stand.

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In 1981, the playwright Zdena Tominová, on an extended visit to the West from her home in communist Czechoslovakia, came to Dublin for a lecture. A critic of her country's political regime, she was the spokesperson for Charter 77, one of the first prominent dissident organizations to make international human rights activism exciting. In the prior few years, it had drawn many Westerners toward the whole notion of basic personal entitlements under global law on which that pioneering activism was based. The United Nations had issued the Universal Declaration of Human Rights (1948) decades before; now, it became famous and reoriented moral consciousness and practice. But Tominová explained that, as a beneficiary of her communist state's policies, she was still grateful for the ideals of her youth and its politics of material equality. "All of a sudden," she remembered of the leveling of classes she lived through as a child, "I was not underprivileged and could do everything."¹

Since then, Tominová reported, and especially after the suppression of the Prague spring reforms in 1968, the scales had fallen from her eyes, and she had learned to denounce her state's oppression. For her membership in Charter 77, she had been beaten on the street and her head was pounded into the pavement. But even when her government suggested she leave for a while to avoid imprisonment, Tominová did not renounce her citizenship (although it was revoked soon after her talk). She even remained true to the socialism that had meant so much to her generation. "I think that if this world has a future," she explained to her Irish audience, "it is as a Socialist society, which I understand to mean a society where nobody has

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priorities just because he happens to come from a rich family.” And this socialism was not just a local ideal. “The world of social justice for all people has to come about,” she added.²

Tominová was clear that socialism could not provide an alibi for the deprivation of human rights. But by the same token, for her nation or for the world, the newer interest in human rights could not serve as an excuse to abandon material equality. Decades later, Tominová’s speech looks ironic. Data show that until the late twentieth century, people were overwhelmingly more likely to utter the word *socialism* than the phrase *human rights* in every language until the one began to decrease and the other to spike precisely when Charter 77 was founded. The lines of the terms’ relative popularity crossed precisely when the Cold War ended in 1989. Notwithstanding Bernie Sanders’s recent candidacy for the American presidency under a socialist banner, our era of market fundamentalism continues almost as if socialism had never been—and as if, in the realm of ideals, human rights alone comprise the highest standards of a just society and world.³

The effect is hardly a matter of the history of language. In different ways in different places, not least in Tominová’s Eastern Europe, human rights surged as a new political economy triumphed. To the extent that human rights morality and law decree economic and social protections, locally or globally, it is as a guarantee of sufficient provision, not a constraint on inequality. After a long period of negligence, attention to inequality spiked after 2008, and outrageous statistics marred the front pages as newspapers reported often accelerating and always wide inequality in every nation. Stories ricocheted around the internet noting that, even in the midst of less penury than ever in world history, a mere eight men controlled more wealth than half the inhabitants of the planet—several billion people.

The age of human rights has not been kind to full-fledged distributive justice, because it is also an age of the victory of the rich. The free market in its most unfettered form has its staunch defenders, but even those who hope to chasten and guide it have generally dropped material equality as a goal, prioritizing more basic and minimal aspirations to save the poor. It was a sharp break from the highest ideals of our immediate ancestors, who passionately invested in distributive equality, sometimes on pain of apologizing for vast historical wrongs to achieve it. Today, in contrast, people invest their hopes (and money) in human rights, looking the other way when vast inequality soars. Tominová’s dream of avoiding a forced choice

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between indispensable human rights and broader distributive fairness has been shattered—but there is no reason to accept the outcome.

NO ONE OUGHT to be treated differently because of the kind of person they are—on the basis of gender or race, for example. This status equality, however honored in the breach, is more accepted than ever before and thankfully so. It is also a matter of greater consensus than ever that the high and equal status of human beings entitles them to some basic political freedoms, such as the rights to speak and to be free from torture. When it comes to what share people ought to get of the good things in life, however, consensus is much harder to achieve.⁴

Compared to how status equality or political rights became imaginable, the history of economic and social rights (often simply called social rights) has been neglected by historians. But there is no way to study them apart from what one might call the distributional imagination and political economy of human rights. Social rights were part of the canon of ideals consecrated in the Universal Declaration, and for a while they have been central to organized rights activism. But strictly speaking, human rights do not necessarily call for a modicum of distributive equality. And a concern for human rights, including economic and social rights, has risen as moral commitments to distributive equality fell.

It is therefore a fundamental task to chart not merely the history of economic and social rights but also how they fit in the broader struggle, across modern history, to argue and make room for two different imperatives of distribution—*sufficiency* and *equality*. Even when social rights have been given their due, the ideal of material equality has lost out in our time. Before the age of human rights came, dreams of equality were taken quite seriously, both nationally and globally. In the age of human rights, the pertinence of fairness beyond sufficiency has been forgotten.

Sufficiency and equality originally came together and contended with each other as distinctive ideals of the first national welfare state during the French Revolution. And it is critical to notice that they are different. Sufficiency concerns how far an individual is *from having nothing* and how well she is doing *in relation to some minimum of provision* of the good things in life. Equality concerns how far individuals are *from one another* in the portion of those good things they get. The ideal of sufficiency commands that, whether as an operating principle of how things are allocated or after the

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fact of their initial distribution, it is critical to define a bottom line of goods and services (or money, as in proposals of a universal basic income) beneath which no individual ought to sink. It singles out whether individuals, in relation to complete penury, have reached a defined line of adequate provision. If sufficiency is all that matters, then hierarchy is not immoral. “I care not how affluent some may be, so long as none be miserable in consequence of it,” Thomas Paine wrote as early as 1796, expressing this exclusionary commitment to sufficiency. Enough, in this view, is enough.⁵

From the perspective of the ideal of equality, however, it does not matter only that everyone gets enough and the worst off avoid indigence (not to mention homelessness, starvation, and illness). For the egalitarian, morality rules out a society in which, even if the most basic needs are met, enormous hierarchy can still exist. According to this stance, at least a modicum of equality in the distribution of the good things in life is necessary. Otherwise it might turn out that two societies emerge: different ways of life, the wealthy towering over their economic inferiors, with morality satisfied so long as basic needs are fulfilled. Not merely a floor of protection against insufficiency is required, but also a ceiling on inequality, or even a commitment to a universal middle class. No commitment to absolute equality of material outcomes is involved necessarily, but you cross the border from advocacy of sufficiency to advocacy of equality if, beyond some minimum, you insist that it matters ethically how far the rich tower over the rest, even if the rest escape from indecency, however defined. Enough, in this view, is not enough.

The distinction is essential. The imperatives of sufficiency and equality, of course, are not necessarily in stark competition, even in theory. Except for many premodern religious and modern revolutionary ascetics, almost all egalitarians in history have shown great regard for the value of sufficient provision too. But like Paine in the eighteenth century or the philosopher Harry Frankfurt today, a great many more supporters of sufficiency adopt their ideal exclusively, compared to egalitarians who do not generally reject a standard of minimum distribution. In fact, even if it is entirely possible for those who care about sufficiency simply to prioritize it, insisting that they value equality as a postponed next step, it is far more common to believe that the goal of achieving sufficiency depends on embracing *more* inequality.⁶

It is also frequently believed that sufficiency and equality are interdependent, as moral ideals to be judged right or wrong not solely in theory but also in their real life interaction. If it turns out to be true that those who

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have their most basic needs met through sufficient provision are likelier to achieve equal amounts of the good things in life under their own power, then a difficult choice in theory evaporates in practice. Or else, if you adjust upward what counts as a sufficient amount of the things that matter most, you may come nearer and nearer to indirectly becoming an egalitarian. In effect, somebody has to pay for the high levels of need you have defined upward, and the likelihood is that the rich will inevitably have to be made to descend closer to the level of the ascending poor to do so.

But before concluding too quickly that there is no practical loss in emphasizing sufficiency alone or first, it is critical to remember how easy it is to argue for the opposite conclusions—especially today. Though one might hope that sufficiency (especially if defined upward) might lead to equality, it is equally possible that the poor will come closer to sufficient provision as the rich reap ever greater gains for themselves. In practice, sufficiency may get along better with hierarchy than with equality. It is also increasingly credible that a concern with equality is a better way to achieve sufficiency in practice—or at least that our desire to provide a sufficient minimum to the worst off is under threat to the extent that a frontally egalitarian politics is dropped. What if there is no way to win political support for sufficient goods for the destitute in society, or around the world, unless more equal circumstances are achieved for its members, especially if people feel too different from their fellows to institute guarantees even for a basic minimum? Donald Trump was elected president of the United States, according to such a story, when the right to the most basic health care for those without means became hostage to a broader sense of unfairness among the working and middle classes. Europeans have widely opted for populist leaders, with potentially widespread consequences for basic rights, not out of penury but because they stagnate even as the wealthy soar ever higher. It might be that you have to strive at more equal society even to get the most vital needs met.

