The Heritage Foundation

First Principles on Human Rights

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THE HONORABLE MICHAEL R. POMPEO

Americans may not usually think about July 4, 1776, as the most important date in the history of human rights, but it was. At the heart of our Declaration of Independence was a profound statement: "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 creed informs the purpose of our own government—and from the point of view of the Declaration, all legitimate governments—which is "to secure these rights." By holding to those truths over the centuries, America has become the world's indispensable force for good.

Our nation's example has inspired countless others to defend their own rights and seek greater freedom. One seminal moment in this history came 172 years after the message to King George III heard 'round the world, when the Universal Declaration on Human Rights echoed our Declaration by recognizing "the equal and inalienable rights of the human family."

But today, the international human rights project is in crisis and is increasingly untethered from history or a realistic understanding of human nature. Aggressive authoritarian regimes twist rights claims to serve their malign ends. Failing international institutions apply human rights selectively and with bias. And political gain too often comes before human dignity. These developments threaten the great and noble progress we have made.

To understand how America can continue to honor the promise of our founding rights tradition, it is vital to return to first principles and confront essential questions: What are our fundamental freedoms? How do we know if a claim about human rights is true? Who or what grants these rights? These were some of the questions I had in mind in the summer of 2019 when I formed the State Department's Commission on Unalienable Rights. I am glad that The Heritage Foundation is also taking up the call with these timely essays.

This *First Principles on Human Rights* series is in the finest tradition of Heritage's scholarship in service to America. You will find areas of disagreement and differences of emphasis among the essays, but common cords tie them together, most notably dedication to the scholarly pursuit of the truth and appreciation of the fact that respect for individual liberty is at the heart of America's founding documents and great achievements.

That ethos guided the State Department commission's work as well. The commissioners also did not agree on everything, but they all affirmed the centrality of unalienable rights and the distinctive form of constitutional government through

which the United States secures those rights. The commission members' independence of mind demonstrated the values of freedom of thought, freedom of conscience and religion, and freedom of expression that Americans hold dear. The competition of ideas makes us all better.

These two projects are deeply meaningful in the formulation of foreign policy, especially regarding the greatest threat to human rights today: the Chinese Communist Party (CCP). The CCP has built the most sophisticated surveillance state in history; crushed the freedoms it promised to the Hong Kong people; and locked more than a million Uyghurs and other minorities in internment camps in Xinjiang, subjecting them to horrific abuses.

As history has shown time and again, nations that disrespect the rights of their own citizens soon threaten their neighbors. Today the CCP is attacking free nations' sovereignty and threatening other nations in the Indo–Pacific—and indeed the world—militarily, economically, diplomatically, technologically, and politically.

America is rising to this challenge. And we recognize that upholding unalienable rights may require us to reform failing human rights bureaucracies or even withdraw our support from those we cannot fix, such as the U.N. Human Rights Council. The council has become a venue for shameless hypocrisy, with some of the world's worst human rights offenders sitting in judgment over other nations. Its most frequent target is Israel—the nation-state of the Jewish people, a thriving democracy, and by far the freest country in the Middle East. Many other multilateral organizations at best confuse human rights and, at worst, dishonor their founding purposes and harm American interests and sovereignty.

Another example of the crisis of the international human rights project today is the proliferation of new and novel concepts of rights. Some claims about rights conflict. Some are more important than others. Some are empty promises or partisan preference masquerading as "rights." No one could possibly remember the thousands of rights claims being made or comprehend how they relate to one another or to a coherent, realistic understanding of human nature.

The bottom line is that more so-called rights does not mean more justice. The constitutions of some of the most repressive regimes in history, such as the Soviet Union, promised a multitude of rights to their citizens while the regimes produced ever-climbing death tolls and daily deprivations.

And the failures to uphold fundamental rights go beyond authoritarian regimes and disagreements over the number and nature of rights themselves. International experts and organizations repeatedly seek to impose their views regardless of objections by sovereign governments. For instance, the International Criminal Court (ICC) abuses its mandate by targeting members of the U.S. military—among the greatest forces for good around the world—even though we have never accepted its jurisdiction over our personnel, and our own justice system is more than capable of investigating and addressing allegations of misconduct. In contrast, the ICC is most often incompetent where it does truly exercise jurisdiction. The ICC has been in operation for 18 years and is now staffed by nearly 1,000 people, yet it has secured only four convictions for major crimes—at a cost of more than a billion dollars.

Despite these challenges, America is well-positioned to lead the fight to clarify human rights internationally and restore their meaning because, as the commission and these essays make clear, securing those rights is the call of our founding and part of our national character. Understanding human rights allows America to speak with clarity, to know who shares our objectives, to grasp the nature and intentions of the regimes with which we engage, and to forge strong alliances and make multilateralism actually work in service to our principles and priorities.

But returning to the course our Founders set is perhaps even more critical in the domestic sphere, especially given the distortions and smears directed at American history. Some of our most powerful cultural voices seem determined to cast doubt on the very goodness of our nation. We must counter these false narratives with the truth about America's magnificent rights tradition. If Americans lose a clear understanding of and respect for our own ideals, then our foreign policy will suffer, and our country and world will be a darker place.

Foremost among the rights that concerned our Founders are those rights that are ours by nature as human beings. The Founders affirmed that these

rights come from our Creator and are therefore before government. Our knowledge of them draws on our distinct biblical and Enlightenment heritage. Prominent among them are religious freedom and property rights, with property rights understood to include the right to the fruits of one's labor, as well as our rights to life, liberty, and the pursuit of happiness.

America has often fallen tragically short in the promise our Founding Fathers made in the Declaration of Independence about the natural equality and unalienable rights of mankind. Most notable among these failures is the legal sanction our nation once gave to slavery and the injustices our country perpetrated against Native Americans. But it is a slander to say that America is exceptional only in a catalogue of abuses that set the supposed oppressor against the supposed oppressed in an endless, invented, toxic, and dehumanizing dialectic.

America is exceptional for the opposite of what her detractors so often claim. The truth is that, more than any other nation in history, we have worked, as George Washington said, to "give to bigotry no sanction" and to correct our mistakes, uphold our founding ideals of equality and opportunity, and serve as an ever-brighter beacon of freedom for each passing generation of those who, like us, seek a better future and a more perfect union.

Our Founders set us on a path to abolish slavery, recognize women's rights, and refine our understanding of the political requirements of the rights inherent in all persons. That is why Martin Luther King Jr. called our founding documents a "promissory note" to which all Americans are heirs. As the authors of *The Federalist* so eloquently explained, the most important guarantee of our rights is the form of limited government, rooted in the will of the people, that the Constitution establishes.

One of the most important days of my tenure as America's 70th Secretary of State was July 16, 2020, when I presented to the public the Commission on Unalienable Rights' draft report in Philadelphia. It was a privilege to look out over Independence Hall and to be reminded of the revolutionary history of sacrifice and freedom that brought every person to that room that day.

The central message from that speech is this: "America is special. America is good. America does good all around the world."

Americans can only understand the truth of that statement if we get back to basics about why unalienable rights are at the heart of the American experiment in freedom. We will also see that a strong, sovereign, and prosperous United States—a nation that lives out the true meaning of its creed—is good for Americans and good for the world. By renewing our sense of purpose, we can encourage other nation-states, through their sovereign laws and political decisions, to secure rights for their own citizens and strengthen their partnerships with the United States. We will continue shining the light of freedom abroad.

Since its own founding in 1973, The Heritage Foundation has exceled at studying the promise of America. These essays take on some of the most important questions before our nation today as we continue to fulfill that promise. My thanks to the authors and editors for their work to teach a new generation the old truths that make our nation exceptional.

The Honorable Michael R. Pompeo was Secretary of State of the United States of America in the Donald Trump Administration.

Returning to First Principles on Human Rights

EMILIE KAO *and* BRETT D. SCHAEFER

The Heritage Foundation has become increasingly concerned about the harmful evolution of international human rights. This evolution diminishes their credibility as truly universal norms, prospects for enforcement, and justice for victims of the worst violations. It also threatens Americans' understanding of fundamental, natural rights that form the foundation of our jurisprudence and system of government. To push back, we convened this series of essays on the First Principles on Human Rights featuring noted experts outlining the threat and defending the special character of natural rights and fundamental freedoms.

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The Founders' Understanding of Equality and Natural Rights

America did not invent the idea of human rights, but no nation more closely incorporates those ideals into its founding and character. The notion that all men are created equal and are endowed by God with inherent, natural rights separate from government was present at the very birth of our nation. The Declaration of Independence references the "Laws of Nature and Nature's God" as the standard against which governments should be held accountable. The revolutionary idea that government should act as the guarantor, not the grantor, of unalienable rights (among them life, liberty, and the pursuit of happiness) is embedded in the U.S. Constitution.

From this American perspective, natural rights do not come from a monarch or a president and are not the privilege of the wealthy or the educated. The proper role of government is to establish the rules and policies to ensure that Americans can exercise their inherent unalienable rights and freedoms. It is no accident that the first amendment to the U.S. Constitution is expressly aimed at defining and protecting these rights.

Dignity, Equality, and Unalienable Rights in International Law

One of the most lasting and valuable gifts that America has provided the world is leadership that led to universal consensus that all human beings possess unalienable rights.

After the staggering human toll of World War II and the horrors of the Holocaust, world leaders began a remarkable project in 1948 to identify and protect universal human rights. Eleanor Roosevelt served as chairwoman of the committee that drafted the Universal Declaration of Human Rights (UDHR). She forged a consensus among representatives from diverse countries, political systems, cultures, languages, and religions. The commission included a Chinese Confucian; a Lebanese Catholic; a Soviet Communist; an Indian Hindu; and members from Australia, Iran, and the Philippines. All 58 member states of the U.N. General Assembly met regularly in some 150 meetings to negotiate the document. The UDHR passed with 48 members voting in favor, eight members abstaining, and two absent. It recognized "the inherent dignity and of the equal and inalienable rights of all members of the human family" as "the foundation of freedom, justice and peace in the world." This revolutionary statement on human dignity, equality, and rights clearly echoed the Founders' natural law understanding.[1]

International Human Rights and the Transnational Legal Process

Over the ensuing decades, however, this remarkable consensus has been challenged by a powerful new movement of sovereign and non-sovereign entities, including lawyers, academics, nongovernmental organizations (NGOs), activists, and U.N. officials who seek to "improve" on what was accomplished in 1948. In order to meet perceived new challenges, many of which are attributed to globalization, this movement asserts new rights and new interpretations of legally recognized rights.[2] However, efforts to promote the "evolution" of rights threaten to undermine the great and noble project in fundamental ways.

Over the past seven decades, progressive activists have advanced a notion of rights that seek to guarantee benefits to individuals from governments or to assert rights to categories of people or to the broader community. These activists have managed to insert this language into various multilateral agreements. As noted by Secretary of State Michael Pompeo, the original 30 rights in the UDHR have proliferated into 1,377 rights provisions in 64 agreements.[3] The new rights encompass a variety of matters, including rights addressing a clean environment, vacation, health care, sexual orientation and gender identity, and many other issues. These rights are often in tension, sometimes outright conflict. For instance, the recently asserted right to be free from offensive "hate speech" conflicts with the internationally recognized right to free speech. But as Pompeo observed, "More rights does not necessarily mean more justice." Indeed, the proliferation of rights and the desire to advance all of them without preference has blunted efforts to advance internationally recognized rights. The more that there is confusion about what human rights are and insistence that all rights are equally important, the less likely it is that their universal nature will be respected.

Moreover, the proliferation enables governments to cynically deflect criticisms by pointing to their protection of other "rights." For example, when confronted with evidence that they torture and illegally imprison their own citizens, repressive states such as Russia and China point to their constitutionally guaranteed rights to health care, water, education, or other benefits. Confusion and controversy over what human rights mean diminishes their credibility and prospects for greater enforcement.

Dr. Aaron Rhodes, in a paper written for the *First Principles on Human Rights* project, takes this debasement of human rights head on. He details how the international human rights movement, originally established as a project to define and protect individual rights, "has evolved to endorse a broadly expanded array of rights, including many that are profoundly inconsistent with the philosophical and moral foundations of the very concept of inherent, natural human rights." He explains how these new "rights" represent a threat to individual human rights, drive rights proliferation, dilute attention to basic freedoms, clutter and politicize the international human rights agenda, and impair "efforts to identify and address violations of individual civil and political rights."[4]

Accountability is further undermined by activists bypassing the process of diplomatic negotiations and Senate ratification through which treaties are adopted. Yale law professor and former Assistant Secretary for Human Rights Harold Koh refers to this process as the "translation" approach. He writes that in the absence of "established legal rules that map perfectly onto the new and unanticipated factual circumstance...we can still make a good-faith effort to translate from the spirit of existing rules of law...to new situations. In time, those new rules can eventually enjoy international consensus and legal legitimacy."[5] However, when those translations lead to contested understandings, as they often do in the area of human rights, the result is to paint the patina of broad consensus on ideological agendas.

Historian John Fonte points out that this process is also a threat to national sovereignty. Unlike "international" law, which is negotiated between nation-states through treaties and agreements, transnational (meaning "across or beyond") law reaches beyond national law, constitutions, and officials. "It is directed at the *internal* political affairs of nation-states and undertaken by both foreign and domestic non-state actors and by foreign states." Even though states may never have expressly agreed to the obligations in writing, the binding character of these norms is nevertheless presumed based on their conduct.[6]

Koh describes how coordinated insider/outsider strategies can promote compliance to new international norms "by resisting governments." The outsider strategy of NGO activists filing lawsuits and complaints, combined with the insider strategy of embedding translations of international law within U.S. government bureaucracies, can lead a nation into "a pattern of sustained default compliance with international law that makes quick deviation from these rules far more difficult than casual observers might predict."[7]

Even some justices of the U.S. Supreme Court have cited international law in discharging their duty to interpret the U.S. Constitution. As Associate Justice Stephen Breyer has argued, "Human rights are more and more international.... What is at issue is the extent to which you might learn from other places facts that would help you apply the Constitution of the United States."[8] Fonte warns that this evolution places the legitimacy of domestic law under the scrutiny of international law rather than the U.S. Constitution.

Professor Jeremy Rabkin, in a paper written for the *First Principles on Human Rights* project, argues for an unapologetic defense of U.S. sovereignty and America's process for treaty ratification. As he notes,

> The traditional view of the Constitution, if we still attend to it, protects our system against overreaching by contemporary human rights advocates. This both protects Americans against distorting pressures from outside forces and leaves the United States in a better position to focus its international efforts against those governments that are, in American eyes, the worst abusers of human rights.[9]

Where the Evolution of International Human Rights Is Leading

The consequences of complying with evolving understandings of human rights are most evident in the conflicting understandings of the right to life, freedom of speech, religious freedom, and equality and non-discrimination. The asserted reinterpretations of these rights have so radically transformed their original meaning as to challenge the Constitution's protections of Americans' rights.