The distinction between sufficiency and equality allows us to see how profoundly the age of human rights, while a good one for some of the worst off, has mainly been a golden age for the rich. The meaning of human rights has slowly transformed as egalitarian aspiration has fallen. For a long period, such aspiration had not only remained strong but spread from local communities to the entirety of the world. The French Revolution's dream of a welfare state offering sufficient provision as well as egalitarian citizenship returned—at least in some places—when the Great Depression and

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World War II ushered in new kinds of national communities. In that era, human rights partook of the ideal of distributive equality within nations. In our day, human rights have instead become associated (along with the excesses of terrible leaders and the horrors of heartrending atrocity) with global sufficiency alone. Expanded in coverage, human rights have become a worldwide slogan in a time of downsized ambition. Across time, in other words, the spirit of human rights and the political enterprise with which people associate them has shifted from nationally framed egalitarian citizenship to a globally scaled subsistence minimum. Human rights have become our language for indicating that our cosmopolitan aspirations are strong, not stopping at the borders of our particular nation. They have been a banner for campaigns against discriminatory treatment on the basis of gender, race, and sexual orientation. But they have also become our language for indicating that it is enough, at least to start, for our solidarity with our fellow human beings to remain weak and cheap. To a startling extent, human rights have become prisoners of the contemporary age of inequality. The primary goal of what follows is to chart the evolution of human rights to illustrate how—inadvertently and unnecessarily for most of their advocates, I believe—they reached this state of imprisonment.

THE IDEALS of sufficiency and equality coexisted and clashed long before the twentieth century. At least as far back as the French Revolution, it had been possible to formulate socioeconomic rights for individuals as an obligation of sufficient provision. But just as far back, sufficiency came linked to equality. And after the intervening libertarian century between the French events and the rise of the national welfare state, their relationship was cemented. For all the interest of the two ideals' prehistory, from classical antiquity to the nineteenth century, the welfare state's appearance in the middle of the twentieth century was the pivotal event in their careers.

The notion of human rights was nowhere near as prominent in the ascendancy of national welfare as in our own neoliberal age. But for those who championed them, human rights were redefined in the ecology of the new welfare states of the era that compromised between sufficiency and equality, resolving to pursue both at the same time. Just as the notion of individual rights had often conformed to the classical liberal political economy of the nineteenth century, protecting the freedom of contract and person and the sanctity of property and transaction, so now they were reimaged for a new age of national welfare, characteristically in the Universal Declaration

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of 1948. Even as skeptics worried in the 1940s that rights could not do the job of making people more equal than before, others insisted that they bolstered that very mission.

The Universal Declaration, cited today to justify identification with egregious suffering at the hands of states abroad, is best understood as canonizing political and social rights as part of a consensus that citizens required new and powerful states at home. Those welfare states would provide the new citizenship that survivors of the Great Depression and World War II believed they deserved, and the Universal Declaration would canonize that mode of citizenship. Social rights, in short, emerged as part of a larger egalitarian package. That sufficiency and equality were so often understood to be different emphases in a unified project is the main reason to look back at what the welfare states attempted and achieved. After all, their work not only made progress in helping the indigent, for all their compromises and limitations; they were also the sole political enterprises that, to date, have ever secured a modicum of distributional equality, in particular constraining the dominance of the wealthiest.⁷

Yet they were achieved in only a few places, and in tarnished form, because they subordinated so many on grounds of gender, race, or other privilege. Most of the world's peoples did not have welfare states of any kind, because they lived under empires. The golden age of the welfare state in the developed world did not forbid the global empires of the European states and the global hegemony of the United States at the apex of its power—and neither did the Universal Declaration. As decolonization proceeded all the same, the bulk of humankind dreamed of the social citizenship that the richest countries had now begun to establish. The new states born of the struggle against empire tended to dream bigger when it came to their own national welfare, invoking egalitarian ideals (and adopting socialist programs) much more readily. More radically, their leaders concluded that it would not be possible to achieve a forum of distributive justice at home so long as an exploding hierarchy of growth and wealth remained on the world stage. The idea of “global justice” was born.

After World War II, the Swedish economist Gunnar Myrdal called for a “welfare world” to be built on top of the welfare states. The era of decolonization made this an exciting prospect. For anticolonial icons, egalitarian aspiration had even greater purchase than it had in the original welfare states and greater purchase than concern for a sufficient minimum did. And they advanced a pioneering vision of globally egalitarian distribution.

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But in the decolonizing states, unlike most places in the economically developed world—where after World War II, sufficiency and equality were both advanced in circumstances of material abundance—the record was far worse, and their demand for a welfare world was certainly never granted by the powerful and wealthy. Out of the wreckage, sufficiency was hived off, and a new and unprecedented ethic of global antipoverty beckoned for our time. Philosophers thinking about the ethics of world distribution offer a valuable aperture on how this happened: The human rights revolution of our time is bound up with a global concern for the “wretched of the earth,” but not in the egalitarian sense that the socialist and postcolonial promoters of that phrase originally meant.

Instead of global justice, market fundamentalism triumphed starting in the 1970s, alongside the new visibility of a more cosmopolitan and transnational understanding of human rights. And once again, human rights conformed to the political economy of the age, not defining it but reflecting it. At different times and in different ways in different places, this dependent relationship was reestablished as the dream of global welfare was spurned and as national welfare states increasingly came under attack. With precedents in the 1970s and after, the first decade after 1989 stands out as the one in which human rights politics surged even as market fundamentalism was consolidated worldwide. Communism died in its original home, and the Chinese state itself marketized. In doing so, it came to fit a global pattern, tolerating greater inequality even as it rescued more human beings from poverty—thereby raising them to the floor of sufficiency protection to which their social rights entitled them—than have ever been helped this way by any other agent in world history.

The companionship between human rights and market fundamentalism was not inevitable. All the same, many factors conspired to bring it to pass. Human rights were cut off from the dream of globally fair distribution that the global south itself advocated during the 1970s. On this ruins of earlier ambition, a neoliberal campaign against welfare at every scale made human rights its hostages. It was not so much that both human rights and market fundamentalism were established on ethically individualist grounds and took the state (and especially the postcolonial state) not as a setting for a collectivist ethics but as a technical intermediary for achieving a global but individualist project. Rather, it was that human rights were extricated from their welfare state crucible and redefined. The attempt to mobilize economic and social rights has remained unimpressive since the end of the Cold War

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allowed such mobilization to begin, especially when constitutional judges and international nongovernmental pressure groups strove to enforce these rights. Worse, human rights lost their original connection with a larger egalitarian aspiration, focusing on sufficient provision instead.

It mattered greatly that the human rights of women and other especially oppressed groups were taken more seriously than ever before, overcoming the biases of the postwar welfare states and those of postcolonial nationalism and internationalism too. But even as aspirations to status equality advanced, distributive equality usually suffered. Despite ascending to geopolitical primacy in the middle of the twentieth century, America had bucked the dominant trend by failing to move to a welfare state. But its example—and its power—shaped the aspirations of a subsequent neoliberal age much more visibly. It was easier for market fundamentalists in America and elsewhere to obliterate whatever ceiling on inequality national welfare states had imposed and to vault the global rich higher over their inferiors than they had ever been. Meanwhile, the most visible ethical movement was struggling merely to build a global floor of protection for the worst off. As egalitarian ideals and practices died, the idea of human rights accommodated itself to the reigning political economy, which it could humanize but not overthrow.

IN THIS story of how human rights came to the world amid the ruins of equality, the main characters are those who were the most articulate, especially politicians and philosophers. They sometimes voiced popular ideals and practical commitment with clarity and depth. Philosophy in particular is indispensable, because it provides a proxy for understanding wider developments—which is not to say that intellectuals are commonly responsible for change, let alone that they succeed in playing the role of vanguards of the future. In their very attempt to raise existing causes from the earth-bound terrain of struggle into the empyrean of moral principle, thinkers often lose touch with the agents and movements that have done most to make the aspirations of social justice current. Intellectuals helped imagine credible ethical standards while also living a broader history that has seen the adoption of some ideals alongside the abandonment of others. As an intellectual and ideological history written out of dissatisfaction with mere sufficiency and committed to a more ambitious equality, what follows therefore pursues a dual agenda: It detects the ethical principle embedded in political action and the social imaginary, which thinkers often voice, and it also brings our ethics down to earth, showing how they exist in proximity

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to the politics that have inspired and obstructed them. There is no place to take sides about right and wrong except within history, as it rapidly changes from one day to the next. For the moment, at least, human rights history is worth telling because it reveals how partial our activism has become, choosing sufficiency alone as intractable crises in politics and economics continue to mount.