As Professor Tom Finegan writes, this movement offers a revisionist account of personhood that excludes various human beings including the unborn, those who lack any significant level of consciousness, and those with profound intellectual disabilities. This new interpretation rejects the right to life of unborn children and endorses a right to abortion despite the absence of supporting language in the text of the UDHR or in the diplomatic history of 1948. Finegan calls upon pro-life states to reject faulty interpretations of treaties by rogue bodies and amend binding international human rights law. He warns that if states are passive toward or acquiescent to faulty pronouncements by treaty-monitoring bodies, those pronouncements could attain the status of customary human rights law. Failure to assert the correct understanding of treaties, he warns, will make adherence to genuine human rights increasingly impractical.[10]

As attorneys Mike Farris and Paul Coleman write, this movement also seeks to limit free speech in the name of combatting "hate speech," even though there is no universally agreed legal definition of hate speech. In the post–WWII debates at the U.N., liberal democracies fought against efforts by the Soviet bloc to justify censorship in the name of combatting fascism. But today, European nations and progressive NGOs want to create politically correct speech codes. The U.N. itself has launched a major initiative to combat "hate speech" spearheaded by the Secretary-General and supported by European nations and by Muslim-majority countries, which view it as a prelude to a global blasphemy law. The U.S. Senate, when it gave its advice and consent to ratifying the International Covenant on Civil and Political Rights, only did so after including a reservation that "Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States." But this reservation is regularly attacked by U.S.-based NGOs, human rights activists, and U.N. experts. Coleman and Farris urge the U.N. to adopt the U.S. Supreme Court's standard, permitting speech to be restricted only if it is likely to incite imminent lawless action, not simply because it creates offense.[11]

As Professor Daniel Philpott explains, New Natural Law Thought recognizes that no person, community, or government may interfere with a person's practice of religion. The UDHR recognized this by protecting religious freedom in Article 18. However, revisionists argue that religious freedom (1) is indistinct from other rights such as freedom of expression and conscience, (2) is the product of modern Western power, and (3) should be drastically curtailed to benefit newly emergent claims for sexual orientation and gender identity. Philpott urges scholars, teachers, and religious leaders to teach natural law as a basis for human rights in general and religious freedom in particular. Natural law can contribute to greater consensus among states and citizens because it offers a justification that may be grasped through reason regardless of particular religious traditions.[12]

As Professor Li-Ann Thio explains, including equality and non-discrimination in the UDHR and subsequent treaties was intended to protect individuals from mistreatment on the basis of characteristics such as race, ethnicity, sex, and religion. But more recently, activists have sought to force agreement on sexual orientation and gender identity in ways that potentially undermine freedom of religion, conscience, and speech. Thio urges a holistic view of rights, duties, and goods, as reflected in the UDHR, rather than a one-sided "balancing" process that privileges a certain ideology. Thio explains that attempts to create controversial "new rights" or standards that member states never agreed to will be counterproductive.[13] Some states already consider the over-reaching of the U.N. bureaucracy in sexuality a form of moral neo-colonialism.

Finally, Professor Paolo Carozza, who served on the State Department's Commission on Unalienable Rights, examines human dignity, the foundation of the universal human rights movement. He notes that the work of Eleanor Roosevelt, French philosopher Jacques Maritain, and their colleagues was to build practical consensus around a limited number of rights, like genocide, slavery, and torture, that are rooted in concrete experiences of human dignity shared across broadly diverse expressions of human culture. International norms should continue to be secured on the basis of human goods that are truly and widely held in common among diverse portions of the human family, he writes. In this way, international human rights will advance real human goods with universal social legitimacy. He urges policymakers to be cautions in the use of the concept of dignity in the law in ways that generate new rights or aggressively new understandings of rights. Claims regarding human rights to abortion, euthanasia, and assisted suicide may advance a particular ideological agenda, but lack universal consensus. Where there is disagreement, Carozza urges strong respect for pluralism and a proper regard for the relationship between national sovereignty and human rights. Rightly understood, sovereignty is not inconsistent with the idea of universal human rights. As the report of the State Department's commission explains, "national sovereignty serves as the condition for human rights because it is typically at the level of the national political community that a people can

best protect human rights." Harkening back to the Founders' understanding, he notes that states are "the main guarantors" of human rights. Sovereignty underlines the dependence of the protection of human rights on political order. "When a state asserts sovereignty as an excuse for committing or failing to address rights violations, the problem is not with the idea of sovereignty but with flawed exercises of it."[14]

Restoring Clarity to the Human Rights Discourse

Ten years after the adoption of the UDHR, Eleanor Roosevelt asked, "Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm or office where he works."

Respect for international human rights depends on the clear understanding of (1) the definition of human rights, (2) universal consensus around the legal norms that protect rights, and (3) respect for the sovereignty of states that guarantee those rights. The extent to which these three conditions are met will correspond to the individual's ability to live according to his or her rights in small places close to home.

But the new rights movement challenges each of these three conditions. Therefore, supporters of human rights should prioritize and stand firm in defense of natural rights and freedoms. The State Department's commission recommended that policymakers carefully consider how closely new rights claims are rooted in the rights laid out in the UDHR, their consistency with U.S. constitutional principles and American traditions, whether the United States and other nations have formally given their sovereign consent to the claimed rights, whether there is a clear consensus of support among the many cultures and traditions of the human family, and whether new rights can be integrated into the existing human rights rubric without harmful conflicts.[15] Each of these considerations will help to ensure that human rights claims have the broad support necessary to justify their recognition as legal obligations.

As explained by Heritage Foundation scholar Dr. Kim R. Holmes:

> The United States is uniquely situated to be the global leader on behalf of fundamental and traditional freedoms because it is the only nation of the world explicitly founded on the creed of individual liberty, natural rights, and constitutional government. It is an exceptional nation. But it will remain so only if succeeding generations are committed to this creed.[16]

By returning to the first principles of universal human rights, the United States can restore clarity to a domestic and global conversation that has become politicized and muddled. This project is a modest attempt to assist that effort.

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CHAPTER 1

How "Collective Human Rights" Undermine Individual Human Rights

AARON RHODES

The human right to individual liberty rests on a moral and rational foundation that was understood in ancient times, with the realization that the laws of rulers and legislatures must conform to the laws of nature so as not to infringe on the freedoms that are essential to human nature. Human beings possess reason and moral agency—the capacity to make moral choices; this is what forms the core of humanity. True human rights are those that constrain governments from violating our inherent, natural right to liberty—the freedom to live and act in accordance with these central pillars of humanity's common nature.

To the degree that the individual right to liberty has been honored and respected, societies have flourished, and their members have had opportunities for human fulfillment. To the degree that they have been betrayed, restrictions on fundamental freedoms have resulted in tragic human suffering: violence, poverty, discrimination, the manipulation of truth and information, and lost opportunities to advance the welfare of individuals and societies.

At the end of World War II, the international human rights system was envisioned as a project to defend individual human rights. Yet, through ideologically driven revisionism, it has evolved to endorse a broadly expanded array of rights, including many that are profoundly inconsistent with the philosophical and moral foundations of the very concept of inherent, natural human rights. Today, internationally protected human rights include rights rooted in political movements, that obligate government not to respect freedoms, but to provide services, and corporate solidarity rights that are not individual rights at all.

One variant of the latter is the notion of "collective human rights." Collective human rights show the contempt for intellectual integrity that underlies much of contemporary human rights discourse and practice, and the failure of the international community as custodian of the idea of human rights itself. Since the establishment of the international human rights system over 70 years ago, and particularly in recent decades, more and more attention in the human rights community (including international institutions as well as civil society campaigns) has been devoted to collective and group rights, and international human rights legislation has focused on protecting the rights of specific categories of people with a tendency to collectivize them in a framework of group interests and entitlements.

Scholars and activists have sought to give assurance that such collective rights neither exclude, nor conflict with, individual human rights.[1] But they do. "A collective right is not a human right, but a right established by a state or community regarding a group."[2] There are no specifically women's human rights, gay human rights, indigenous peoples' human rights, or disabled persons' human rights, beyond those they share with all others. Collective or "group" human rights are an oxymoron because they are not rights of human beings.

This *Special Report* aims to provide a cursory review of the origins of the idea of collective human rights, and how these rights entered into international human rights law and "soft law."[3] It enumerates the ways that collective human rights are a threat to individual human rights and how they drive human rights proliferation and inflation, how they dilute attention to basic freedoms, clutter and politicize the international human rights agenda, and how they impair—sometimes intentionally—efforts to identify and address violations of individual civil and political rights. Collective rights are fragmenting and divisive, corrosive of the vision of humanity as such—the moral vision that gives human rights their potential as an inclusive, international movement on behalf of all individuals, everywhere.

Collective Human Rights in Context

Collective human rights are sometimes also called group rights, solidarity rights, or communitarian rights. A clear, consensus definition is not an option; there is hardly a fuzzier issue in international human rights—or one that has been subject to more technocratic casuistry—than the issue of collective human rights. It is perhaps easiest to identify the rights that preceded the assertion of collective human rights and use those examples to illustrate how collective rights are a departure from human rights as traditionally understood.

Civil and political rights, that is, inherent, individual rights to be free from state coercion, are "first-generation" rights. These basic human rights to various freedoms and liberty itself have been recognized in different ways and with varying degrees of clarity since ancient times, and became the basis for liberal democratic governments in the Enlightenment. They are rights that are protected in the U.S. Constitution's Bill of Rights. The First Amendment prohibits the passage of laws that infringe on religious freedom, freedom of speech, the freedom of peaceful assembly, and the right to petition the government for redress of grievances. Such rights to freedom, or "negative liberties," are also protected by international human rights legislation, in particular by the United Nations' International Covenant on Civil and Political Rights (ICCPR). First-generation rights require government restraint, and few if any government expenditures (hence, "negative" liberties). They are rights that are seen as inherent and rooted in a natural, or God-given, order; that is, they are natural rights.

Economic, social, and cultural rights, or "second-generation" rights, differ fundamentally from the first-generation human right to basic freedoms in that they assert rights to positive state services. For example, the U.N.'s International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees citizens a wide range of social services, mandating legislation to provide, inter alia, social insurance, paid maternity leave, and the right to an "adequate standard of living."[4]

Such positive rights from the state cost money to provide, and thus depend on the availability and redistribution of resources. They are not clearly inherent natural rights, but are rights granted by states on the basis of positive law, reflecting political preferences. They are arguably not universal human rights, but rights that derive from specific political traditions. Their presence in the system of international human rights establishes that for the purposes of international politics, human rights need not be natural rights; positive human rights have provided a moral and legal framework for human rights proliferation, and for the loss of human rights as a moral test of the legitimacy of regimes.

Collective human rights, as "third-generation" rights, are a further devolution from inherent human rights. Third-generation rights are both "corporate rights" belonging to individuals by virtue of their membership in groups, and collective rights of groups themselves. The distinction between these two forms of third-generation rights often becomes obscure in practice; here we discuss issues of concern with both, while

focusing in particular on the latter—rights that are, strictly speaking, collective rights. Economic and social rights are enjoyed by whole societies, and by different categories of people in different ways through implementing social policies that seek to protect well-being differentially, that is, through groups. They are often seen as collective rights, but economic and social rights can also be understood as individual human rights to minimum social standards and protections, that is, as an implementation of individual rights.

Collective human rights are the rights, not of individual human beings, but of groups *as* groups. The doctrine of collective rights holds that a person's rights that are dependent on the group cannot be honored unless the rights of the group as an entity are honored. Some collective rights are seen as universal, when the collectivity in question is the human species; such rights cannot be enjoyed individually unless they can be enjoyed universally. Rights like the "right to a sustainable environment" might make sense as rights to be free from harm from others, within the framework of tort law, for example. But this is not how they are framed in collective rights legislation and soft law, which is generally redistributionist in orientation. Other collective rights are human rights that are restricted to a defined set of people. They are thus rights that cannot be enjoyed by all; they are only available to individuals within a given community.

Proponents of collective rights argue that while the individual may have been the main subject of international human rights law, and individual rights its main object, the enjoyment of those rights requires some to devolve directly upon groups.[5] They hold that individual rights to basic freedoms are insufficient to protect members of groups from discrimination and exploitation on the basis of qualities they derive from such membership. Collective and group rights are considered necessary to individual psycho-social survival when individuals derive their very identity from such groups, for example, members of indigenous tribes. Some group rights are thus meant to preserve the cohesion of groups as such. They are "special measures to maintain and promote separate identities...[and]...allow for a lasting manifestation of difference."[6]

The idea of group rights raises the problem of priorities: Group or collective rights might be considered priorities in the sense that without them, various other human rights cannot be realized. This draws upon, but also contradicts, the U.N. doctrine that no human right is prior or superior to any other, and that all are equal, indivisible, and interdependent. If one believes that collective rights are indeed human rights, then one is bound to the conclusion that the enjoyment of individual freedoms depends on honoring collective and group rights.

Collective Human Rights in Hard Law and Soft Law

The idea of collective human rights grew into human rights discourse and the modern human rights system from conceptual and legal kernels that predate it, kernels that have been eclipsed subsequently in international human rights "hard"[7] and "soft" law.

The League of Nations recognized various rights of minority collectivities in the context of political adjustments after World War I. Article 22 of the Covenant of the League of Nations referred to "peoples" of former colonies, and "the principle that the well-being and development of such peoples form a sacred trust of civilization."[8] During the inter-war period and World War II, dangerous, and indeed lethal, interpretations of minority rights and collective rights were deployed. Expansionist ethno-nationalist regimes, mainly that of Nazi Germany, but also other entities, such as the fascist and anti-Semitic Ustasa regime in Croatia, defined collective legal *duties* of minorities in the framework of minority rights, resulting in group deprivation and exclusion, and the near extermination of Jewish minorities in the quest for racial purity. Protecting the rights of German minorities abroad provided a pretext for Nazi conquest and subjugation. Some have claimed that racist Nazi legislation based on an inversion of collective rights was inspired by America's Jim Crow laws, which enforced racial segregation.[9]

When leaders of the Allied powers envisioned a post-war international system to protect human rights and ensure peace, they bore these negative experiences in mind. Respect for individual rights

gained favor as a principle goal of the nascent United Nations Organization, in part due to the failure of the League of Nations to protect members of minorities, and the Nazis' cruel exploitation of the principle of minority rights.[10] All the same, the U.N. Charter, in Article 1, stated that the "self-determination of peoples" was a primary principle for building peace, signaling a collective right.