The outcomes pose a stark challenge to our highest ideals, which demand readjustment today. The human rights revolution certainly deserves credit for saving the ideal of social justice from the highly exclusionary form in which it emerged. Today few would countenance authoritarian welfare—even though authoritarians helped birth welfare states. And even democratic welfare states suffered manifold exclusions at the start, based on gender, race, and other factors. Even if they integrated distributive equality better than any political enterprise before or since, no nostalgia for the authoritarian or democratic welfare state is compelling if it means sacrificing one moral ideal to an equally important one. Status equality matters fully as much as distributive equality.⁸

But the reverse is also true, and recalling the distributive commitments of the welfare state therefore raises a series of questions to those who might otherwise celebrate their pluralism and tolerance in the age of human rights. Is the attention human rights allow on global sufficiency at fault for the explosion of inequality in many nations and (by some measures) globally too? Were there alternatives to the redefinition of human rights and their rise in our age as a global political language for long-distance but hollowed-out solidarity? Is there any way for human rights to return to their original relationship with distributive equality, or even—as Tominová wanted, echoing many postcolonial voices—to scale it up to the world stage?

There is no reason for human rights ideals to continue the accommodating relationship they have had with market fundamentalism and unequal outcomes. Human rights may well serve to indirectly indict the consequences of inequality when it threatens the minimum standards of liberty, security, and provision that human rights protect. This does not mean, however, that either human rights norms or the kinds of movements we have learned to associate with those norms—engaging in an informational politics of “naming and shaming,” operating in the professional mode, and prizing judges as ideal enforcers of basic norms—are up to the challenge of supplementing sufficiency with equality in theory or practice. I myself suspect that, since the preeminence of human rights ideals has occurred in a neo-

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liberal age, it is exceedingly unlikely that their usual representatives can find the portal to exit it on their own. Human rights advocates can work to extricate themselves from their neoliberal companionship, even as others mark their limitations, in order to restore the dream of equality to its importance in both theory and practice. If both groups are successful, they can save the ideal of human rights from an unacceptable fate: it has left the globe more humane but enduringly unequal.

5. Environmental human rights: a constructive critique

Peter D. Burdon*

1. INTRODUCTION

In the last sixty years, human rights have become the international moral currency and ‘umbrella’ under which all kinds of justice claims are articulated. Since the 1972 United Nations Conference on the Human Environment (the Stockholm Conference) human rights have also been used as both a legal tool and moral discursive strategy for protecting human health and well-being.¹ The extension of human rights to the environment has taken two dominant forms. First, it is held that human beings have a right to a healthy environment, i.e. a right to clean water and air, among others.² Second, that there are ecological limitations to human rights. While not yet implemented in ‘hard law’ the latter argument refers to the idea that individual freedom is not only determined by a social context – but also by an ecological context as determined by principles such as ecological integrity or planetary boundaries.³

Today, the idea of environmental human rights has growing international status⁴ and is often billed as ‘the only game in town’ for environmental protection.⁵ Yet, as I outline in detail below, commentators have voiced serious concerns about the efficacy of human rights for long-term protection.⁶ Further, scholars are beginning to examine

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¹ Note also that in 1968 the UN General Assembly passed a resolution identifying the relationship between the quality of the human environment and the enjoyment of basic rights.

² Within the first category I also include procedural rights. See B.H. Weston and D. Bollier, *Green Governance: Ecological Survival, Human Rights and the Law of the Commons* (Cambridge University Press 2013) 33–4.

³ K. Bosselmann, ‘Human Rights and the Environment: Redefining Fundamental Principles?’ in B. Gleeson and N. Low (eds), *Governance for the Environment: Global Problems, Ethics and Democracy* (Palgrave 2010) 118.

⁴ Weston and Bollier, above n 2, 27–49.

⁵ For a discussion of this point see K. Woods, *Human Rights and Environmental Sustainability* (Edward Elgar 2010) 8.

⁶ See for example B. Golder, ‘Theorising Human Rights’ in F. Hoffmann and A. Orford (eds), *The Oxford Handbook of International Legal Theory* (Oxford University Press 2014).

whether human rights actually perpetuate harm and crowd out alternative methods that go to the root causes of a problem.⁷

It is from within this growing critical literature that I situate my own examination of environmental human rights. Specifically, I draw on tools provided by social ecology, recent revisionist histories of human rights, Marxism and neo-Foucauldian theorists engaged in the critique of identity-based human rights.⁸ Naturally, there are important differences between these diverse subject areas and my own concern with environmental human rights. However, in bringing these analyses together I have tried to find common ground and to extract insights that I believe have broader implications than the authors may have originally intended or foreseen.

The chapter begins by examining the term ‘critique’ and outlining the purpose of my critical intervention. As I explain, critique should not be conflated with rejection. It is not my intention to ‘bash’ environmental human rights or to suggest that the project is without merit and should be abandoned. Rather, I adopt a perspective and method in this chapter that tries to reveal the underlying assumptions and preconditions upon which a discussion of environmental human rights rests. I am also interested in shining light on these assumptions and considering whether they aid or inhibit the goal of environmental protection. In this I adopt the perspective of a young Karl Marx who in his paper ‘For a Ruthless Criticism of Everything Existing’ argues that ‘we do not attempt to dogmatically ... prefigure the future but want to find the new world only through a criticism of the old’.⁹

Following this I argue that there are identifiable ‘root causes’ that underlie and are obscured from the particular manifestations of the environmental crisis. Drawing on the work of Murray Bookchin,¹⁰ I suggest that environmental exploitation mirrors and often works in conjunction with the myriad ways human beings exploit each other. This perspective is broad enough to encompass structural exploitation as evinced in systems like the law or the economy and also types of social power that concern human subjectivity. It can also describe various exploitative hierarchical relationships such as anthropocentrism, sexism, racism and capitalism. I contend that genuine projects for environmental protection need to engage with these hierarchies to be effective.

Following this I mount my critique of environmental human rights. I suggest that environmental human rights are a surface discourse and while they *may* offer protections for people in need (and through those people, parts of the environment) they have not been designed to address the underlying root causes of environmental harm. Moreover, I suggest that environmental human rights may actually solidify and perpetuate the underlying problems even as they offer some protection.

⁷ See for example W. Brown, “‘The Most We Can Hope For ...’: Human Rights and the Politics of Fatalism” 2004 *The South Atlantic Quarterly* 103(2/3): 451 at 461.

⁸ In particular, this chapter is influenced by the following works: M. Bookchin, *The Ecology of Freedom* (Cheshire Books 1982); K. Marx, ‘On the Jewish Question’ in R.C. Tucker (ed.), *The Marx-Engels Reader* (Norton 1978); S. Moyn, *The Last Utopia: Human Rights in History* (Belknap Press 2012); S. Moyn, *Human Rights and the Uses of History* (Verso 2014); and W. Brown, *States of Injury* (Princeton University Press 1995).

⁹ K. Marx, ‘For a Ruthless Criticism of Everything Existing’ in Tucker, above n 8, 13.

¹⁰ Bookchin, above n 8, 4.

In this chapter I explore three key implications of my critique in particular. The first concerns the way environmental human rights embody an anthropocentric logic that abstracts human beings from the environment and from each other. I suggest that this abstraction gets produced and re-inscribed in the political and legal discourse of human rights and in its application to particular circumstances. Second, I describe how contemporary human rights discourse represents a ‘last utopia’¹¹ in the political juncture which right wing Hegelian Francis Fukuyama termed ‘the end of history’.¹² Drawing on Samuel Moyn’s recent revisionist history of human rights,¹³ I consider how human rights have been used as a tool for repressing ‘radical politics’¹⁴ and how the language of human rights acts as a ‘colonising space’ that subsumes other discourses or modes of action.¹⁵ Finally, I draw attention to critical discourses that get displaced by environmental human rights – namely anti-capitalism and other alternatives to the modern market economy that are often presented under the heading of the ‘new economy’.¹⁶ I argue that the egoism of environmental human rights limits their ability to combat market capitalism and that environmental human rights risk being subsumed within a capitalist economic framework.

2. A CONSTRUCTIVE CRITIQUE

I begin this chapter by briefly addressing the topic of critique. Reinhart Kosellek contends that the term ‘critique’ emerged in Ancient Athens as the jurisprudential term for *krisis*.¹⁷ It is difficult for the postmodern compartmentalized subject fully to appreciate the holistic meanings that pertain to the term *krisis*. As expressed by the Greeks, *krisis* was identified with the art of making distinctions and with deliberative judgment.¹⁸ More generally, Wendy Brown suggests that *krisis* integrates ‘polis rupture, tribunal, knowledge, judgment, and repair at the same time that it links subject and object in practice’.¹⁹ *Krisis* also refers to a specific work that citizens must engage in – a *practice* of ‘sifting, sorting, judging and repairing’ the consequence of polis law and

¹¹ Moyn, above n 8, 1–5.