The 1948 Universal Declaration of Human Rights, which is the framework of principles underpinning the modern international human rights system, made no explicit references to collective rights, and was faulted by some for prioritizing individual rights over collective rights. During deliberations over the Universal Declaration, for instance, the Soviet Union demanded inclusion of collective rights in the form of minority rights, but ultimately failed in the face of resistance from the United States and other nations.[11]

The Universal Declaration did, however, recognize economic, social, and cultural rights, which, as note, can often apply to specific groups only, can be seen as collective rights, and which included principles that enabled the development of collective rights as the human rights system evolved. The Universal Declaration recognized the rights of families and the "will of the people" as what legitimates governments (Article 16). The document stated in Article 28 that "everyone is entitled to a social and international order in which the rights set out in the Declaration can be fully realized." The Universal Declaration thus suggested that humanity has the characteristics of a single entity or collectivity. How is such a right, owed to the human species as such, to be claimed? Who or what is the duty holder?

The Universal Declaration embedded a form of utopianism into human rights discourse and practice, and gave space for the legitimation of collectivistic globalism and ideologies like "one world socialism" that have led to grave violations of individual freedom, and have undermined the U.N.'s own core principle of national sovereignty.

Third-generation rights have typically been promoted by governments and groups from the third world, or what is now more commonly known as the "global South," beginning in the context of de-colonization and increasingly during a period of profound revisionism in human rights that began in the 1980s. Agitation for such rights continues today, often as a political or ideological weapon against systems defending individual rights, against capitalism and free markets, against the putatively discriminatory character of efforts to defend traditional sexual and family mores, and to shield some religions and religious groups from criticism. Although collective and group rights are increasingly embedded in the international *human rights* system, the intrinsic contradiction between universal human rights and collective rights is finessed in diplomatic and human rights jargon by dropping the word "human," so the term of art is "collective rights," not "collective human rights." Collective rights, as such, can be coherent in the sense of rights that are established by groups for their members, but those something altogether different from *human* rights.

Collective Rights in U.N. Human Rights Treaties. Following the devastation of World War II and the Holocaust, the international community sought to address tragic and urgent threats to members of minorities and refugees within the matrix of human rights. The Convention on the Prevention and Punishment of the Crime of Genocide is considered the first piece of international human rights legislation, promulgated in 1948, before the U.N. Third Committee and the Human Rights Commission began to debate how to codify the principles in the Universal Declaration. The Genocide Convention specifically banned violence that targeted a national, ethnic, racial, or religious group for destruction, and thus suggested that "membership of a minority community entails distinct human rights."[12] It was an inversion of exterminationist Nazi law and practice, seeking to protect groups targeted as groups.

The 1951 Convention on the Status of Refugees is another early human rights treaty targeting specific groups: asylum seekers and refugees—those who have a "well founded" basis to fear persecution based on their race, religion, nationality, membership of a particular social group, or political opinion. The right to asylum, however, is clearly an individual right: Article 14(1) of the Universal Declaration states, "Everyone has the right to seek and enjoy in other countries asylum from persecution." In order to be declared a refugee under the terms of the Convention on the Status of Refugees,

an individual must show personal persecution, not persecution of a group.

The main international human rights treaties, namely, the ICCPR and the ICESCR, share a common Article 1 on the "right of *peoples* to self-determination." (Emphasis added.) Self-determination was thus seen as a collective right, a right of peoples or nations; if the article had referred to people, singular, or persons, it would have affirmed the right of individuals to choose their form of government, to make their own laws, indeed, to liberty and the pursuit of happiness. Instead, it suggests the collective will of a putatively homogeneous community, and all the dangers of majoritarian rule that go with it.

Article 27 of the ICCPR states, "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." This statement does *not* assert a collective right of any group, but individual rights of members of groups. It is the same with the non-binding 1992 U.N. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.[13]

The African Charter on Human and Peoples' Rights,[14] which came into effect in 1986 under the auspices of the Organization of African Unity (later the African Union), recognizes collective rights more than any other human rights treaty. The document states that "peoples" have the rights to equality (Article 19), self-determination (Article 20), their natural resources (Article 21), development (Article 22), peace and security (Article 23), and a "generally satisfactory environment" (Article 24). In fact, Chapter 1 concerns "Human and People's Rights," suggesting that the two are not the same.

Of the nine major international human rights treaties (other than the genocide and refugee conventions), four address specific groups: women, children, migrant workers, and the disabled. These treaties conceive of human rights along identity lines; both "corporatist" and "collectivist" impulses may be found in each. The treaties tend heavily toward mandating state group entitlements deemed necessary to the enjoyment of human rights, and some have established new human rights altogether.

The Convention on the Rights of the Child has 196 state parties—more than any other U.N. human rights treaty. The treaty deals with numerous serious threats to children, yet puts the state in the role of making decisions about the moral education of children. Dealing with children as a group, it has spawned assertions of additional collective rights of various classes of children, especially indigenous children,[15] and suggestions of special human rights of indigenous children with disabilities.[16]

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which the U.N. General Assembly adopted in 1990, defines a migrant worker as "a person who is to be engaged or has been engaged in a remunerated activity in a State of which he or she is not a national."[17] Migrant workers are often abused by employers, sometimes with complicity by state actors, such as with workers from Pakistan and elsewhere in the United Arab Emirates and other Persian Gulf states. The numerous articles affirm that migrant workers cannot be denied their human rights under other existing U.N. and International Labor Organization treaties. However, the treaty neither creates new rights, nor suggests that migrant workers are a collectivity with human rights.

The U.S. government supported the creation of the Convention on the Rights of Persons with Disabilities (CRPD) "not to create new rights but to ensure that *existing* human rights were made *equally* effective for persons with disabilities."[18] But legal scholar Andrea Broderick of Maastricht University in the Netherlands has argued that "the enactment of accessibility obligations for States Parties, falling indirectly on the private sector, results in some form of *sui generis* 'entitlement' for persons with disabilities, which can arguably be viewed as amounting to a corresponding new human right—the right to accessibility." She states that

> there is no sound legal basis for a separate human right to access and that, even if there were, the accessibility obligations in the CRPD go far beyond any potential "right to access" that could be read into existing international human rights law, both in

> terms of their scope and content. Article 9 CRPD not only imposes widespread positive obligations on States Parties, but it also requires the private sector to take into account accessibility considerations.[19]

The Charter of the United Nations enshrined nondiscrimination as a legal principle. The International Convention to End Racial Discrimination (ICERD) defines racial discrimination as any distinction, exclusion, restriction, or preference based on race, color, descent, or national or ethnic origin.[20] The treaty endorses discriminatory quotas that favor one group over another with the aim of rectifying past inequality and discrimination,[21] but does not explicitly focus on collective rights of any particular racial group.

The Convention to Eliminate Discrimination Against Women (CEDAW), which came into force in 1981, deals exclusively with discrimination against women and does not oppose discrimination against men when promoting more opportunities for women. Like ICERD, it legitimates discriminatory quotas, such as one enshrined in German law in 2015, that imposes a minimum of 30 percent female membership on the boards of large corporations. The campaign to ensure that women can enjoy basic human rights is an ongoing challenge, and legal and societal discrimination against women, especially in Islamic theocracies, is the most widespread form of discrimination in the world. But do women constitute a "group" with rights of its own? Mainstream human rights scholar Jack Donnelley argues that there is no "collective agency for a diverse group that constitutes half of humanity."[22]

Yet, especially following the 1993 World Conference on Human Rights in Vienna, feminist activists and officials have disregarded the principle that women have human rights as individuals, and have sought to collectivize women's rights. Feminism thus put its stamp on human rights, and proponents went further, reflecting an effort to change the very idea and practice of human rights, international law, and society itself. The aim, for the most ambitious members of the movement, was to renegotiate the universal human rights framework in light of women's experiences in particular cultures and class backgrounds.

Women's rights activists claimed that "all human rights instruments in fact assume men to be the bearers of basic rights."[23] The assertion gave license to abandon the principle of gender neutrality altogether. The idea of universality was deemed a fraud, even a conspiracy, to favor generally white men and the patriarchal social order, and was now obsolete. Instead, human rights treaties should focus on a specific group, not individuals. The Vienna conference rightly focused on members of a number of groups who were vulnerable, including members of "national or ethnic, religious and linguistic minorities," indigenous peoples, migrant workers, children, and the disabled, in addition to women. However, it promoted the notion that abused and vulnerable individuals should be protected *as members of groups*—that groups themselves would be the focus of human rights.

Thus, over the course of decades, the very notion of equal, individual human rights was upended. Human rights advocates now see major treaties defining human rights as flawed because they were not drafted from the point of view of victims, but supposedly from the perspective of privileged classes of people. The idea of protecting individual rights came to be associated with discrimination, individualism, and reactionary resistance to expanding respect for the rights of women and minorities. New treaties were needed to rectify historical injustices and challenge the transcendent vision of universal human rights, in favor of a divisive emphasis on group rights and identity politics.

Soft Law on Collective Human Rights. Collective human rights thus occupy a significant, if duplicative and often-ambiguous, position in legally binding international human rights law. But the growing influence of these so-called rights also flows through soft law, in the form of quasi-legal U.N. resolutions and declarations and the assertions of U.N. human rights mandate holders, ad hoc groupings of state representatives, and academic experts that have identified, expanded, and promoted collective human rights.

Soft law is easier to create than hard law because it is not legally binding. Yet there is a distinct tendency for soft law to morph into hard law. Given the wide and differentiated range of sources and topics, there is no comprehensive list of collective and group rights that have been

proclaimed in soft law. However, it is unquestionably a growth industry. As noted by U.S. Secretary of State Michael Pompeo,[24] claims of "rights" have exploded; indeed, human rights proliferation is watering down and diluting focus on protecting basic liberties. The scope of this expansion is staggering. The Freedom Rights Project, a research initiative co-founded by this author,

> counted a full 64 human-rights-related agreements under the auspices of the United Nations and the Council of Europe. A member state of both of these organizations that has ratified all these agreements would have to comply with 1,377 human rights provisions (although some of these may be technical rather than substantive).[25]

Cursory accounts follow of several prominent examples of collective rights that originated as soft law and have gained legal currency:

The Right to Development is among the most influential elements of soft law asserting collective rights. Established by a U.N. General Assembly Resolution in 1986,[26] on which the United States cast the only dissenting vote, the Right to Development is a hybrid, involving both "the human person," as well as states and peoples, as subjects. Yet the main thrust of this highly influential concept has always been to strengthen the sense of obligation on the part of wealthy states to assist poor, third-world countries financially, and, thereby, provide the economic conditions under which they could honor civil and political human rights. The Right to Development is perhaps best seen as a cynical play justifying a redistributive political and economic agenda in terms of human rights. It has also been a powerful platform for proclaiming the "indivisibility" of human rights, as seen for example in the 2017 Chinese-government-inspired "Beijing Declaration" of the South–South Human Rights Forum, which declared that "[h]uman rights are the unity of individual rights and collective rights."[27] From this perspective, individual freedom cannot exist, and cannot be honored by governments, if collective economic and social entitlements are not sufficient—which amounts to a form of international blackmail playing upon the West's attachment to individual rights and freedoms. Third-world states have essentially held respect for human and civil rights hostage with the notion that without more financial assistance to provide for economic and social rights, those rights cannot be enjoyed.[28]

Environmental Rights are collective rights that "affect everyone everywhere"—in other words, they are of the form of collective human rights for which the subject of rights is the human race as a whole. It has an important foundation in the 1972 Declaration of the United Nations Conference on the Human Environment,[29] also known as the Stockholm Declaration, which is considered a part of international environmental law recognizing the right to a healthy environment. In Principle 1 of the declaration, the signatories established that everyone "has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being." Principle 7 asserts, "States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea."

Environmental rights typically obligate governments to refrain from interfering directly or indirectly with the enjoyment of the right to a healthy environment, prevent third parties, such as corporations, from interfering in any way with the enjoyment of the right to a healthy environment, and adopt the necessary measures to achieve the full realization of the right to a healthy environment. Similar language also has been applied to the right to health and other all-encompassing collective rights.

Recently, the Office of the U.N. High Commissioner for Human Rights has focused on climate change as a human rights issue. At the opening of the Human Rights Council session in September 2019, High Commissioner for Human Rights Michelle Bachelet stated, "The world has never seen a threat to human rights of this scope."[30] A "human rights based" approach to combating climate change suggests that U.N. human rights officials need to set and control a wide range of national economic policies in order to ensure that legal human rights obligations are met. Some have charged that promotion of environmental rights in the face of climate change[31] can be a justification and smoke screen for campaigns to end capitalism and to promote

revolutionary economic ideologies that threaten property rights and individual freedom.

Indigenous Peoples' Rights are based on the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). A large proportion of the rights set out in the declaration are collective rights. It begins by asserting: "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law." The declaration also includes, in Articles 3, 5, 8, 10, and 11, the rights of indigenous peoples to self-determination to "maintain and strengthen their distinct political, legal, economic, social and cultural institutions," to protect their culture from destruction, not to be forcibly removed from their lands and territories, and to practice and revitalize their cultural traditions and customs. "In UN parlance, the Declaration is a 'human rights instrument' and commentators commonly conceive the rights it enunciates as human rights."[32]

"Defamation of Religion" Rights. Persistent efforts by the Organization for Islamic Cooperation (OIC) to ban the "defamation of religion" amount to claiming a collective human right based on religion—that a religion, not an individual, can be slandered or defamed. The U.N. Human Rights Council adopted 16 resolutions with the support of Islamic states that essentially demanded protection of Islam from criticism, which proponents call "Islamophobic." A U.S. ambassador to the Human Rights Council, Eileen Donahue, said the concept of "defamation of religion" was "used to justify censorship, criminalization, and in some cases violent assaults and deaths of political, racial, and religious minorities around the world."[33]

Sexual Orientation and Gender Identity (SOGI) Rights. A current top preoccupation of numerous U.N. and other officials and activists is the establishment of collective human rights based on membership in sexual identity groups. The movement is guided by the Yogyakarta Principles, which are ostensibly a "set of new principles on international human rights law relating to sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC)—released... by a group of 33 international human rights experts—[that] charts a way forward for both the United Nations, governments, and other stakeholders to re-affirm their commitment to universal human rights."[34] SOGI is not included in any international human rights treaty. But U.N. member state delegations and the U.N. High Commissioner for Human Rights—in its compilation of "United Nations information on the State under review" and "summary of information submitted by other stakeholders"[35]—regularly call for SOGI group rights during Universal Periodic Review exercises.[36]

Numerous other U.N. initiatives and resolutions declare collective human rights.[37] In 2012, the U.N. Human Rights Council began a process to establish a "right to peace."[38] The motion passed with the support of such states as China, Cuba, Libya, the Russian Federation, and Saudi Arabia, states for whom "peace" meant acceptance of state authorities, by their own citizens and by other states. The United States was the only country voting against the motion, while European countries abstained. In 2014, the independent expert on Human Rights and International Solidarity, a mandate created in 2005, presented a draft U.N. resolution claiming, "The right to international solidarity is a fundamental human right enjoyed by everyone on the basis of equality and nondiscrimination."[39] The main thrust of the draft resolution is the obligation of wealthy states to provide financial assistance to poorer countries in order to help them honor economic and social rights. Such assistance has always been a key component of the "right to development."