¹² F. Fukuyama, ‘The End of History’ (1989) *The National Interest* <<http://www.wesjones.com/eoh.htm>>.

¹³ Moyn, above n 8.

¹⁴ I use the term ‘radical’ to refer specifically to a kind of politics that goes to the ‘root’ of a problem.

¹⁵ Brown, above n 7, 461.

¹⁶ C. Kaufman, *Getting Past Capitalism: History, Vision, Hope* (Lexington Books 2012) 234.

¹⁷ R. Kosellek, *Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society* (Cambridge University Press 1988) 4. In contrast, Talal Asad argues that the terms ‘critique’ and ‘criticism’ emerged as French and English equivalents of each other. See Asad, ‘Free Speech, Blasphemy and Secular Criticism’ in T. Asad et al (eds), *Is Critique Secular? Blasphemy, Injury and Free Speech* (Townsend Press 2009) 21.

¹⁸ W. Brown, *Edgework: Critical Essays on Knowledge and Politics* (Princeton University Press 2005) 5.

¹⁹ W. Brown, ‘Introduction’ in Asad et al (eds), above n 17, 2009) 9. Since, in Athenian democracy, a defendant was also a citizen and Senate member, and the subset of the Senate

order.²⁰ Since this practice has an inherent restorative aspect (not necessarily acceptance), there was no such thing as ‘mere critique’ for the Greeks.²¹ Rather, the project of critique is to set the times right again by discerning and repairing a tear in justice through practices that are themselves exemplary of the justice that has been rent.²²

As the term ‘critique’ was integrated into Latin and the cultural traditions of broader Europe, the term lost much of its multifaceted holism. However, critique remained distinct from criticism for much of modernity, especially for seminal figures such as Marx.²³ Marx’s development of critique emerged from his interaction with ‘Young Hegelians’,²⁴ such as Bruno Bauer and Max Stirner, who criticized religion as an illusory consciousness that obscured the real and the true in human existence. While Marx initially identified as a ‘Young Hegelian’, he soon turned against it by distinguishing ‘criticism’, ‘mere criticism’ or ‘critical criticism’ from critique.²⁵

The objection Marx advanced against the Young Hegelians concerned the latter’s advocacy of criticism of religious illusion as the road to freedom. For them, if citizens and the State shed religious for rational consciousness, both would be liberated from error and achieve true liberation. Marx took an alternative approach drawing on (and yet transforming) Ludwig Feuerbach’s critique of religion.²⁶ Marx regarded religious belief not only as an error but also more fundamentally, as the symptom of an unhappy and unfree human condition. Put otherwise – the existence of religion was the sign of an unfree world, a world that ‘requires illusion’.²⁷ Thus, Marx characterizes God as ‘the illusory sun about which man revolves so long as he does not revolve around himself’.²⁸

Whether one accepts this argument or not, the methodological point that Marx sought to elucidate was the difference between criticism of religion as illusory and a *critique of the conditions* that produce religious consciousness. Mere criticism marks religion as false, while critique connects religious illusions to the specific reality that generates and necessitates their existence. Moreover, critique discerns in religion the desire for a better world where we are all ‘equal in the eyes of God’ and in which ‘the meek shall inherit the Earth’.²⁹ Thus for Marx, critique not only positions religion with reference to historical conditions, but also reads religion as *indirectly* containing within

constituting the jury also judged and sentenced the defendant, *krisis* referred to a scene in which the object, agent, process, and result of critique were intermingled.

²⁰ Ibid.

²¹ Ibid.

²² Brown, above n 18, 6.

²³ See also Kant’s method of critique as outlined in I. Kant, *Critique of Judgement* (Hackett Publishing Company 1987).

²⁴ The Young Hegelians, or Left Hegelians, were a group of German intellectuals who, after the death of Georg Wilhelm Friedrich Hegel in 1831, wrote and responded to his legacy.

²⁵ K. Marx, ‘Contribution to the Critique of Hegel’s Philosophy of Right’ in Tucker, above n 8, 54.

²⁶ L. Feuerbach, *The Essence of Christianity* (Cambridge University Press 2011)

²⁷ Marx, above n 25, 54.

²⁸ Ibid.

²⁹ Ibid.

it the aspirations of humanity against its suffering in the present. More generally, Marx founded his distinction between criticism and critique in the latter's ability to apprehend the real order of things and explain why this order is not immediately manifest but requires critique to be revealed.³⁰

Today the term critique has moved some distance from its use in ancient Greece and modernity. Used as a verb, 'critique' is often taken to convey polemical rejection or deconstructive analytic practices. However, following Marx's method, I think it is very important to revive the generative aspects of critique and to mark its distinction from rejection or abolition. Critique is not rejection or abolition. It is not about destroying the object that one is focused on. Rather, critique is an attempt critically to evaluate the premises, the preconditions and implications of something that may not be obvious or reveal itself in everyday self-description. It is a method that can be directed toward understanding what a problem symptomatizes or represents that is larger than itself.

The critique of environmental human rights that I present in this chapter should be understood in this light. It is not my intention to reject environmental human rights or to advocate that we abandon the project. Rather, it is an attempt to get at the implications, entailments and premises that we do not always see at the surface of the discourse. In this light, I would like to distinguish my project from that conventionally undertaken under the name 'critical legal studies' (CLS), whose proponents, while providing instructive analysis, have advocated for the abandonment of liberal rights discourse.³¹ In distancing myself from this aspect of CLS I find myself in almost complete agreement with Patricia Williams, who contends that such counsel from a position of relative privilege is both strategically naïve and a disavowal of cultural prerogatives.³² Indeed, in the context of the impending environmental crisis I maintain that individuals and communities should have the liberty to deploy whatever discursive strategy or law that is at their disposal to attain even modest (and perhaps temporary) protection.

3. IN SEARCH OF ROOT CAUSES

Oil spills, endangered species, ozone depletion and so forth are presented as separate incidents and the overwhelming nature of these events means that we seldom look deeper. However, these issues are analogous to the tip of an iceberg, they are simply the visible portion of a much larger entity, most of which lies beneath the surface, beyond our daily inspection.³³

³⁰ Marx, above n 9, 15. Here a young Marx reveals his early 'idealism' as influenced by Hegel and Feuerbach: 'Our motto must therefore be: Reform of consciousness not through dogmas, but through analyzing the mystical consciousness, in waking it from its dream about itself, in explaining to it the meaning of its own actions.'

³¹ Significant articles on this subject include M. Tushnet, 'An Essay on Rights' 1984 *Texas Law Review* 62: 1363 and A. Hutchinson and P. Monahan, 'The Rights' Stuff: Roberto Unger and Beyond' 1984 *Texas Law Review* 62: 1477.

³² P. Williams, 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights' 1987 *Harvard Civil Rights – Civil Liberties Law Review* 22: 401.

³³ J. Livingston, *Arctic Oil* (CBC 1981) 24.

The critique of environmental human rights that I present in this chapter derives from the perspective that there are underlying ‘root causes’ that can be examined to help understand the present environmental crisis. In conducting this analysis, I have been particularly influenced by the discipline of social ecology and its progenitor, Murray Bookchin. According to Bookchin, the domination of nature by human beings stems from and takes the same form as the myriad of ways human beings exploit each other.³⁴ The key to this analysis is ‘hierarchy’ – a term that encompasses ‘cultural, traditional and psychological systems of obedience and command’.³⁵ This includes the domination of the young by the old, of women by men, of one ethnic group by another, of the wealthy over the poor and of human beings over nature.

Bookchin argues that hierarchy has its ultimate foundation in the ‘raw materials’ of early civilization.³⁶ However, he also recognizes that its emergence and elaboration has a dual effect that is both material and subjective. On a material level, Bookchin argues that hierarchy attained sophisticated form in ‘the emergence of the city, the state, authoritarian technics, and a highly organized market economy’.³⁷ On a subjective level, hierarchy found expression ‘in the emergence of a repressive sensibility and body of values – in various ways of mentalizing the entire realm of experience along the lines of command and obedience’.³⁸ Bookchin labelled these subjective elements ‘epistemologies of rule’³⁹ to denote the emergence of a body of knowledge that normalizes the characteristics of a bifurcated hierarchical society.

What attracts me to this analysis is that it allows one to theorize the myriad ways that negative hierarchical relationships contribute to environmental harm in an open and dialectical way. It recognizes both structural and biopolitical analysis and invites conversation about anthropocentrism, gender, racism and economics. It also provides a foundation for thinking through how these root causes interact with one another – for example how environmental harm often works in conjunction with racism and class – as seen in the frequent placement of coal fired power plants or nuclear waste facilities near lower class, black communities.⁴⁰ Or how poor women are disproportionately affected by environmental catastrophes such as flooding, drought and forced migration.⁴¹

Importantly, Bookchin does not theorize ‘hierarchy’ as an intrinsically negative concept (as it is for some environmental philosophers and people on the left). Rather,

³⁴ Bookchin, above n 8, 4.

³⁵ Ibid 4–5.

³⁶ Ibid 62–88.

³⁷ Ibid 89. See also L. Mumford, *Technics and Civilization* (University Of Chicago Press 2010).

³⁸ Bookchin, above n 8, 89.

³⁹ Ibid.

⁴⁰ R.D. Bullard, *Dumping In Dixie: Race, Class, And Environmental Quality* (Westview Press 2000).

⁴¹ S. Sontheimer, *Women and the Environment: A Reader Crisis and Development in the Third World* (Monthly Review Press 1991). For a historical analysis see also C. Merchant, *The Death of Nature: Women, Ecology, and the Scientific Revolution* (HarperOne 1990).

Bookchin upholds the classical liberal position⁴² that whenever one human being claims or exercises power over another, they must meet a burden of proof.⁴³ Put otherwise – hierarchy is not self-justifying. In some instances, such as exercising physical restraint on a person who is seeking to harm others, the application of force will not be hard to justify. In other instances, such as the forms of violence that flow from patriarchy or anthropocentrism, the hierarchy may not be justifiable and will need to be dismantled as a result.

This statement on ‘root causes’ is important for my critique of environmental human rights – they are found wanting precisely to the extent that they fail to engage with the underlying legacy of domination and hierarchy that underlies the present environmental crisis. I turn now to conduct this examination.

4. ENVIRONMENTAL HUMAN RIGHTS: A CRITIQUE

4.1 Reinscribing Anthropocentrism

The first branch of my critique concerns the way environmental human rights perpetuate anthropocentrism. For example, the phrase ‘human rights and the environment’ is species specific, focuses on ‘rights’ which is traditionally an individualistic concept,⁴⁴ and sets up an immediate dichotomy between the ‘human’ and the ‘environment’. While this might sound trivial, I contend that this conceptual fragmentation reflects a deeper problem that gets reproduced and re-inscribed in the application of rights discourse to the environment.

Specifically, the problem surfaces in the question of when and whether environmental human rights are formulated in such a way as to enable an escape from the anthropocentric dichotomy between human beings and nature or whether the discourse solidifies that dichotomy.⁴⁵ To have a right to a healthy environment or to clean water does not free the environment from its designation and subordination to human

⁴² See for example W. von Humboldt, *The Limits of State Action* (Liberty Fund 1993) and J.-J. Rousseau, ‘The Discourses’ and Other Early Political Writings (Cambridge University Press 2007). For analysis of the relationship between early liberalism and libertarian socialism see N. Chomsky, *Government in the Future* (Seven Stories Press 2005).

⁴³ Bookchin, above n 8, 25–9.

⁴⁴ In stating this I also recognize the ‘relational’ character of rights: J. Nedelsky, *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press 2011) 236–8, 248–50. I also recognize more recent scholarship on collective and identity based rights: J. Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2002) 24, 211–15.

⁴⁵ Here I am drawing on Foucault’s formulation of the regulatory powers of identity and of rights based on identity: M. Foucault, *The History of Sexuality, Vol. 1: An Introduction* (Vintage 1990). See also Brown, above n 8.

interests.⁴⁶ Rather, while such a right *may* provide limited protection from gross exploitation, it reinscribes the dichotomy *as* it protects human beings and thus enables the further subordination of the environment through that designation. To borrow a term from Louis Althusser, human beings are ‘interpellated’⁴⁷ as other when we exercise environmental human rights, not only by the law but also by all the political and social discourses that are triggered by our exercise of such rights. The regulatory dimension of environmental human rights emerges to the extent that rights are never deployed in isolation or in a vacuum. Rather, environmental human rights emerge as part of a discursive and normative context – precisely the context in which ‘human beings’ and ‘the environment’ are iterated and reiterated.⁴⁸

The paradox within this problem is that the more ‘neutral’ or ‘general’ a particular right (or law/policy) the more likely it is to *enhance* existing power relationships.⁴⁹ An oft-cited example of general human rights language can be noted in the Portuguese constitution, which asserts that ‘all have the right to a healthy ecologically balanced human environment and the duty to defend it’.⁵⁰ In this formulation and in other ‘general’ formulations, environmental human rights that are presented as neutral may enhance the privilege of human beings and eclipse the needs of nonhuman animals and the inanimate world. To be indifferent to social power is to consecrate relations as they are – it is to indirectly sanction the hierarchy of human beings over nature and to affirm the ontological primacy of the human subject.

Yet the opposite problem might also emerge when environmental human rights are defined with specificity. While the international community has not yet defined international human rights with reference to a specific ecosystem or described

⁴⁶ Note that over 100 states expressly recognize the right to a clean environment. See further Sierra Club Legal Defense Fund, ‘Human Rights and the Environment’, Report on the UN Sub-Commission on the prevention of Discrimination and the Protection of Minorities (1992).

⁴⁷ L. Althusser, *Lenin and Philosophy and Other Essays* (Monthly Review Press 2001) 117–20. Althusser used the term to describe the process by which ideology, embodied in major social and political institutions, constitutes the nature of individual subjects’ identities through the very process of institutions and discourses of ‘hailing’ them in social interactions.

⁴⁸ Wendy Brown makes a similar point with reference to identity based rights. See W. Brown, ‘Suffering the Paradoxes of Rights’ in W. Brown, *Left Legalism/Left Critique* (Duke University Press Books 2002) 422–3.

⁴⁹ C. MacKinnon, *Feminism Unmodified* (Harvard University Press 1987) 73. See also C. Hill, ‘Whiteness as Property’ and N. Gotanda, ‘A Critique of “Our Constitution is Color Blind”’ in K. Crenshaw and N. Gotanda et al (eds), *Critical Race Theory: The Key Writings that Formed the Movement* (New Press 1995).

⁵⁰ A.C. Kiss and D. Shelton, *International Environmental Law* (Transnational Publishers 1991) 27. See also The Constitution of Belgium, where the right to ‘lead a worthy life of human dignity’ includes ‘the right to protection of a sound environment’ and Spain where the Constitution states that ‘everyone has the right to enjoy an environment suitable for the development of the person as well as the duty to preserve it.’ Further north, the Finnish Constitution, adopted in 2000, states that the ‘public authorities shall endeavor to guarantee for everyone the right to a healthy environment.’ Likewise, the Norwegian Constitution, altered in 1992, contains a right to ‘an environment that is conducive to health.’

environmental human rights with specificity (i.e. a defined level under which environmental quality must fall before a breach of a person's human rights will have occurred),⁵¹ the more highly specified environmental human rights are, the more likely they are to *encode* a definition of the environment, premised on its subordination to human beings.⁵²

Wendy Brown provides a neat summary of the same paradox in the context of identity-based human rights: 'rights that entail some specification of our suffering, injury or inequality lock us into the identity being defined by our subordination, and rights that eschew this specificity not only sustain the invisibility of our subordination but potentially enhance [it].'⁵³ Paradox is not an impossible political condition. However, as Brown comments, it is 'a demanding and frequently unsatisfying one'.⁵⁴ It is not my intention to resolve this paradox in this chapter. Rather, consistent with my description of critique, I wish to bring this paradox to the surface and acknowledge how it limits the practical and discursive power of environmental human rights.

4.2 Human Rights and the End of History

The second branch of my critique is a political objection. I begin with Samuel Moyn's genealogical history of human rights in his recent book *The Last Utopia*.⁵⁵ According to Moyn, the linearity of the history of human rights has been grossly overestimated: 'the tangled history of how political values today protected as "human rights" arose shows they bear no essential relationship either to each other or to the universalistic belief that all men (and more recently, women) are part of the same group.'⁵⁶ If we take care not to succumb to the temptations of hindsight, he argues, at least two discontinuities in that history become apparent.

First, the twentieth century internationalist idea of human rights bears little resemblance to its Enlightenment or pre-modern counterpart.⁵⁷ While the former sought to limit national sovereignty by making all governments answerable to certain universal standards of conduct, the latter was premised on a particular strand of human universalism and had no such pretension.⁵⁸ In elucidating this first discontinuity, Moyn argues that the idea(s) of human universalism (including the versions of universalism

⁵¹ P. Sands, *Principles of International Environmental Law* (Cambridge University Press 2009) 294.