The U.N. General Assembly proclaimed a "human right to clean drinking water and sanitation," and called upon states and international organizations

> to provide financial resources, capacity-building and technology transfer, through international assistance and cooperation, in particular to developing countries, in order to scale up efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all.[40]

American officials objected, stating that no such right existed under international human rights law. A review of the relevant legal instruments, they said, "demonstrates that there is no internationally

agreed 'right to water.' Neither the Universal Declaration of Human Rights (UDHR) nor the International Covenant on Economic, Social, and Cultural Rights (ICESCR) mentions water at all."[41] Other collective human rights that are generally redistributionist routinely mushroom up from within international bodies, for example, the "right to sanitation"[42] and the "right to the city."[43]

New Collective Human Rights Treaties in the U.N. Pipeline. With the assertion of a broad array of collective rights in "soft law," international officials and human rights activists are hard at work pressing for additional legally binding human rights instruments. For instance, United Nations human rights officials, lawyers' groups including the American Bar Association (ABA), nongovernmental organizations, and influential governments have been promoting a "U.N. Convention on the Rights of Older Persons." Argentina, Chile, and other Latin American and African countries spearheaded the proposal.

The proposed convention would institutionalize services to the elderly not as government policies, but as rights guaranteed by international law. According to its proponents, the rights of older persons are "invisible under international law" because they are not "recognized explicitly." Proponents say that universal human rights protections afforded by the main U.N. conventions on civil, political, social, economic, and cultural rights have not protected the aging from discrimination, exploitation, and deprivation. At a strategy meeting to promote advocacy for a convention, sponsored by the ABA, a top Argentine diplomat argued that the main rights treaties came into force at a time (in the 1970s) when people only "thought about white males."[44] Universal human rights protected all "in theory," but additional treaties were needed to protect children, women, racial minorities, indigenous people, migrants, those with disabilities, and now, the aging. U.N. human rights officials took the position that the lack of a dedicated human rights protection system for the elderly was an affront to the rule of law; older persons are victims, and international law is the most effective way to make changes in societies. The "progressive development of international law" is thus a worthwhile investment as "states turn to the U.N. to solve problems more cheaply."[45]

Nongovernmental activists argue that "mainstreaming" the rights of older people through a new treaty and applying a "rights-based" approach to social services will raise the profile of the issue and force states to assign resources and create institutions to comply with legal obligations. The project of advocacy for a treaty has become a guidebook for civil society groups that want a U.N. treaty dealing with their own area of work. It is also a strategy to generate funding streams and lock them in with binding legal obligations.

The U.N. General Assembly gave a major boost to the creation of a new treaty by establishing the Open-Ended Working Group on Ageing to "consider the existing international framework of the human rights of older persons and identify possible gaps and how best to address them, including by considering, as appropriate, the feasibility of further instruments and measures."[46] The working group, open to input from civil society, institutionalizes the treaty-making process, making it virtually inevitable. A communication from the working group states: "Existing instruments and mechanisms do not appear to provide sufficient specificity about quality and accessibility of health and long-term care for older persons."[47]

Addressing the U.N. Social Forum in 2014, the High Commissioner for Human Rights gave unqualified support for a new treaty, saying, "We have found that articulation of dedicated instruments laying [out] the specific rights of certain groups can be of invaluable assistance in focusing world attention—and action—on key groups at risk."[48] The rights of older persons have been included in the agenda of the Human Rights Council, which has appointed an "Independent Expert on the enjoyment of all human rights by older persons" to report regularly on the issue.[49]

Some resistance to this initiative has reportedly come from the United States, the European Union, China, and other powerful states who argue that existing international law already protects the rights of older people.[50] But democratic states fear conflict with "like-minded" allies and political backlash from their large aging populations. European human rights officials wanted to oppose the treaty, but did not know how without placing themselves in political jeopardy. A confidential memorandum from the EU's Human Rights Working Group (COHOM) in July 2013 referred to a

growing lobby, especially in Latin America, for a convention on the rights of the elderly:

> The EU and many others are opposed to a new convention, as they say that all rights are already covered in existing treaties and are wary of the creation of a new treaty architecture, reporting, treaty body etc. However, the OHCHR [Office of the High Commissioner for Human Rights] has also come out clearly in favour of a new convention. The EU is still looking at other options… but ultimately the lobby for a new convention might be too strong.[51]

Without guidance from clear principles, there is apparently no way to resist the proliferation of collective human rights treaties.

In another example, nongovernmental organizations are pressing governments to consider a global treaty protecting the human rights of peasants. The campaign is led by La Via Campesina, an alliance of more than 140 peasant organizations from 69 countries claiming to represent more than 200 million peasants. Other nongovernmental organizations have also joined the effort. The campaign for a human rights convention on peasants' rights is seen as emblematic of "new rights advocacy," that is, the expansion of human rights claims since the 1993 World Conference. La Via Campesina represents a movement to "challenge the hegemonic ideology of neoliberalism in global economics," according to a sympathetic observer.[52]

The Human Rights Council and the General Assembly both invited La Via Campesina to give its views on how the 2008 food crisis could be remedied. In September 2012, the Human Rights Council adopted a resolution on the "Promotion of the human rights of peasants and other people working in rural areas."[53] Sponsored by Bolivia, Cuba, and South Africa, the council adopted the resolution with 23 votes in favor, 15 abstentions, and nine votes against, including European states and the United States.[54] The resolution led to the creation of yet another open-ended intergovernmental working group with the mandate of negotiating a draft U.N. Declaration on the Rights of Peasants and Other People Working in Rural Areas.[55] Negotiations started in July 2013.

In December 2018, the General Assembly approved the Declaration on the Rights of Peasants and Other People Working in Rural Areas, with 121 voting in favor, eight opposed, and 54 abstentions.[56] A campaign for another collective human right initiated by a highly partisan civil society formation thus resulted in a U.N. resolution that will likely lead to a legally binding international human rights treaty.

U.N. Human Rights Council Mandates on Collective and Group Rights. The U.N. Human Rights Council has 56 mandates, or special procedures, through which the body monitors human rights concerns. Only 12 of these focus on examining human rights abuses committed by specific countries.[57] In recent years, the council has approved more and more "thematic mandates." Currently, there are 44 thematic mandates[58]—nearly four times the number of country mandates—that consume the bulk of council time and resources dedicated to its special procedures.[59] In general, newer mandates focus on either a collective rights issue or issues that are political in nature rather than directly with human rights and freedoms. Examples of mandates dealing with specific groups include people of African descent, persons with albinism, migrants, people with leprosy, and older persons. Others deal with rights to housing, development, and the right to a "safe, clean, healthy and sustainable environment."[60] Research has shown that support by U.N. members for collective rights and overtly political mandates has come from unfree states, while free, democratic states have generally resisted politicized and collective rights mandates.

The Threat to Authentic Human Rights Posed by Collective Human Rights

The notion of a group as the *subject* of human rights is inconsistent with principles that have informed our civilization's most central scientific and humanistic traditions. In his *Nichomachean Ethics*, Aristotle showed that to understand what is good for man and for communities, one needs first to understand the individual person and what is good for that individual. He stressed the ability of individuals to think and act independently; that their character is not determined by any group, not even the most basic primary group in society, the family.

Individuals are objectively the basic unit of human life everywhere, so one needs to begin with the individual in seeking answers to ethical and political questions about freedom, authority, moral responsibility, and the obligations and limits of governments, in other words, questions about human rights. Individuals are a universal and irreducible human reality; there is nothing less than an individual. Social formations are not universal; some would say they are artificial, and all would agree they are transitory. Families are defined in various ways in different societies and cultures; so are racial, ethnic, tribal, national, religious, and other communities. Members of specific age cohorts do not have the same rights everywhere. Sex or "gender" is more and more the source of category disputes, with individuals and movements challenging science-based categories as well as social traditions. Categorical identities become more fluid and irrelevant to dignity and rights. What is more, while human rights are a moral principle that remains valid through the vicissitudes of history, the relevance of groups changes over time.

Because group identity is arbitrary, culturally specific, and time-bound, the priority of *individual* human rights makes rational sense. And while collective or group rights may be coherent if understood as rights established by groups themselves that apply to members, all groups are in fact heterogeneous. Ambitious individuals typically seek to leverage the political and economic power of others on the basis of their putative group membership. Groups themselves need scrutiny: Are they voluntary? Are they democratic, or coercive? Do members actually share the beliefs and principles as claimed by those who act on their behalf?

The scholarly human rights literature has lucidly established that collective human rights are not authentic human rights, but what needs more emphasis is how the idea and implementation of collective rights threatens respect for individual human rights. The concept and proliferation of collective human rights have been widely criticized by a number of respected human rights scholars, such as Jack Donnelly, James Griffin, James Nickel, and Wiktor Osiatyński, all of whom have clarified that human rights are only the rights of individuals.[61] They have expressed deep skepticism about how groups supposedly holding human rights should be identified, what kind of rights they should have, and who should exercise collective rights.

Collective human rights threaten the idea, and enjoyment, of human rights insofar as they empower assertions that the rights of a group, or the state itself, can be of higher value than the rights of the individual. In fact, the recent tendency to claim that nonhuman entities enjoy human rights, such as animals and inanimate entities (the Earth and rivers, for instance) may be yet a further devolution of the notion that started with the claim that human rights need not be the rights of individual humans.

The concept of universal, individual human rights, based in nature, is a unifying idea with deep roots in world religions and philosophical traditions. In the Judeo-Christian tradition, it stems from ethical monotheism: If all are members of the same family of mankind, sharing common ancestors, and all beholden to one, all-encompassing deity, all are morally equal, and owe to one another, the respect due to an equal. The Bible teaches to love the stranger and to see others not as members of tribes, clans, or nations, or other families, but as fellow human beings.[62] The idea of humanity, of a common human nature, is not a given in human history, but is rather a revolutionary and emancipative idea, and a continuing moral challenge to societies and institutions. Despite all of its problems and failures, the international human rights system, insofar as it concerns individual human rights and freedoms, has helped to mobilize support for people in oppressive societies and societies that have embraced the concept of collective, as opposed to individual, rights. As an institutional manifestation of universal individual rights, it has offered a bridge between people from diverse societies.

The idea of collective human rights is a step backwards, toward social life rife with ascriptive divisions, that is, differences that are based not on achievement or virtue, but on race, sex, and class. It undermines the vision of universality and the dignity of the morally responsible individual as the subject of human rights. The late Sir Roger Scruton observed that while individual rights compel states, and other people, to respect individuals as having sovereignty over their lives,

> the new ideas of human rights, allow rights to one group that they deny to another: you have rights…which you can claim only as a member of that group. To think in this way is to resurrect the abuses to which John Locke and others were in search of a remedy—the abuses which led to people being arbitrarily discriminated against, on account of their class, race or occupation.[63]

Collective human rights provide moral legitimacy and a quasi-legal foundation for the identity politics that are dividing Western societies, promoting a culture of irresponsibility and victimization. Indeed, with the emphasis on collective human rights, international human rights practice, both in civil society and in U.N. and other multinational bodies, has increasingly embraced "intersectionality," or the need to "acknowledge the ways in which multiple identity strands interact to produce a specific experience at the intersection of numerous heads of discrimination."[64]

Identity politics is also destructive of democratic processes. According to Peter Berkowitz,

> Identity politics represents the latest assault to emanate from our colleges and universities on the principles and practices of liberal democracy. It directs students to think of themselves as members of a race, class, or gender first and primarily, and then to define their virtue in terms of the degree of oppression that they believe the group with which they identify has suffered. It demotes the individual rights shared equally by all that undergird American constitutional government, while distributing group rights based on its self-proclaimed hierarchy of grievances.[65]

Another analyst, Addison Del Mastro, attributed the rise of identity politics and decaying respect for individual rights and democracy specifically to the proliferation of collective human rights:

> [T]he all-encompassing human-rights discourse, if truly implemented and practiced as all the UN documents and treaties say it should be, obliterates the frame of politics itself. It replaces open discussion, disagreement, and compromise with a rights-based frame in which all disagreement and compromise is an unacceptable denial of rights. In essence, a rights-based discourse turns all politics into identity politics.[66]

Indeed, we see in the proliferation of collective human rights a form of human rights neocorporatism, a structured system of interest-group politics that even suggests the collective rights politics of the Soviet Union. Leading U.N. officials openly claim that the goal of the international human rights system is "substantive equality."[67]

According to legal philosopher Roger Pilon, the modern human rights system, in emphasizing positive state actions as opposed to freedom from state coercion, is "socialist to its core." Given that the Soviet Union sought to establish collective rights in the Universal Declaration of Human Rights, the proliferation of collective rights represents a postmortem victory for Soviet ideology. Indeed, the proliferation of collective rights is not merely an academic problem, it is a problem for the future of freedom. The proliferation of collective human rights reflects rational-actor behavior on the part of interest groups and identity-politics campaigners, who see in the contemporary elastic concept of human rights opportunities to endow their causes with the moral prestige and legally coercive power of human rights and create opportunities for influence and funding.

As observed by Clifford Bob, a proponent of more human rights, "If aggrieved groups can portray their causes as human rights issues, they may be able to tap organizations, personnel, funding, and other strategic resources now available at the international level."[68] Both international officials and human rights lawyers support this agenda because they see it as addressing human rights problems and offering expanded human rights structures and more professional opportunities in expanded international human rights. Civil society has been a primary driver of the process. The human rights movement has often set aside principles and "adopted" new collective rights for "strategic" reasons, whether to broaden constituencies and funding bases, pander to groups insisting that their grievances are human rights violations, expand

coalitions, or other reasons. A progressive *realpolitik* holds that human rights are a tool for achieving political objectives, based on a "realistic appraisal of rights claims and rights law as politics."[69]

Undemocratic states also support the proliferation of collective rights to further weaken the leverage that international law and political pressure pose to their own oppressive policies against individual freedom. Promoting collective human rights inflation is a tactic to violate human rights with impunity. In 2018, the European Parliament's Directorate-General for External Policies examined how the "expansion of the concept of human rights impacts on human rights promotion and protection." The consultation resulted in the conclusion that "attempts to develop new rights or to change the nature of human rights has [sic] caused the system to be diluted and is undermining the protection of fundamental rights."[70] Some actors, the study found, have sought to use human rights mechanisms to address issues that go beyond the scope of human rights.