⁵² Brown, above n 48, 422. See also Brown, above n 8, 134. Here Brown argues that the symbolic character of legal rights that have potential political efficaciousness: 'If rights figure freedom and incite desire for it only to the degree that they are void of content, empty signifiers, without corresponding entitlements, then paradoxically they may be incitements to freedom only to the extent that they discursively deny the workings of the substantive social power limiting freedom.'

⁵³ Brown, above n 48, 423.

⁵⁴ Ibid 430.

⁵⁵ Moyn, above n 8.

⁵⁶ Ibid 19.

⁵⁷ Ibid 12.

⁵⁸ See the chapter 'The Decline of the Nation-State and the End of the Rights of Man' in H. Arendt, *The Origins of Totalitarianism* (Harcourt 1973) 267–304.

that were proliferated in Greek philosophy and monotheistic religion) are of ‘no real relevance’ to contemporary discussions of human rights for two reasons. The first is that these strands offered the ‘raw ingredients’ for a vast, diverse and at times conflicting range of ideas and movements over the millennia.⁵⁹ Second, the proliferation of human universalism occurred only in connection to other ideas that were necessarily abandoned in order to achieve human rights.⁶⁰ Moyn contends ‘Greeks and Jews both demanded “justice”, albeit rooting it in the very different sources of nature and theology. Since then, numerous successor universalisms have arisen. But their alien conceptions, no less than the diversity of their legacies, make crediting them with the origins of contemporary morals simply unbelievable.’⁶¹

Moreover, nineteenth-century rights were premised on being a citizen of a defined political community and on the construction of spaces where rights could be recognized, protected and even defined through political struggle.⁶² In contrast, human rights after the 1948 Universal Declaration of Human Rights (UDHR) had no comparable citizenship space. Given this shift, Moyn writes, the central event in human rights history after 1948 was the ‘recasting of rights as entitlements that might contradict the sovereign nation state from above and outside rather than serve as its foundation’.⁶³

Following on from this, the second discontinuity identified by Moyn concerns the nonlinear development of human rights in the twentieth century. Contrary to conventional histories,⁶⁴ he argues that the immediate global reverberations created by the UDHR were relatively modest and the full impact of the Holocaust only set in later on: ‘it was less the annunciation of a new age than a funeral wreath laid on the grave of wartime hopes’.⁶⁵

In fact, it was not until the mid to late 1970s, Moyn argues, that an arbitrary confluence of factors created an environment in which human rights finally emerged (‘seemingly from nowhere’) as a genuinely viable social cause.⁶⁶ Prior to the 1970s, human rights were eclipsed by far more dominant social movements and by radical politics as evidenced in anticolonial struggle and student movements.⁶⁷ It was only

⁵⁹ Moyn, above n 8, 14.

⁶⁰ Ibid.

⁶¹ Ibid 14–15. On the idea of ‘successor universalisms’ see also E. Pagels, ‘Human Rights: Legitimizing a Recent Concept’ 1979 *Annals of the American Academy of Political and Social Sciences* 442: 57.

⁶² Moyn, above n 8, 13.

⁶³ Ibid.

⁶⁴ See for example M.R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (University of California Press 2008) 17, 216–17.

⁶⁵ Moyn, above n 8, 2. See also pages 236–9 for detail concerning the number of human rights documents, prosecutions and celebratory events that occurred between 1940–1978.

⁶⁶ Ibid 3. Moyn highlights the events of 1977 as being pivotal – in his year US President Carter stated in his inauguration speech ‘Our commitment to human rights must be absolute’ and Amnesty International won the Nobel Peace Prize.

⁶⁷ Ibid 2, 45–7, 195–203. For analysis of two influential revolutionary movements in America and Germany see J. Varon, *Bringing the War Home: The Weather Underground, the Red Army Faction, and Revolutionary Violence in the Sixties and Seventies* (University of California Press 2004).

after the disenchantment with revolutionary communism, nationalistic anti-colonialism and the Vietnam War that human rights emerged as a plausible ideological alternative.⁶⁸

In fact, Moyn argues that it was precisely because human rights were represented as ideologically and politically neutral – accommodating both communism and capitalism on the one hand, and nationalism and individualism on the other – that human rights then emerged as a safe (or the safest) bet for the ideologically disenchanted.⁶⁹

More importantly, human rights were supposedly innocent of the aggressive utopianism that brought alternative political formations to ruin. They did not require a commitment to political and social upheaval in the way that radical political discourse did. Human rights found success in representing a sober-minded, anti-political, anti-revolutionary, anti-utopian utopia, at the right historical moment.⁷⁰ This sentiment was explicitly recognized by the founder of Amnesty International, Peter Benenson:

[T]he underlying purpose of this campaign ... is to find a common base upon which the idealists of the world can co-operate [and to] absorb the latent enthusiasm of great numbers of such idealists who have, since the eclipse of socialism, become increasingly frustrated; similarly it is geared to appeal to the young in search of an ideal.⁷¹

In this sense, human rights represented a kind of *last utopia* – that is a realistic or realizable one.

Further to this, while human rights groups like Amnesty International claimed to be ‘beyond politics’, they behaved in a way that was in clear opposition to revolutionary struggle.⁷² This is not surprising. Indeed, in *The Concept of the Political* Carl Schmitt writes ‘all political concepts, images, and terms have a polemical meaning. They are focused on a specific conflict [and] are incomprehensible if one does not know exactly what is to be affected, combated, refuted or negated by such a term.’⁷³ Jessica Whyte has consciously mapped the links between the early human rights movement and anti-communism.⁷⁴ These links include Amnesty International’s focus on religious and political dissidence in the Soviet Bloc and the work of Medicine Sans Frontier and Helsinki Watch (later to be renamed Human Rights Watch) with the neoconservative⁷⁵ movement and the United States State Department respectively. Whyte concludes that these movements offered not only a ‘moral gloss to neoconservative anti-communism’,

⁶⁸ Ibid 2.

⁶⁹ Ibid.

⁷⁰ Ibid 4.

⁷¹ Ibid 130.

⁷² Ibid 132. At 157 Moyn argues that during the 1970s the emerging neoconservative movement in the United States defined human rights as anticommunism.

⁷³ C. Schmitt, *The Concept of the Political* (University of Chicago Press 2007) 30–31.

⁷⁴ J. Whyte, ‘Intervene, I said’ (2012) 207 *Overland* <<http://overland.org.au/previous-issues/issue-207/feature-jessica-whyte/>>.

⁷⁵ I draw a deliberate contrast here between neoliberal and neoconservative. For a detailed analysis of the distinction refer to D. Harvey, *The New Imperialism* (Oxford University Press 2005) 190–208.

but more fundamentally, a ‘stark warning against those emancipatory projects that sought to challenge the emerging economic orthodoxy of neoliberal capitalism’.⁷⁶

The contemporary discourse of human rights is marked by the conditions of its historical emergence – it provides a liberal democratic form of utopianism that is predicated upon the abandonment of alternative political formations and the vision of human emancipation that they contained. It also involved the acceptance of the fundamental co-ordinates of the political and economic system of liberal democratic capitalism. The utopia they provide is not a substantive or transformative alternative, but a negative or minimalist utopia that seeks to mitigate suffering within the co-ordinates of the current system.⁷⁷

Seen in this light, the contemporary dominance of human rights discourse is a symptom of what the right-wing Hegelian Francis Fukuyama famously described as ‘the end of history’.⁷⁸ What Fukuyama meant by this was that with the defeat of fascism and the collapse of the Soviet Union, the twentieth century had seen the ‘total exhaustion of viable systematic alternatives to Western liberalism’.⁷⁹ History has shown that liberal democracy was the end point of humankind’s ‘ideological evolution’.⁸⁰ Politics would no longer involve a debate or struggle between fundamentally different political systems. Instead, the revolutionary tradition was replaced by a politics of gradual reform that history had proven to be fundamentally necessary and sound.

While the historical development of human rights is a subject hotly debated by political scientists and historians, I submit that there is considerable value in recent revisionist histories from Moyn and others.⁸¹ Further, given their more recent historical emergence, I contend that environmental human rights⁸² (and rights for nature discourse)⁸³ can also be situated as part of the genealogical history of rights described by Moyn. In this sense, environmental human rights represent a liberal reformist project that avoids confrontation with the underlying negative hierarchies perpetuating

⁷⁶ Ibid. See also N. Chomsky, *Human Rights and American Foreign Policy* (Spokesman Books 1975) 67. Chomsky argues that ‘the human rights campaign is a device to be manipulated’ by those who wish to gain popular support for ‘counter-revolutionary interventions’.

⁷⁷ Ibid 121.