The EU Parliament study found that, in particular, collective rights, such as the "right to development," are tools promoted and used by undemocratic states "seeking to undermine human rights through expansion [with] several goals: UN agenda cluttering, resource absorption, weakening of human rights scrutiny or accountability mechanisms, diversion of attention from existing human rights or from their own abuse."[71] The conclusion is consistent with the development of increasing numbers of U.N. Human Rights Council mandates dealing with collective human rights, as noted above. With more and more mandates approved for more groups, more human needs, and more ideological and political conflicts, the relative amount of attention to freedom from torture, freedom of association, freedom of religion, and freedom of expression—freedoms that allow citizens to address all of their social problems—is restricted.

Indeed, there is a strong overlap between the main abusers of freedom of religion and other fundamental individual rights, and states that promote collective rights. Oppressive states fear the idea of human rights as individual rights; they seek to undermine the concept of individual rights and crowd it out of the international human rights system through human rights inflation and dilution. Promoting collective human rights is a divide and conquer strategy, domestically and internationally, and corrodes what is the most powerful intellectual and spiritual principle for protecting individual rights: the ideal of universal human brotherhood founded on our common human right, as individuals, to liberty.

Saving Human Rights from the Collective Rights Agenda

Liberal democracies, the United States foremost among them, need to oppose the idea and proliferation of collective human rights if they are to renew understanding of the principle of individual freedom and to promote authentic human rights abroad. The nefarious political agenda behind the proliferation of collective rights is symptomatic of a broad malaise affecting the field of international human rights. Both collective rights and ideologically driven economic and social rights have come to dominate international human rights discourse to the detriment of focus and discourse on individual liberty and fundamental freedoms. More and more problems are labeled human rights problems, and there are more and more human rights standards, treaties, "high-level" international human rights officials, international mechanisms, and courts, all of which are good business for academics, lawyers, and the mainline human rights community, that is, generally well-intentioned people seeking solutions to important problems.

However, in the face of ongoing, politicized, and largely technocratic expansion of international human rights ideas, legislation, and institutions, respect for individual freedom is declining dangerously around the world. Over decades of human rights revisionism, authoritarian states that fear individual rights have developed a seductive human rights ideology, human rights without freedom that conflate human rights with redistributive social policy, justify repression, and push the struggle to protect basic freedoms off the international agenda. Governments increasingly encroach upon religious freedom and freedom of speech, the freedoms arguably most vital to future human fulfillment. Liberal democracies have done little to counter, in philosophical and moral terms, anti-democratic discourse that denies the principle

of inherent individual rights based in nature and hijacks the agendas of international institutions with politicized collective rights issues.

Multilateral human rights institutions have proven incapable of addressing this downward trend and are, tragically, contributing to it. In the past few years, the U.N. Human Rights Council, the world's premier human rights institution, has proven vulnerable to dictatorships who successfully seek membership in the body to damage both the idea and practice of human rights. The Universal Periodic Review process now reflects the broad disrespect, hypocrisy, and insouciance toward individual rights among even liberal democracies. For example, when China's human rights record was last examined under the Universal Periodic Review, few U.N. members objected to China's assertion of "human rights with Chinese characteristics," nor to its defense of the incarceration of more than one million Muslims as a means of vocational education. At the conclusion of the review in November 2018, a majority of states applauded China, a key take-away for Chinese diplomacy that will undoubtedly be used in domestic propaganda to show international support for practices that violate human rights. Likewise, when North Korea's record was reviewed, most states praised its respect for human rights, many noting the totalitarian state's programs in support of disability rights, a collective rights issue.

Both the Human Rights Council and the Universal Periodic Review emerged from the 2006 reform of U.N. human rights institutions. In campaigning for those "reforms," former U.N. Secretary–General Kofi Annan described the problem afflicting the Human Rights Commission (the Council's predecessor) as one of "declining credibility," noting: "States have sought membership of the Commission not to strengthen human rights, but to protect themselves against criticism or to criticize others."[72]

In recent years, with China, Cuba, Mauritania, Russia, Saudi Arabia, Venezuela, and other repressive regimes winning election to the Human Rights Council, it is clear that the same syndrome afflicts the Council. The problem is not rogue states and dictatorships; those will always exist. The problem is the illusion that inclusive multilateral human rights institutions are effective in promoting and protecting human rights, while in reality they are most often a trap where efforts to defend those struggling for their inherent and universal freedoms are willfully thwarted or paralyzed by bureaucratic processes.

While liberal democracies have done little to defend the idea of human rights against the idea of collective rights and other debased notions, they have also generally failed to recognize that human rights institutions of the "liberal" world order have not resulted in liberalization. They have failed to articulate, promote, and deploy a coherent and consistent approach to promoting human rights that could take place outside established multilateral organizations, free from the collectivist approach toward defending human rights. To more effectively counter the trend toward collective rights and support individual rights, liberal democracies must reinforce their own principles, and build a human rights policy based on principled unilateralism and on the use of limited, ad hoc alliances with states that share a commitment to protecting individual rights.

The U.S. Department of State has taken steps in this direction through a 2019 initiative of Secretary of State Pompeo—the Commission on Unalienable Rights—that is charged with examining the question of how human rights are currently understood with reference to the principles of natural law and natural rights. Given America's classical liberal foundations and tradition of constitutional protection of a closely defined, narrow range of basic individual freedoms, discomfort with the international community's loss of focus in human rights, and consequent human rights inflation, comes as no surprise.

Yet anxiety about this major problem appears to be shared only by a few. The human rights community, including civil society and international organizations, is overwhelmingly complacent, and indeed defensive on the topic of reforming human rights. The idea of collective human rights is a domestic, as well as an international challenge. Widespread criticism of the very idea of an initiative to reflect on the proper scope of human rights has emerged largely by advocates of collective rights who view reinforcement of the principle of individual liberty as a threat to group identity and rights. The reactions have revealed shocking deficits in knowledge and understanding of the

foundations of human rights, as well as of how they have been neglected by the methodological positivism of human rights education.

There is a long way to go before a renewed, broad-based consensus on the meaning and importance of freedom and human rights can emerge. The United States can best promote individual human rights and freedoms by projecting its ideals abroad; but broken ideals, and those ideals not enjoying broad-based respect by citizens, are damaged goods that do not travel well. The impulse that gave rise to the Commission on Unalienable Rights thus needs to inform and drive a range of initiatives in civil society aimed at renewing appreciation for America's individual rights tradition.

Saving human rights from collective rights requires not only challenging the idea of collective rights, but also marginalizing it through initiatives reinforcing the salience of the most important individual freedoms. Another Department of State initiative—Ministerial Meetings to Advance Religious Freedom—suggests future directions for promoting basic freedoms on the international level. The two Ministerials to Advance Religious Freedom in 2018 and 2019, have built on a U.S. effort to emphasize and promote religious freedom that began in the 1990s. A Heritage Foundation analyst[73] recommends that these international coordination meetings be codified into law, and form part of a process to identify states that should be sanctioned for abusing religious freedom.

What is remarkable about the Potomac Plan of Action, a document endorsed at the Ministerial in July 2018, is how it almost completely bypasses international human rights institutions while emphasizing national responsibility to uphold international religious freedom standards. The plan introduces a new "framework for national and multinational activity."[74] In essence, this is an ad hoc international human rights process formed as a voluntary alliance, ready to act together to promote religious freedom, unimpeded by procedural and constrictive obstacles such as characterize inclusive U.N. multilateral processes. It should signify a new beginning for international religious freedom and human rights more broadly, but it also reveals how decaying and dysfunctional U.N. institutions can, should, and will be bypassed by freedom-respecting governments, and will—to borrow language from Friedrich Engels—wither away.

Finally, to effectively and broadly counter the trend toward collective human rights and other tendencies that have diminished respect for individual human rights, the U.S. should take steps that would merge the impulses behind both the Commission on Unalienable Rights and the Ministerial to Advance Religious Freedom—that is, the conceptual and institutional dimensions of human rights reform. America's Founders inspired freedom movements around the world, not by military interventions or other foreign entanglements, but by their ideas, beliefs, and sympathies.

The United States has an opportunity to fill the moral vacuum of international human rights with both renewed ideas and renewed methods for improving respect for individual freedoms and rights. The principle of individual rights and freedoms is the key to people living peacefully with their differences, and re-establishing human rights as a North Star for people around the world seeking freedom and democracy, indeed, to strengthening the global struggle for liberty. To challenge the idea of collective human rights; to insist that the universality of individual human rights has a transcendental foundation; and to rally allied partners in efforts to defend individual freedom and civil society, should be the central pillar of American foreign policy. In the long term, it will help secure a more peaceful and prosperous future for all.

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CHAPTER 2

Human Rights: In Our Own Hands

JEREMY A. RABKIN, PHD

America was launched with a declaration that, in the words of John Quincy Adams, "constituted a great people" and "laid the foundation of their government upon the unalterable and eternal principles of human rights." It does not follow, however, that Americans should embrace elaborate schemes to codify human rights in international law. Our Founding documents actually suggest the opposite conclusion. The traditional view of the Constitution, if we still attend to it, protects our system against overreaching by contemporary human rights advocates. This both protects Americans against distorting pressures from outside forces and leaves the United States in a better position to focus its international efforts against those governments that are, in American eyes, the worst abusers of human rights.

Americans are bound to care about human rights. Our country was launched, after all, with a declaration invoking human rights to ground our claim for independence. Sixty years later, John Quincy Adams, whose father had helped to draft that declaration, celebrated it as a unique event in world history: "For the first time since the creation of the world, the act, which constituted a great people, laid the foundation of their government upon the unalterable and eternal principles of human rights."[1]

It does not follow, however, that Americans should embrace elaborate schemes to codify human rights in international law. Our Founding documents actually suggest the opposite conclusion.

The perspective of the Founding era still reflects good sense and clear-sighted appreciation of enduring realities—much more so than the thinking behind contemporary human rights law does. The traditional view of the Constitution, if we still attend to it, protects our system against overreaching by contemporary human rights advocates. This both protects Americans against distorting pressures from outside forces and leaves the United States in a better position to focus its international efforts against those governments that are, in American eyes, the worst abusers of human rights.

Our Law Should Not Rest on Utopian Visions

The Declaration of Independence asserts as "self-evident" that "all men are...endowed by their Creator with certain unalienable rights...." Our most fundamental rights thus come from God or from the logic of nature, not from international conventions.

The Declaration goes on to explain that it is not sufficient to proclaim rights: "to secure these

rights, governments are instituted...deriving their just powers from the consent of the governed." It follows, then, that "whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it." In other words, the remedy for government abuse of basic rights is a new government.

Our Founders would have rejected the idea of an international code guaranteeing human rights by treaty. For one thing, they would have seen it as utopian. They did not have high expectations for treaties in general. After all, the point of the Constitution was to remedy the defects of the original Articles of Confederation—a treaty among the states. As *The Federalist* warned, history offers an "instructive but afflicting lesson to mankind, how little reliance is to be placed on treaties which have no other sanction than the obligations of good faith, and which oppose general considerations of peace and justice to the impulse of any immediate interest or passion."[2]

The Federalist looked at confederacies, with members linked only by agreements among the governments, as holdovers from (or counterparts to) feudal institutions, lacking the strength of governments founded in the direct consent of the governed. Publius derided the "Germanic empire" of the time, a surviving relic of the medieval Holy Roman Empire, as still resting on "laws...addressed to sovereigns" (the princely member states) and "a nerveless body, incapable of regulating its own members, insecure against external dangers, and agitated with unceasing fermentations in its own bowels."[3]

It is not that the Framers saw no value in treaties. When they required that treaties be confirmed by a two-thirds majority in the Senate, they expected that this would ensure that international commitments achieve broad support and presumably, as a result, be hard to disregard. President Washington, while advocating "as little political connection as possible" with foreign nations, still admonished that where the United States had "already formed engagements, let them be fulfilled with perfect good faith."[4]

Nevertheless, as the *Federalist* put it, "a treaty is only another name for a bargain"—an agreement between sovereigns.[5] The most general means of enforcement was understood to be withdrawal of promised concessions in retaliation for delinquency by the other party. As *The Federalist* explained, "a breach of any one article is a breach of the whole treaty" and "absolves the others, and authorizes them...to pronounce the compact violated and void."[6]

Clearly, a human rights treaty cannot work in this way. If Saudi Arabia fails to live up to its obligations under the Convention on the Elimination of Discrimination Against Women (CEDAW), Canada cannot retaliate by authorizing Canadians to perpetrate more sex discrimination. The International Court of Justice (ICJ) recognized the point in a 1970 ruling that distinguished between ordinary obligations of a state "vis-à-vis another State" and "obligations of a State towards the international community as a whole...obligations [which] derive, for example, in contemporary international law from outlawing acts of aggression and of genocide, as also from the principles and rules concerning the basic rights of the human person...."[7]

While the U.N. Security Council might mobilize the world's leading powers to confront "acts of aggression,"[8] there is no comparable body or mechanism to punish defiance of "rules concerning the basic rights of the human person." To talk of "obligations towards the international community as a whole" is to assume something like a world government with power to enforce these obligations—except, of course, that such an authority does not exist. The authors of *The Federalist* would have viewed claims about "obligations" in this context as delusional: "If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation."[9]

The Founders would probably have been even warier of the sorts of claims that advocates for "international human rights law" advance to compensate for the weakness of this law. From the outset, there was an effort to endow international human rights law with transcendent moral authority as a quasi-religious creed. This is the inescapable implication of the Universal Declaration of Human Rights (UDHR), which was "proclaimed" by vote of the U.N. General Assembly in 1948.[10]

The UDHR was not actually a treaty, but a template for later treaties. Its claim to "universality"

might make it seem a sort of contemporary revelation. According to its preamble, it aims to supply "a common standard of achievement for all peoples" so 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...."[11] It is not a set of "bargains" between governments, but a "universal" catechism that "every individual" must "strive" to "respect."[12]

The Founders tried to keep constitutional authority distinct from religious teachings and practices. Accordingly, Article VI of the Constitution requires that state and federal officials be "bound by oath to support this Constitution...." The same clause, after only a semicolon, goes on to prohibit "any religious test for office."[13] The Constitution seeks to assure that our representatives will be loyal to our own governing ground rules, not that they keep a whole catalog of policy aims "constantly in mind."

The UDHR's emphasis is, of course, different from old affirmations of faith. It does not admonish "every individual" to observe fast days or keep the Sabbath, but rather demands that governments secure such benefits as "periodic holidays with pay."[14] But it raises the same question: If government draws its just powers from "the consent of the governed," why should so many practices be settled in advance through a code established by outsiders?

The question has only deepened as the UDHR's initial framework has been further developed in subsequent conventions, each supposed to have the force of law when ratified. In the mid-1960s, the U.N. launched twin "covenants," the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR).[15] In later decades, there would be separate conventions on the rights of women, children, racial minorities, people with disabilities, migrant workers, indigenous peoples, and still others. In 2014, Eric Posner, law professor at the University of Chicago, counted more than 300 separate rights guarantees in the accumulated corpus of international human rights conventions.[16]

Advocates may have thought that touching on so many different practices would bring support from a wider coalition of interests and constituents. The more immediate point was to bridge the difference in outlook between different states. Western states might emphasize personal freedom in a private sphere, while Communist regimes demanded unlimited state power to impose socialist ideals. Human rights conventions were supposed somehow to combine or synthesize all their different views into a new global consensus.

In fact, the conventions assume that states can and should exercise very broad powers of control. The Convention on the Elimination of All Forms of Discrimination Against Women, for example, directs states to "eliminate discrimination against women by any person, organization or enterprise" and "to modify or abolish existing...customs and practices which constitute discrimination against women."[17] It does not recognize exceptions for religious institutions or for any sphere of private life, so it seems to demand (for example) that all religions allow women to exercise the same priestly or clerical functions as men. It also requires states to assure "equal remuneration...in respect of work of equal value"[18]—as if states could judge the "value" of any and every job.

Meanwhile, the conventions tend to minimize or disregard rights that Americans have considered quite fundamental. The UDHR did recognize a right to change one's religion, but that was dropped from the ICCPR.[19] The UDHR offers a vague stipulation that "no one shall be arbitrarily deprived of his property."[20] It says nothing, however, about compensation for nonarbitrary takings (whatever that permissible category might include). Even this questionable guarantee was dropped from the ICESCR and finds no place in any other U.N. "human rights" convention.[21]

The ICESCR does include a "right of every one to the opportunity to gain his living by work which he freely chooses or accepts,"[22] but it does not mention a right to start and maintain a business. It purports to guarantee "the continuous improvement of living conditions" and "the enjoyment of the highest attainable standard of physical and mental health"[23] but never mentions a right to own or sell land or other resources.

If the argument for adhering to international human rights law is that it can make Americans more secure, it is inherently implausible: It is hard

to see how we could make our own rights more secure by letting tyrannical governments help to define what they are. If the argument is that it will stabilize rights in the wider world, that is still unlikely. Since there is no enforcement capacity behind the conventions, their implementation must rely on voluntary cooperation. This assumes the very point at issue: that the world already is or soon could be in agreement on what respect for "human rights" requires.[24]

In general, as Posner notes, ratification of U.N. conventions has not brought higher levels of compliance with what Western states might regard as fundamental human rights.[25] It is not surprising. Every effort to emphasize such rights has been rebuffed by international gatherings. Even after the collapse of Communism, the 1993 World Conference on Human Rights emphasized that "[a]ll human rights are universal, indivisible and interdependent and interrelated" and rushed on to emphasize the "right to [economic] development."[26] "Human rights" has been understood by much of the world as a slogan justifying the expansion of government controls.

Even in Europe, which offers the more favorable conditions for human rights protection, experience has not been encouraging. The Council of Europe, established in 1949 by a handful of Western countries, has since expanded to include 47 member nations (nearly half of which are outside the more exclusive and demanding European Union). Members of this grouping subscribe to a European Convention on Human Rights, which made provision for a Court of Human Rights.[27] The court has evolved to offer many elements of genuine judicial process. Individuals may pursue complaints of noncompliance to the European Court of Human Rights, based in Strasbourg, France. The court has the authority to direct states to compensate the victims of human rights abuses.[28]

Western states have often complied with the court's holdings on human rights obligations. Under Prime Minister Tony Blair, the United Kingdom bowed to the court's finding that British parliamentary government—far older and more reliable than counterparts in any other European nation—violated principles of due process because senior judges were given a place in the House of Lords, where they might participate in debate on new legislation. Britain abolished the Law Lords and established a new Supreme Court in a different building. It also agreed to allow convicted felons to vote because the Human Rights Court insisted that Britain was denying human rights by its ancient practice of denying the franchise to criminals. There are now demands in Britain that after withdrawal from the European Union, a newly independent Britain should also withdraw from or retrench its commitment to the European Convention on Human Rights.

There has been little talk, however, that Russia or Turkey might withdraw or be expelled from the European Convention system. The Court of Human Rights has received hundreds of complaints against these increasingly authoritarian governments, but court rulings have done nothing to restrain their descent into arbitrary rule under Vladimir Putin and Recep Tayyip Erdogan.[29] The Court has failed to focus attention on particular failings. It does not even ensure that recalcitrant countries implement particular decisions or pay mandated compensation awards to victims.[30]

The U.N. human rights conventions have much feebler "enforcement." There are monitoring committees, which can offer criticism but do not even claim the authority to order compensation payments. Though committees sometimes refer to their comments as "jurisprudence" and some states may feel pressured by committee admonitions, the conventions do not give legal authority to the monitoring committees to settle the meaning of convention provisions. States naturally—when they bother at all to attend to what they have promised—tend to choose interpretations they deem most convenient.

The most optimistic view is that over time, we will see a hardening of international human rights norms so that their meanings become more generally accepted and their obligations more generally observed. It is unlikely to happen. As Posner says, it is more likely that they will "gradually dissolve into a soup of competing and unresolvable claims" that lack any real substance.[31]

In the meantime, the conventions are available for advocacy groups to interpret as they find most convenient. They use them to press receptive governments to accept their own favored claims

as international obligations. The domestic public policy of the United States has not yet been much affected by such claims. We may adopt policies favored by international human rights advocates, but it does not yet seem to be particularly impressive or a matter of particular concern to government decision-makers (let alone public opinion) that such policies are described as international legal obligations. It should not, in fact, matter at all what advocates claim is required by international human rights law.

A Treaty Cannot Make a New Constitution

The United States has ratified a number of major international human rights conventions. This may prompt people to think that we are bound by them because treaties are the "supreme law of the land" according to the Constitution itself.[32] That cannot be correct.

To start with, not all treaties are "self-executing" (immediately binding in U.S. law). The distinction was recognized by Chief Justice John Marshall in the early 19th century and reflects basic realities.[33] Treaties often promise certain results but require legislative action to implement. For example, we promised to pay Russia for the purchase of Alaska, but the payment required Congress to enact an appropriation measure separate from the treaty. A treaty makes a promise to other nations, but the follow-through may require subsequent legislation.

For human rights treaties, the Senate has always taken care to clarify that nothing in these treaties would take direct effect without subsequent legislation. The question, then, is whether Congress has full power under the Constitution to implement anything and everything a treaty may require. Again, the answer must be no.

The ICCPR, for example, recognizes that "Everyone shall have the right to freedom of expression" but then adds a number of qualifications on free speech and imposes contrary obligations on government: "Any propaganda for war shall be prohibited by law" along with "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence...."[34] When the Senate ratified this convention, it insisted on including a reservation clarifying that U.S. consent to the bulk of the treaty should not be taken to require American acceptance of any law or policy "that would restrict the right of free speech and association protected by the Constitution and laws of the United States."[35] Nevertheless, international authorities might insist that to comply fully with ICCPR obligations, our government must disregard these internal limits on its authority, even though they are set out in our First Amendment and have been emphasized and applied repeatedly by the U.S. Supreme Court.

Does a treaty allow that? That notion has been rejected emphatically in the past. If "the treaty power is boundless," Thomas Jefferson remarked, "then we have no Constitution."[36] As Justice Hugo Black observed in a 1956 ruling, "It would be manifestly contrary to the objectives of those who created the Constitution" and "alien to our entire constitutional history and tradition" to say that any "international agreement" can supersede constitutional limits. "In effect, such construction would permit amendment of [the Constitution] in a manner not sanctioned by [the amending provisions in] Article V."[37]

If that sounds far-fetched, consider that the European Union is an elaborate scheme of authority superior to the governments of the member states. Thus, European law takes precedence even over the national constitutions of the member states—and all by the force of treaties to which the member states have agreed. It is the precise, clear, and unambiguous claim of the EU's Court of Justice that European law as interpreted by the European Court of Justice is supreme over enactments of national parliaments and pronouncements of national constitutional courts because the European Court interprets the European treaties to require this arrangement.[38]

Could we actually follow that example? In the Virginia ratifying convention, anti-Federalist speakers protested that the treaty power might enable the federal government to do almost anything if a foreign partner agreed. No, said James Madison. He affirmed that "[t]he exercise of the power must be consistent with the objects of the delegation" and then insisted that "[t]he object of treaties is the regulation of intercourse with foreign nations, and is external."[39] *The Federalist* summarized the concerns relevant to the treaty

power as "war, peace, and commerce."[40] Other figures of the era offered comparable assurances.[41]

Joseph Story, the most learned and influential American jurist in the early 19th century and Chief Justice Marshall's great ally on the Supreme Court, explained the issue at some length in his *Commentaries on the Constitution*:

> A power given by the constitution cannot be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it.... A treaty to change the organization of the government or annihilate its sovereignty, to overturn its republican form or to deprive it of constitutional powers, would be void; because it would destroy, what it was designed merely to fulfill, the will of the people.[42]

Decades later, the Supreme Court reaffirmed this reasoning in *Geofroy v Riggs*, which concluded that:

> [The treaty power must be bound by both] those restraints which are found in that instrument [the Constitution] against the action of the government or its departments [and] those arising from the nature of the government itself.... It would not be contended that [the treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the [federal] government or in that of one of the States....[43]

Human rights treaties do present this challenge. To begin with, they would seem to bring under federal authority a vast range of issues now regarded as reserved to state governments under the Constitution. If Congress has power to implement any treaty with new legislation, treaties of this kind risk overriding any remaining limits on congressional power under the Constitution.

The Supreme Court recently recognized the problem in *Bond v. United States*, which concerned a federal statute purporting to implement the Chemical Weapons Convention.[44] While the United States could commit to prohibiting deployment of chemical weapons for war, the Court held, the implementing legislation could not be stretched so far as to justify prosecution for an isolated local crime, which in this case was an attempted poisoning aimed at one person in a Pennsylvania town. The majority was content to insist that the implementing statute "must be read consistent with principles of federalism inherent in our constitutional structure" and that "the statute's expansive language" not be interpreted "in a way that intrudes on the police power of the States."[45]

Justices Antonin Scalia, Samuel Alito, and Clarence Thomas went further. They insisted that Congress could not claim power to reach into purely local affairs, even for the sake of implementing an otherwise valid treaty. Justice Thomas argued that there must be limits on the reach of treaties. The treaty power was intended to reach "those subjects which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty."[46] After reviewing leading cases, Thomas concluded that "[n]othing in our cases, on the other hand, suggests that the Treaty Power conceals a police power over domestic affairs."[47] No justice disputed this claim. No justice endorsed the notion that the treaty power is unlimited in its reach.

Apart from the threat to our federal balance, human rights treaties might threaten the ordinary distribution of power in our constitutional scheme. In the 1990s, the Human Rights Committee, the monitoring body for the ICCPR, asserted its authority to review reservations made by states when ratifying that major human rights convention, which the United States had recently ratified with numerous reservations. The experts (as they are called) on the Human Rights Committee insisted that improper reservations must be treated as having no effect, and the Committee would make authoritative determinations of which reservations were improper.[48] Though based on no actual judicial process or treaty language authorizing definitive decisions, these determinations are called "jurisprudence" by U.N. publications.[49]

If an international body could reliably exercise that sort of authority, U.N. officials could impose obligations on the United States without regard to the Senate's advice and consent. The international

body would thus be exercising the treaty-making power of the United States. If its determinations entered into U.S. law, it would arguably be exercising the legislative power assigned by the Constitution to elected Members of Congress or the judicial power vested in judges who, under the Constitution, are supposed to be nominated by the President and confirmed by the Senate.[50] If we eventually did come to accept that human rights conventions could be implemented at the direction of international authorities, that would amount to a scheme to "change the organization of the government or annihilate its sovereignty" or to "overturn its republican form or to deprive it of constitutional powers"—exactly what Justice Story had insisted no treaty can do within the limits of the Constitution.

In fact, the Clinton Administration insisted that it would not recognize such powers in the Human Rights Committee.[51] By the terms of the treaty, the Committee may only "comment," not "decide," let alone "bind."[52] The constitutional challenge can thus be escaped by insisting that the treaty does not really commit us to follow any outside direction, but on that understanding, it is hard to see why it should be recognized as a treaty. We do not actually promise any particular country to do anything, but merely certify to the world our good intentions in the most general way.

Human rights advocates have charged that Senate reservations make American participation meaningless or ratification disingenuous,[53] but no other country has committed to having U.N. monitors directly resolve disputes about its own law. The U.N.-sponsored conventions have no direct means of enforcement at the international level. In effect, every participant commits to its own interpretation of the conventions, such as they may be, and few states are fussy. Only a handful of states objected when Saudi Arabia subscribed to CEDAW with the reservation that it would comply only to the extent that the convention is consistent with Saudi Arabia's own interpretation of Islamic law.[54]

It is also worth recalling that the United States has often proclaimed general policy aims—often in conjunction with other states—without actually making a formal legal commitment. To take a famous example, in August of 1941, President Franklin Roosevelt met with British Prime Minister Winston Churchill at a naval base in Newfoundland and produced a "joint declaration" of common commitments that came to be called "the Atlantic Charter." Among other things, it pledged to "aid and encourage...practicable measures which will lighten for peace-loving peoples the crushing burden of armaments."[55] No one claimed that it stood in the way of the U.S. military mobilization then underway, or even of the post-war rearmament under NATO. In itself, it was, as historians observed some decades later, merely "a press release."[56]

Since the Second World War, it has become common for American Presidents to meet with other world leaders at conferences of NATO allies, major industrial economies, Western Hemisphere allies in the Organization of American States, partners or sometime adversaries in Asia, and so on. It is common for such "summit" meetings to produce a declaration of some sort. It may be inspirational. It may even prefigure enduring policy commitments by the United States and others. That does not make such pronouncements the counterpart of a federal statute or grant an international commitment the force of a statute.

There are legislative pronouncements as well that, with the support of the House and the Senate and the President, salute some achievement or express sympathy but require no one to take any particular action. They are legislative counterparts of a ceremony or a sermon rather than exercises of the coercive authority usually associated with the term "law."

It is not pedantic to insist that human rights conventions are law only in this ceremonial sense. That is the simplest way to describe their role in our legal system. It would require great metaphysical subtlety to explain how these noncontractual international commitments enter our legal system if they are not emanations of an emerging world government. Someone with sufficient insight to explain that might still find it hard to say what conventions actually commit us to do or forebear from doing, since their meaning need not turn on what others expect or on what some imaginary world authority demands. The project had elements of the fantastical from the beginning. To acknowledge that is not fanciful; it is a belated nod to sobriety.

Ensuring That International Law Does Not Enter by Back Doors

If one thinks of "human rights law" as the product of treaties, the main safeguard might seem to be in the Senate. So long as the Senate declines to ratify or ratifies only with the stipulation that the treaty is not U.S. law, treaties will not present a challenge to our legal system. Or will they? There are several back doors into the U.S. legal system, and none has been slammed shut. It is therefore important to remain alert to the associated dangers.