⁷⁸ Fukuyama, above n 12.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ See also, L. Hunt, *Inventing Human Rights: A History* (W.W. Norton & Company 2008); C. Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge-Cavendish 2007); C. Douzinas, *The End of Human Rights* (Hart 2000); B. Golder (ed.), *Re-reading Foucault: On Law, Power and Rights* (Routledge 2012); and B. Golder, ‘Human Rights Contra Critique: Preliminary Notes on the Politics of Interpretation’ 2011 *Australian Journal of Human Rights* 17(2): 185.

⁸² The links between human rights and the environment are apparent at least as early as the first international conference on the human environment, held in Stockholm in 1972.

⁸³ Rights for nature arguments have a long philosophical history: see R. Nash, *The Rights of Nature: A History of Environmental Ethics* (University of Wisconsin Press 1989). However, it is interesting to note that the most popular statement on rights of nature also occurred in 1972: C. Stone, ‘Should Trees Have Standing? Toward Legal Rights for Natural Objects’ 1972 *Southern California Law Review* 45: 450.

environmental exploitation. Abandoning the language of radical political and economic transformation may have been a pragmatic move for some, but it also has serious consequences that need to be brought to the surface.

It is essential to remember that environmental human rights, like other legal rights, are a response to an overwhelming or overweening power.⁸⁴ Environmental human rights might serve as mitigation against that power, but due to their exclusive juridical focus, they cannot resolve it. Put otherwise, although environmental human rights may attenuate the subordination of the environment in an anthropocentric social, legal and economic regime, they vanquish neither the regime nor its mechanisms of reproduction.⁸⁵ They do not eliminate any of the negative hierarchies listed above, even as they soften some of their effects. Moreover, environmental human rights, like other legal rights, are not necessarily a democratization of that power.⁸⁶ They are not about sharing power in a way that empowers communities or builds resilience. Rather, environmental human rights are designed to protect human beings (and through that protection – parts of the environment) from some of the most extreme applications of power. The protections offered by environmental human rights instruments are essential if that is all that is available. However, protections should not be confused with justice or with a resolution of the problem.

4.3 Using the Master's Tools

What happens when we frame our demands in the particular and putatively post-political expression of environmental human rights? What other languages, with what other and perhaps more productive possibilities for social and environmental justice become silenced and displaced?

In response to these questions, Brown describes legal rights as a politics that 'organizes political space, often with the aim of monopolizing it (and) it also stands as a critique of dissonant political projects'.⁸⁷ Following Brown, what concerns me about the ballooning of human rights discourse into spheres such as the environment is that larger projects of justice, equality, sharing power, self-governance, and collectivization of power will be set aside. Environmental human rights are no substitute for these more radical projects and as noted above, environmental human rights re-inscribe dominant conceptions of power and value.⁸⁸ To quote Judith Butler, the re-inscription of existing normative concepts such as rights, which are 'derived from liberalism are ...

⁸⁴ Marx, above n 8, 42. Marx makes this point with specific reference to legal rights for Jewish people in the Prussian state.

⁸⁵ See further Brown, above n 8.

⁸⁶ Marx, above n 8, 42.

⁸⁷ W. Brown, “The Most We Can Hope For ...”: Human Rights and the Politics of Fatalism’ 2004 *The South Atlantic Quarterly* 103(2/3): 451; Brown, above n 7, 461.

⁸⁸ K. Marx, *Capital Volume 1* (Penguin Books 1990) 178–80. It is on this basis that Marx critiques the French anarchist Proudhon: '[Proudhon] creates his idea of justice, of "justice éternelle" from the juridical relations that correspond to the production of commodities: he thereby proves, to the consolation of all good petty bourgeois, that the production of commodities is a form as eternal as justice. Then, he turns round and seeks to reform the actual production of commodities, and the corresponding legal system, in accordance with this idea.'

inadequate to the task of grasping both new subject formations and new forms of social and political antagonism.⁸⁹

Karl Marx offered a comparable critique of legal rights in his early essay entitled ‘On the Jewish Question’.⁹⁰ The quest for Jewish citizenship provided Marx (and for his left-Hegelian protagonist Bruno Bauer) with the backdrop from which to raise questions about the limits of law as articulated by the liberal state within a capitalist economy.⁹¹ Marx argued that the liberal constitutional-democracy is premised upon depoliticized social powers and depends upon naturalizing egoistic civil society and abstract representations of equality.⁹² He argued that ‘rights’ are a political device for securing and legitimating these tendencies.⁹³ Put otherwise, legal rights emblematic of the ‘ghostly sovereignty of the unemancipated individual in modernity’.⁹⁴ In order to see the connections as Marx made them, I need to engage briefly with his critique of Bauer on the question of whether Jewish people should be entitled to legal rights.

According to Marx, Bauer argued that Jewish people need to ‘sacrifice the “privilege of faith”’ or their ‘Jewish nature’ in order to ‘acquire the general rights of man’⁹⁵ and to acquire membership in the community that delivers those rights. Marx critiqued this conclusion and argued that legal rights are nothing more than the rights of ‘a member of civil society ... of egoistic man, of man separated from other men and from the community’.⁹⁶ Nothing about these rights, Marx noted, pertains to human association, membership or even participation in political life.⁹⁷ Consequently, he argued that there is no reasonable basis for withholding their application to individuals who identify publicly or politically as Jewish.⁹⁸

It is from this analytical position, where rights both reflect and perpetuate a specific historical production of human isolation, that Marx offered his well-known critique of ‘bourgeois rights’.⁹⁹ Consistent with my description of critique above, Marx’s analysis did not reject legal rights. Rather, he sought to expose the way that rights (as articulated in documents such as the 1793 Declaration of the Rights of Man and the Citizen)¹⁰⁰ encode rather than emancipate us from social powers and social formations that underlie political struggle. Marx described the constitutional right to liberty as the right

⁸⁹ J. Butler, *Frames of War: When is Life Grievable?* (Verso 2009) 146.

⁹⁰ Marx, above n 8. While this essay provides great insight into the effectiveness of liberal rights, I also wish to acknowledge that there are stumbling blocks in using the ‘Jewish Question’ as a critique of rights discourse. In particular, many have dismissed the essay altogether as a result of its putative anti-Semitism. I make no attempt to defend Marx against such critiques here and instead will concentrate on his analysis of rights discourse. See also Brown, above n 52 fn 10, 101–102.

⁹¹ Marx characterizes law in terms of abstract ‘political emancipation’.

⁹² Marx, above n 8, 34.

⁹³ Ibid.

⁹⁴ Brown, above n 52, 110.

⁹⁵ Marx, above n 8, 40.

⁹⁶ Ibid 42.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ It is worth noting the resistance from many political liberals to the universal recognition of these rights. See D. Losurdo, *Liberalism: A Counter-History* (Verso 2011) 182–4.

of ‘separation’ or the ‘right of the circumscribed individual, withdrawn into himself’.¹⁰¹ The right to private property is interpreted as the ‘practical application’ of liberty and as a result is only ‘the right of self-interest’.¹⁰² Finally, Marx described the right to equality as ‘a term [that] has no political significance’ since it is ‘only the equal right to liberty [in which] every man is equally regarded as a self-sufficient monad’.¹⁰³

A more mature Marx made a similar argument in *Capital Volume 1*. In Chapter 24, Marx argued that hollow notions of ‘freedom, equality, property and Bentham’ prevail over the marketplace and mask exploitation and alienation.¹⁰⁴ While Marx recognized the emancipatory function of rights, he argued that legal rights provide a ‘superstructural adjustment’¹⁰⁵ to legitimate and legalize the appropriation of surplus value. Hence Marx objected to all attempts to universalize bourgeois rights on the basis that they merely provide the legal and institutional cover for the increased production of capital.

In both texts, Marx could be critiqued on the basis that the examples of legal rights that he considers were not designed to deliver the values that he tacitly endorses. Further, his criticism of the liberal state glosses over the possibilities that on the one hand, legal rights need not be the end of liberal political states and on the other, liberal individuals (even subordinated ones) may want nothing more than state-secured rights and protections. Yet, I maintain that ‘the Jewish Question’ contains important lessons about the inherent limits of rights discourse to realize either ‘human emancipation’ or environmental justice.

Marx’s description of rights as egoistic rests on a reading of the ways in which rights instruments naturalize and solidify historically specific, unavowed social powers that set human beings against one another and against the environment.¹⁰⁶ In other words,

¹⁰¹ Marx, above n 8, 42.

¹⁰² Ibid. On the relationship between private property, choice and environmental harm see also P. Babie, ‘Choices that Matter: Three Propositions on the Individual, Private Property and Anthropogenic Climate Change’ 2010 *Colorado Journal of International Environmental Law and Policy* 22: 223 and P. Burdon, ‘What is Good Land Use? From Rights to Responsibilities’ 2010 *Melbourne University Law Review* 34(3): 708.