The first is the doctrine that courts may enforce "customary international law." This is not a modern innovation. At the time of the Founding, it was a familiar notion that Anglo–American courts would take notice of basic norms of international comity such as the immunity of foreign diplomats to local prosecution. As the Founders were well aware, the practice was discussed (and sanctioned) in William Blackstone's *Commentaries on the Laws of England*, the foremost authority on English common law in that era.[57] Until the advent of codifying treaties in the 20th century, most of international law (or "the law of nations" as it was still known in the 18th century) was customary law.[58]

What counts as customary international law today? In its 1980 ruling in *Filartiga v. Peña-Irala*, a federal appeals court in New York was persuaded to allow a lawsuit by a Paraguayan family against a Paraguayan official for torture of their relative back in Paraguay.[59] The court claimed to derive authority from a 1789 enactment known as the Alien Tort Statute (ATS), which granted federal courts jurisdiction over torts "committed in violation of the law of nations."[60] The court then decided that this could apply to perpetrators of torture on the ground that torture had come to be considered a violation of international human rights law—even though this was years before the ratification (or even drafting) of a formal international convention against torture.[61] The ruling unleashed a cascade of lawsuits that quickly came to focus on American corporations for alleged involvement with human rights abuses in foreign countries.

The U.S. Supreme Court did not pronounce on the issue for a quarter of a century. Its 2004 ruling in *Sosa v. Alvarez-Machain* held that the ATS could be applied only to claims as well grounded in customary law as diplomatic immunity had been in 1789 but left open the possibility that new claims could achieve this status over time. Justice Scalia, joined by Chief Justice William Rehnquist and Justice Thomas, adamantly opposed such an open-ended doctrine. At the time of the Founding, Justice Scalia explained:

> [T]he law of nations was understood to refer to the accepted practice of nations in their dealings with one another.... The notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign's treatment of *its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human-rights advocates.... The Framers would, I am confident, be appalled by the proposition that, for example, the American peoples' democratic adoption of the death penalty...could be judicially nullified because of the disapproving views of foreigners.[62]

The Supreme Court subsequently ruled that the ATS did not apply outside the United States and did not apply to corporations.[63] That has put a stop to most ATS litigation and has dispelled interest in invoking customary international law through that vehicle. However, there has not been a majority opinion of the Supreme Court confirming the Scalia view that courts should not treat customary international law as extending to human rights treaties.

How can courts know what is customary law? It was once assumed that courts could assess the question on their own (for the narrow range of issues where it was relevant). In recent decades, it has been asserted that it is the President who should determine when the United States recognizes that the government should be bound by customary standards.[64] There are many situations in which this has become almost routine. For example, the Defense Department holds that many provisions in treaties on humanitarian protections in war have become part of customary law, even though the relevant treaties have not been ratified by the Senate.[65] Similarly, President Ronald

Reagan endorsed, as statements of customary law, various provisions of the U.N. Convention on the Law of the Sea, claiming that while the convention as a whole had not been ratified by the Senate, these provisions would be acknowledged as legally binding on the United States.[66]

Could the executive try to give this status to the customary international law of human rights? In 1980, the Second Circuit Court of Appeals seems to have been swayed by Justice Department briefs arguing that prohibitions on torture were already part of customary international law.[67] What if a future President offered a more dramatic end run around Senate ratification by stipulating that several major human rights treaties should henceforth be considered customary law, binding on the United States and treated as such by U.S. courts?

The present Supreme Court seems unlikely to accept the notion that Presidents can make law for the U.S. legal system by such unilateral proclamations. During the first term of President George W. Bush, the Court was faced with a case in which Texas state courts refused to heed a directive from the International Court of Justice. Foreign nationals convicted of murder had argued that they had been deprived of the chance to consult with consulates of their home countries, a right guaranteed by the Vienna Convention on Consular Relations, which the U.S. has signed and ratified.[68] The International Court of Justice, in a suit by Mexico against the United States, ruled that courts must allow new trials if the right to consultation with a defendant's consulate had not been observed.

In *Medellin v. Texas*, the Supreme Court held that the Convention on Consular Relations was merely a diplomatic promise, not self-executing (in other words, not law directly applicable in the U.S. legal system) and that the ruling of the ICJ had the same status.[69] The justices also concluded that President Bush did not have constitutional authority to direct state courts to heed the convention, since the President's powers do not extend to changing the status of a treaty that the Senate seemed to regard as not self-executing. It would seem to follow from *Medellin* that the President cannot make international human rights treaties binding in domestic law.

It is true that the Supreme Court has recognized that the United States can sometimes be bound by an executive agreement (an exchange of promises between a President and a foreign leader). The Court has even acknowledged that such measures may have binding force within the U.S. legal system, but it has endorsed such agreements only when authorized by prior statute or subsequent legislation or when initiated in connection with recognition of a new foreign government. The last time the Supreme Court addressed the issue, in *Dames & Moore v. Regan*, it endorsed certain commitments made to the new Iranian regime (in return for release of U.S. hostages) but with cautions against inferring any general power of the President to change U.S. law by an agreement with a foreign leader that was not authorized or approved by Congress.[70]

This reasoning seems to have been taken to heart. President Barack Obama did claim to commit the United States to the Paris Climate Agreement on his own say-so, knowing there was no chance for Senate confirmation of a formal treaty, but the agreement was written in such a way that U.S. signature did not of itself impose restrictions on carbon emissions within the United States.[71] The Obama Administration did not dare to claim that an elaborate regulatory scheme could be imposed on American industry by nothing more than a presidential signature on a political statement that also happened to be signed by foreign leaders. President Donald Trump rescinded even that signature. Still, we cannot yet be sure where another Administration might try to go in committing the U.S. to international regulatory ventures without congressional approval.

There remains another way, however, in which international human rights norms might affect American law even without prompting from the President. A long tradition dating to Chief Justice Marshall holds that statutes should be interpreted to avoid conflict with international law.[72] In Marshall's day (and for long after), as Justice Scalia observed, international law was much more modest, but contemporary courts have sometimes shown willingness to embrace much more adventurous views, and a few courts have invoked international human rights norms to interpret federal statutes.[73]

Some commentators even claim that courts should interpret the Constitution itself to avoid conflicts with international law.[74] To take a clear example, many countries (even democratic countries) hold that guarantees of free speech should not extend to "hate speech" that insults or disparages particular ethnic or religious groups. As noted earlier, the ICCPR codifies this view, making restrictions on such speech obligatory for signatories to the convention. The U.S. Supreme Court has insisted on a more robust scope for the protection of free speech under the First Amendment. We do not know whether an appeal to international practice would persuade the Court to change its past commitments to free speech, but advocates seem to be urging such a course.

The Court has already embraced an approach that comes close to this in several cases interpreting the Eighth Amendment guarantee against "cruel and unusual punishment." Most notably, the Court has held in two cases that capital punishment should be regarded as unconstitutional for perpetrators of murder judged to be of subnormal intelligence and for perpetrators who were under 18 when the crime was committed.[75] One reason the Court gave was that capital punishment in such situations was excluded by law in most other countries and could thus be regarded as "overwhelmingly disapproved" by "the world community" or rejected by the "opinion of the world community."[76]

These rulings did not claim that the results were required by international law. Rather, they argued that foreign practice or provisions of international conventions not actually ratified by the U.S. (for example, the Convention on the Rights of the Child) could illustrate "evolving views" that might inform judicial assessments, though not as binding precedent. The majority also adduced other, domestic reasons for the rulings, so the weight to be accorded international practice was left uncertain. Nevertheless, Justice Scalia, along with fellow conservatives Thomas, Alito, Rehnquist, and (in the later of the two cases) Chief Justice John Roberts, objected strongly even to this attenuated appeal to foreign examples.[77] Similarly, Justice Scalia objected to Justice Anthony Kennedy's citing a decision of the European Court of Human Rights in deciding whether the U.S. Constitution affords the right to engage in homosexual conduct.[78] So far, no decision of the Court has settled the question of when or whether the U.S. Constitution should be reinterpreted to harmonize with foreign practice.

In academic debates, supporters have pointed out that recognition of foreign practice is not a novel departure. It is quite true that 19th century courts took note of foreign practices. In the Legal Tender Cases after the Civil War, for example, the Court pointed out that the federal statute requiring acceptance of paper money in payment of debts was similar to laws in effect in major European countries.[79] But the argument there was that foreign countries had adopted paper currency because they found it useful to do so, thereby lending weight to the claim that it was "necessary and proper" for the U.S. Congress to adopt a similar law. No one argued that the United States was under some sort of moral obligation, let alone legal duty, to coordinate its currency law with European nations.

With respect to capital punishment, there has been an international campaign by the Council of Europe and the European Union to lobby states to abolish the practice. They have submitted amicus briefs to the U.S. Supreme Court in these cases. Meanwhile, it has become regular practice for judges (very much including U.S. judges) to visit with foreign counterparts and share opinions or at least attitudes. Ann-Marie Slaughter, subsequently a top aide to Secretary of State Hillary Clinton, published a book in which she touted such international networks as the means to coordinate international standards on a wide range of issues: "[J]udges around the world are coming together in various ways that are achieving many of the goals of a formal [global] legal system."[80]

More recently, Justice Stephen Breyer published a book in which he dismissed concerns about "a single rule of law for the whole world" and predicted that "cross-referencing [of decisions and laws from different countries] will speed the development of 'clusters' or 'pockets' of legally like-minded nations whose judges learn things from one another...."[81] The argument assumes there is no serious objection to judges pulling America toward, say, European norms on issues that we still debate at home but that have been

settled for Europeans by their judges. It assumes, in other words, that the United States needs to feel some self-doubt about going its own way on domestic law regarding issues like gun rights, capital punishment, respect for the rights of religious minorities, or a range of labor protections favored by European authorities but not by American legislatures.

Advocates for the practice note that mere judicial notice of foreign authority does not make it binding in American law, so courts can refer to principles enshrined in treaties or international agreements even when the U.S. is not a party without claiming that these establish binding domestic law for us. Judges may even invoke hortatory resolutions at international conferences, not to give direct legal effect to such pronouncements, but to recognize support for a conclusion already grounded on other arguments.

As it happens, Justice Breyer has expressed openness to the possibility that judges would invoke international conference resolutions to adjust U.S. domestic law (for example, on environmental policy) so that the United States could "remain an active participant in worldwide efforts" to deal with global environmental threats.[82] By a similar principle, European governments accept as binding law what gatherings of government ministers or commissioners in Brussels elaborate from treaty commitments to which governments have agreed. Justice Breyer has also suggested that our understanding of U.S. constitutional law on federalism might be improved by attending to what Germany, Switzerland, and the European Union think about federalism.[83]

The risk is that what enters legal debate as a mere point of reference will evolve in time into something more. Academic commentators on international law sometimes speak of international conferences as generating "soft law," defined as something that prompts, encourages, or induces without having the full authority to compel. But the whole point of noticing soft law is that it may become hard (real) law over time if it continues to be invoked in legal analysis. So judicial appeal to foreign or international precedent may push understandings toward a sense of legal obligation without treaty ratification or some other formal process of commitment.

Safeguarding Judgment and Discretion in Foreign Policy

Some critics dismiss talk of human rights in foreign policy on the grounds that our own government should stay focused on protecting the rights of our own people. Sometimes they even bolster that claim by citing a famous statement of that view by John Quincy Adams: America "goes not abroad in search of monsters to destroy. She is the well-wisher to the freedom and independence of all [nations]. She is the champion and vindicator only of her own."[84]

Yet the issue is not that simple. The Declaration of Independence, in its recital of grievances, protests against British legislation "abolishing the free system of English Laws in a neighbouring Province [Quebec] establishing therein an Arbitrary government...so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies." What happens next door can be a threat to our own security. Governments that abuse their own people are unlikely to be scrupulous about the rights of other peoples.

Adams himself well understood the point. As Secretary of State, he crafted the part of President Monroe's 1823 Annual Message that announced the policy known to later generations as the Monroe Doctrine.[85] The United States put European powers on notice that it would view as hostile, hence potentially war-provoking, any attempt to recolonize nations in the Western Hemisphere and reimpose monarchical government. The defensive zone that this entailed went far beyond immediate neighbors and far beyond what America then had the military capacity to enforce: Buenos Aires in Argentina is further from Washington, D.C., than St. Petersburg, then capital of the Russian Empire.

Nor was this an idiosyncratic American approach. Treatises on international law emphasized the duty not to interfere in the domestic affairs of others but acknowledged exceptions for self-defense. Beyond that, there might be some threshold required for ordinary friendly relations. A leading English commentator in the late 19th century put it this way: The internal practices of "despotic states" cannot provide "adequate guarantees for the international trustworthiness of [those] states...." Normal diplomatic relations presume some common principles of justice. Other

nations could not be expected to retain friendly dealings with governments founded on principles against all order: "Communism and Nihilism are thus forbidden by the law of nations."[86]

Judging whether a foreign government can be a reliable partner or needs to be regarded as dangerous is like judging the character of an individual with a questionable personal history: It is not something that can readily be reduced to a checklist of considerations. *The Federalist* offered a general warning: "No government, any more than an individual, will long be respected without being truly respectable...."[87] Whatever might be true in the long term, immediate assessments often depend on context and comparisons.

During the Cold War, the United States tried to rally as many nations as possible to an anti-Communist coalition sometimes called "the Free World." There were quite a few authoritarian governments in the coalition, and it was charitable to link them with genuine democracies. Nevertheless, the rhetoric of that era captured the essential point: Countries that were opposed to Communism did share some important common political premises with the United States.

Advocacy for "international human rights" in the sense of fidelity to a list of rights set out in international conventions did not gain momentum within U.S. foreign policy until the late 1970s, when President Jimmy Carter insisted it should be a principal theme of U.S. foreign policy. Carter's rhetoric may have helped to undermine U.S. allies like the Shah of Iran without at all threatening tyranny behind the Iron Curtain. Some leading human rights organizations seemed to be more eager to use human rights advocacy to attack authoritarian U.S. allies than to criticize America's Communist and totalitarian adversaries during the Cold War. Amnesty International, founded in the 1960s to advocate against torture, declined to report on Khmer Rouge atrocities in Cambodia in the mid-1970s and did not issue a critical report on the Soviet Union until the late 1970s.[88]

The Reagan Administration was often successful in pressuring Latin dictatorships to make transitions to democracy or to better versions of democracy, but it did so by leveraging U.S. assistance, including military assistance to the governments of Guatemala and El Salvador in their fights against Communist-supported insurgencies. Reagan also challenged the Soviet Union to relax its repression and to "tear down this wall" in Berlin. Years before he went to Berlin, Reagan adopted a directive to U.S. government agencies insisting that "U.S. policy must have an ideological thrust which clearly affirms the superiority of U.S. and Western values of individual dignity and freedom, a free press, free trade unions, free enterprise, and political democracy over the repressive features of Soviet Communism."[89]

The Reagan Administration's embrace of human rights advocacy reflected a general U.S. foreign policy strategy aimed at strengthening the confidence of free nations. It did not treat protection of human rights as a program devised and supervised by the United Nations without regard to U.S. geopolitical priorities.