¹⁰³ Ibid. Marx contends that liberal equality, in so far as it neither constitutes political community nor achieves substantive equality, guarantees only that all individuals will be treated as if they were sovereign and isolated individuals.

¹⁰⁴ Marx, above n 88, 733. For example Marx argues at 733–44: ‘To the extent that commodity production, in accordance with its own immanent laws, undergoes a further development in capitalist production, the property laws of commodity production must undergo a dialectical inversion so that they become laws of capitalist appropriation.’

¹⁰⁵ K. Marx, *A Contribution to the Critique of Political Economy* (International Publishers 1979) 2. In Marxist theory, human society consists of two parts: the base and superstructure. The base comprehends the forces and relations of production (employer-employee work conditions, the technical division of labour, and property relations) into which people enter to produce the necessities and amenities of life. These relations determine society’s other relationships and ideas, which are described as its superstructure. The superstructure of a society includes its culture, institutions, political power structures, roles, rituals, and state.

¹⁰⁶ Marx, above n 8, 45. Marx writes: ‘The liberty of egoistic man, and the recognition of this liberty ... is the recognition of the frenzied movement of the cultural and material elements which form the content of his life.’

the substantive content of legal rights that bourgeois rights discourse casts as natural is actually the consequence of historically specific and contingent elements of social life.¹⁰⁷ Through rights discourse, ‘bourgeois social relations are reified as bourgeois man’ and the rights required by this social order are ‘misapprehended as required by and confirming the naturalness of the man it produces’.¹⁰⁸

In a similar vein, foundational documents for ultimately environment-dependent human rights, such as the UDHR, have also been used to promote an egoistic form of market-based individualism.¹⁰⁹ This has been explored in detail by Pheng Cheah in his book *Inhuman Conditions*.¹¹⁰ Cheah illustrates how a focus on social and economic rights for developing countries leads to a re-affirmation of capitalist virtues.¹¹¹ This is because second generation human rights are ‘rights to resources’ and their realization by future generations depends on the size of the economic pie that is available to the government they are claimed against.¹¹² For those without a fundamental critique of capitalism, the best response to poverty and inequality would appear to be economic development through environmental exploitation. However, Cheah argues that unless the economic framework of capitalism is itself critiqued, economic, social and environmental rights are likely to end in a re-inscription of the capitalist status quo.¹¹³

More recently, the language of environmental human rights has been deployed in service of the so-called ‘green economy’. This was highlighted in a recent joint-report from the Office of the High Commissioner for Human Rights (OHCHR) and United Nations Environment Programme (UNEP). While the report recognized that ‘[h]uman activities have changed ecosystems more rapidly and extensively in the past half-century than in any comparable period of time in history’ it goes on to advocate for a growth model of economic development as the vehicle for securing environmental human rights.¹¹⁴ Consistent with other similar reports that dominated the Rio+20 climate talks, the report does not engage with mainstream critiques of economic growth, nor does it engage with distributive justice or with distinctions between growth and development. Instead, the report affirms private property and calls for the further commodification (or ‘Green Accounting’)¹¹⁵ of ecosystem services.

Audre Lorde has written that ‘the master’s tools will never dismantle the master’s house’. These tools may ‘allow us temporarily to beat him at his own game’ but they

¹⁰⁷ Marx, above n 88, 178–80.

¹⁰⁸ Brown, above n 52, 113.

¹⁰⁹ D. Harvey, *A Companion to Marx’s Capital* (Verso 2010) 49.

¹¹⁰ P. Cheah, *Inhuman Conditions: On Cosmopolitanism and Human Rights* (Harvard University Press 2007).

¹¹¹ Ibid 148.

¹¹² Ibid.

¹¹³ Ibid 148–9.

¹¹⁴ OHCHR & UNEP, ‘Human Rights and the Environment Rio+20: Joint Report OHCHR and UNEP’ (Union Publishing Services Section 2012) <http://www.unep.org/environmental_governance/Portals/8/JointReportOHCHRandUNEPPonHumanRightsandtheEnvironment.pdf> 21–2.

¹¹⁵ Ibid 22–3.

‘will never enable us to bring about genuine change’.¹¹⁶ Following Lorde, I contend that environmental human rights, for all the reasons canvassed above, are insufficient to provide the basis for a thoroughgoing critique of neoliberal capitalism. Indeed, whether it is politically useful to insist that the capitalist political order should live up to its own foundational principles is one thing, but to imagine that a politics grounded in environmental human rights can lead to a radical displacement of one of the key hierarchies that is responsible for environmental degradation is a serious error.

5. CONCLUDING REMARKS: HUMAN RIGHTS AND THE REBIRTH OF HISTORY

I would like to conclude by affirming my opening contention that critique of environmental human rights should not be equated to rejection or abolition. I acknowledge that many marginalized groups in society actually rely on the power of human rights at the same time as they are oppressed by them. Further, while I do not believe that environmental human rights represent a transformative discourse, it is certainly strategically necessary from time to time to use human rights arguments to gain whatever ground is possible. In this respect I concur with Jacques Rancière who advocates for the ‘tactical appropriation’ of rights as a method for staging dissent that can hopefully grow into broader forms of critique and political action.¹¹⁷

Rather than abandoning the project of environmental human rights I would like to see advocates for environmental protection move out from the safe and familiar umbrella of human rights and create alternative spaces for projects and discourses that address the underlying root causes of the environmental crisis. Thus, I suggest that it does not make sense to ‘bash’ human rights (as is increasingly popular), but to work to the side of it and pursue justice projects in other vocabularies and using alternative tools.¹¹⁸ This is precisely the approach adopted by projects directed toward deepening

¹¹⁶ A. Lorde, *Sister Outsider: Essays and Speeches by Audre Lorde* (The Crossing Press 1984) 112.

¹¹⁷ See J. Rancière, ‘Who Is the Subject of the Rights of Man?’ 2004 *The South Atlantic Quarterly* 103(2/3): 297. This method is supported by Slavoj Žižek, ‘From Politics to Biopolitics ... and Back’ 2004 *The South Atlantic Quarterly* 103(2/3): 501. Although Žižek’s approach in this article is difficult to reconcile with less amicable statements expressed in texts such as *First As Tragedy, Then As Farce* (Verso 2009) 7–8: ‘the time for liberal democratic blackmail is over. Our side no longer has to go on apologising; the other side had better start soon.’

¹¹⁸ See for example A. Badiou, *The Rebirth of History: Times of Riots and Uprisings* (Verso 2012). Badiou advocates for a return to and rethinking of the political language of communism. By insisting that the history of twentieth-century state socialism means the failure of one version of communism, rather than a failure of communism or political emancipation as such, Badiou is attempting to re-fashion a political utopia beyond the last utopia in which we live.

democratic institutions,¹¹⁹ reclaiming the commons,¹²⁰ prefigurative politics,¹²¹ the transition movement¹²² and the growing number of people who have reclaimed Communism as a political discourse.¹²³

Whatever one thinks of the strengths and limits of these projects, their advocacy for a return to and rethinking of political language and institutions is an invaluable attempt to expand the theoretical and discursive space for radical left politics. Such projects are also attempting to re-fashion a political utopia beyond the ‘last utopia’¹²⁴ in which we live and in the process, to avoid the great ideological blackmail of ‘the end of history’.¹²⁵

These projects are, I think, profoundly attentive to the political juncture at which we find ourselves. Although the environmental crisis continues to intensify, there may be a glimmer of hope in the long dark night of the end of history. As Alain Badiou suggests, the ‘age of riots’¹²⁶ in which we live *potentially* augurs the return of history and an opportunity for long-term environmental protection.

¹¹⁹ P. Burdon, ‘The Project of Earth Democracy’ in *Confronting Collapse: What Agencies, Institutions and Strategies Are Needed for a Better World? How to Achieve Environmental Justice?* (Routledge 2013) 244.

¹²⁰ Weston and Bollier, above n 2, 28: ‘Any great leap forward in human rights must necessarily imagine new types of socio-political governance and economic arrangements.’

¹²¹ See A. Cornell, *Oppose and Propose: Lessons from Movement for a New Society* (AK Press 2011).

¹²² See R. Hopkins, *The Transition Handbook: From Oil Dependency to Local Resilience* (Chelsea Green Publishing 2008).

¹²³ See A. Badiou, *The Communist Hypothesis* (Verso 2010), C. Douzinas and S. Žižek, *The Idea of Communism* (Verso, 2010); and S. Žižek, *The Idea of Communism 2: The New York Conference* (Verso 2013).

¹²⁴ Moyn, above n 8.

¹²⁵ Fukuyama, above n 12.

¹²⁶ A. Badiou, *The Rebirth of History: Times of Riots and Uprisings* (Verso 2012) 5.