A legalistic view of human rights risks undermining the strategic aims of our foreign policy in several ways. The dangers are already on display.

First, if we accept the premise that all nations are engaged in the same effort because all nations can (and mostly have) subscribed to international human rights treaties, all nations seem to stand on the same ground. All governments alike are subject to the same higher law. In fact, the most oppressive governments have proved eager to serve on human rights forums both to fend off attacks on themselves and to use human rights slogans to further their own enmities and priorities.

The original United Nations Commission on Human Rights became so discredited by its obsession with denunciations of Israel and other vices that even U.N. Secretary General Kofi Annan urged reform. Under President George W. Bush, the United States urged that countries with poor human rights records should not be eligible to participate in the new body. That was rejected. Unsurprisingly, the Human Rights Council, which replaced the commission, regularly includes Russia, China, Cuba, Venezuela, Saudi Arabia, and a rogues' gallery of extreme human rights abusers. Frequently, countries arrange to eliminate competition for seats by offering the same number of candidates as there are open seats. Since seats are allotted by region, this means that Latin American nations are prepared to subordinate human rights concerns to political maneuvers in voting for Cuba

and Venezuela, while African and Asian nations do the same when allowing states like Libya or Syria or Saudi Arabia to secure seats on the council.

A second problem has developed partly in response to this first problem. If states cannot be trusted, it might seem attractive to focus on what nonstate actors say. If one thinks there can be law for humanity or for the international community as a whole, one might even think mere eloquence or fervor could induce governments to improve their behavior. So nongovernmental organizations have played a larger role in human rights forums and a much larger role in publicizing—and therewith interpreting—what international human rights "law" requires. Most people hear about international standards from organizations like Human Rights Watch or Amnesty International rather than from U.N. delegates or officials.

Inevitably, then, what is defined as "human rights" is strongly influenced by the priorities of advocacy groups. Their concerns may appeal to donors or political activists in Western countries but can be inappropriate for American foreign policy. Advocates, for example, have placed much emphasis on issues like abortion rights and recognition of sexual choice in other areas, which are likely to provoke hostility in traditional cultures in ways that may undermine respect for the general principles of liberty and law that the U.S. should be seeking to promote.[90]

A third bad effect is that human rights talk has become a principal driver of ideas about regulation of armed conflict. For centuries, Western states have embraced the general notion that armies should try to "diminish the evils of war, as far as military requirements permit" (to quote the 1899 Hague Convention on Land Warfare).[91] But the primary means of enforcing agreed restraints was by reprisal: retaliation in kind. Armies often deployed more destructive tactics against enemies that did not accept common restraints (as the Hague Convention allowed). In the Second World War, the Western Allies deployed unusually brutal tactics, such as bombing of cities and food blockade by sea, when so much seemed at stake. We still threaten nuclear retaliation against a nuclear attack.

If the world can be governed by a law that humanity gives itself, it seems plausible that outside judges, judging for humanity, can judge the military actions of all states. The European Court of Human Rights thus concluded that British military forces in Iraq following the 2003 invasion were accountable to the court for the use of lethal force against suspected truck bombs at roadblocks—which judges presumed to second-guess despite extensive internal review within the British military command.[92] Under pressure from earlier rulings of the European Court of Human Rights, Britain funded a human rights advocacy program to pursue claims of excessive force in security operations against terrorists in Northern Ireland and elsewhere—even decades after the disputed incidents and after actual terrorists in Northern Ireland were given a general amnesty. Senior military officials have protested the program as harassment of soldiers into their retirement.[93]

Critics, citing international humanitarian law, have also been quick to denounce American military actions. Most recently, such critics warned that the targeted strike on Iranian terrorist master Qassem Soleimani may well have violated international law—even though the argument for this conclusion draws on a treaty the U.S. has not ratified and a U.N. report the U.S. has not endorsed.[94] Viewing armed conflict from their perspective, human rights advocates find it entirely reasonable to invoke international humanitarian norms as a moral shield for a notorious international terrorist who for decades directed attacks in foreign states such as the attack on the Jewish community center in Buenos Aires in 1994. They regard restraints in war not as dependent on actual agreements on mutual limitation of force when actually maintained, but as abstract moral imperatives adumbrated by supposed international experts on behalf of the world at large and limiting force even against those who themselves respect no limits on force.

This sort of legalistic scolding might seem entirely futile. What gives it some weight is the existence of the International Criminal Court, an ongoing monument to such thinking in world affairs. The court was established in 1998 by a U.N.-sponsored conference. Human rights advocacy groups played a large role in this conference (though ostensibly from the sidelines) and later mobilized political support for ratification by

national governments. The inescapable premise is that enforcing proper safeguards on the conduct of war is more important than who wins. It is not a premise that will provide much inspiration—or perhaps do much to advance the cause of human rights—in wars with terrorist insurgencies or with states that have no regard for human rights or restraints in war.

This law will never apply equally. A democratic government has to fear the stigma of terms like "war crimes." Terrorist networks glory in their brutality: ISIS used sadistic murder videos as a recruitment tool. Potential allies may shrink from practices that are stigmatized by institutions like the ICC. Terrorist networks or militias with covert or ambiguous support from authoritarian powers do not worry about that. It is doubtful that authoritarian regimes in rival states will be much cowed by the ICC either.[95]

Meanwhile, the ICC claims the right to second-guess disputable military judgments made in the heat of action. Its charter (the Rome Statute) allows judges to order prosecutors to pursue a case even when the prosecutor has determined that it would not be appropriate. The charter also directs the court to focus on "the most serious crimes of concern to the international community."[96]

The court has twice insisted that the prosecutor look at Israeli action against a ship trying to violate the blockade on Gaza, where nine people died in a fight between an Israel Defense Forces landing party and armed resisters, the judges reasoning that the incident must be adequately serious because resolutions of the U.N. Human Rights Council proved the international "concern caused by the events at issue."[97] The judges provoked fury among human rights advocates when they decided not to authorize the prosecutor to pursue investigation of U.S. actions in Afghanistan. The judges expressed doubts that relevant facts could be compiled amid continued fighting in Afghanistan. Then—over American protests—this ruling was overturned on appeal.[98] Meanwhile, the prosecutor offered critics the satisfaction of initiating a new investigation of Israeli "war crimes," this time in response to rocket attacks and human wave assaults on Israel's land border with Gaza.[99]

The ICC is not just poorly functioning international machinery. It is a potential weapon mobilized by hostile regimes against nations that actually do try to defend human freedom. The ICC is not naturally on the side of defenders of freedom: There is not a word in its charter to indicate that democratic governments are more to be trusted to exercise force responsibly than are nondemocratic governments.

The same could be said of human rights law in general. It is not aimed at nondemocratic regimes and does not actually accord any deference to elected governments or governments with long-established traditions of respect for law and individual rights. It is focused more on establishing international authority over states than on protecting people who are actually in danger.

How to Protect U.S. Law and Policy Discretion

When the U.N. first began to work on human rights conventions, critics worried that they would undermine our existing constitutional system. One response was a constitutional amendment that came to be known by its principal sponsor, Senator John Bricker (R–OH). The Bricker Amendment would have stipulated that treaties in conflict with the Constitution would be "without force or effect," that all treaties would require implementing legislation to have direct effect in U.S. law, and that Congress could enact such legislation only if already authorized to enact such measures under its enumerated powers in Article I. In 1954, it fell only one vote short of the required two-thirds support in the Senate. The Eisenhower Administration managed to deflect some support by promising not to submit any U.N. human rights treaties for ratification.[100]

That inhibition was relaxed at the end of the Cold War. The U.S. has still ratified only a handful of international human rights conventions and always with reservations to limit their reach. To date, there has been no very clear or significant harm, so it would be very hard today to mobilize support for a constitutional amendment akin to Senator Bricker's proposal. It is and should be hard to change the text of our Constitution.

Beyond that difficulty, it is not clear that such an amendment by itself would solve the problem. Drafters would have to use language that excluded one set of treaty commitments without

entirely disabling the United States from entering into treaties to facilitate, for example, trade or investment across borders or cooperation on environmental threats across borders. Judges eager to accommodate the project of codifying international standards on human rights might well interpret new constitutional restrictions in ways that minimize their effects.

A mere statute would be much easier to enact. One Congress cannot stop a successor from approving or implementing treaties, but a statute might be helpful in limiting the legal effect of executive agreements. At present, there is no statute clarifying congressional expectations in this area.[101] Congress could indicate that it expects agreements that purport to change or take effect in domestic law to have some immediate statutory authorization or subsequent approval.

It is not completely certain whether Congress has constitutional authority to impose a total prohibition on such executive agreements (that is, those having the force of law in our legal system). In practice, Presidents have been cautious about claiming domestic legal effect for executive agreements. Since Congress has not attempted to codify restrictions, there are no court cases. There is an instructive opinion by Justice Robert Jackson, however, frequently cited in more recent cases, which holds that where Congress has enacted limits on executive action, presidential power is at its "lowest ebb," meaning that appeals to inherent presidential authority in this situation deserve the least deference from courts.[102] Merely by giving serious attention to a proposal of this kind, Congress might induce the President to acknowledge limits to presidential authority in this area, which would make it easier for courts to endorse such limits. Whether finally enacted or not, this might be a useful preventive measure.

It may also be helpful to raise questions about the authority of foreign law or practice in judicial confirmation proceedings. Any sort of discussion can be a reminder for future judges that there is enduring skepticism and concern about the practice. At the same time, however, we must recognize that nominees are not always forthright about their views, and what they say at a confirmation hearing is not a commitment that stops them from changing their approach once they are on the bench.[103]

The challenge, then, is to nurture a broader understanding about the limits of what America can commit itself to do. The current Administration has a commission to report on "unalienable rights."[104] That may be helpful in providing a focal point for skeptical views about the current overreaching of international rights law. It cannot, of course, prevent the next Administration from announcing different priorities, but it might help to inform and fortify opinion in opposition to thoughtless new commitments, which might itself give pause to subsequent Administrations.

The most useful precaution may be to encourage Americans to appreciate what is at stake. We need to recover the spirit of Washington's Farewell Address: "The unity of government which constitutes you one people is also now dear to you" as "a main pillar in the edifice of your real independence" and "of that very Liberty which you so highly prize."[105] What holds us together is our common Constitution, and our Constitution is the safeguard of our freedom. That has been true to a considerable degree for most of our history. It has never been true that international human rights law has held the diverse powers of the world together and rarely true that it has safeguarded freedom against regimes that suppressed it.

Washington's Farewell Address is famous for its warnings against factional divisions: "[T]he spirit of Party...serves always to distract the Public Councils and enfeeble the Public administration" while it "agitates the Community with ill-founded jealousies and false alarms...." The speech immediately goes on to warn that such division "opens the door to foreign influence and corruption" and that entangling our own political deliberations with foreign loyalties "gives to ambitious, corrupted or deluded citizens...facility to betray or sacrifice the interests of their own country without odium, sometimes even with popularity...."[106]

It is by no means an anachronistic thought. Critics of President Trump have sounded alarms on a vast range of supposed legal or moral offenses but finally focused their indignation (and impeachment charges) on the claim that he had "colluded" with foreign powers to influence U.S. elections. The fact that such charges had little factual basis shows their emotional resonance: It is the most fundamental betrayal to move U.S. political decisions

away from the freely concluded opinions of our citizens into currents churned by murky bargains with foreign powers.

Exactly that sort of charge will be at hand if government officials—whether they be legislators, administrators, or judges—invoke the vague admonitions in human rights treaties to change U.S. law or practice. In effect, political advocates on one side would appeal for foreign support for the policy they think should prevail. If they prevailed, the "views of the international community" might be accorded enough weight to nullify contrary convictions or opinions of American citizens. If we are going to go beyond current election rolls, why give weight to foreign diplomats or international bureaucrats rather than previous generations of Americans stretching back to the Founders? To disregard our own heritage in the name of some artificial international consensus is to undermine the foundations of our own Constitution.

It can be disabling abroad as at home if we come to believe that the United States must have an approved international escort before it condemns abuses by foreign states. Of course we ought to summon support from other nations when they agree with us, and it may be worth making compromises to achieve a common statement in particular situations. But to hold our foreign policy hostage to agreement from some international consensus is to compromise our independence. While we continue to endorse freedom for individuals at home, we should also insist on our national freedom in international affairs.

That does not mean we must abandon talk about human rights or humanity. Early American statesmen sought to avoid getting drawn into domestic disputes in other countries, partly because they recognized the relative weakness of their young nation. By the mid-20th century, the United States had emerged as the wealthiest and (by several measures) militarily strongest power in the world. We have vastly more capacity to influence what happens outside our borders, and greater power confers more extended responsibility as other peoples look for American protection and assistance.

Conclusion

It is not mere altruism that should prompt our concerns about severe oppression in other countries. Foreign dictators have a natural tendency to oppose the United States and join with its enemies in order to divert their own oppressed people from responding to the appeal of freedom. A world in which freedom is more widely respected will be a safer world.

American Presidents will find it much easier to rally American support against foreign tyrants, however, if such efforts do not require the United States to submit to a checklist of what foreign diplomats define as "human rights." Foreign governments may also find it easier to move their societies toward freedom if that does not commit them to submitting to ongoing international supervision and control.

The United States should certainly remain an advocate for freedom. We can even embrace the term "human rights." But we should not let the meaning of this term be defined for us by international bodies, by foreign governments, or by political activists. We have an honorable tradition as champions of freedom, but sharing a vocabulary does not mean we should share our own governing authority with outside powers.

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CHAPTER 3

The Right to Life in International Human Rights Law

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Introduction

No one committed to human rights denies what Article 3 of the Universal Declaration of Human Rights[1] (UDHR) asserts: "Everyone has a right to life." Rather, what is disputed today is the question of who is included under the term "everyone." More than any other right, then, debates over the right to life implicate the basic scope of human rights protections, or, in the language of contemporary moral philosophy, the fundamental moral status of humanity and its individual members.

Core to these debates are three moral–legal categories: (1) the inherent dignity of members of the human family (referenced by the first and fifth preambular paragraphs of the UDHR, as well as by Articles 1 and 23[2]); (2) equal rights consequent on the equal dignity of human beings (also referenced by the first and fifth preambular paragraphs, as well as by Articles 1 and 7[3]); and (3) personhood (referenced by the fifth preambular paragraph, as well as by Articles 3 and 6).

Personhood and human dignity both indicate a unique kind of heightened moral status that requires human rights protections, while basic equality indicates that those with this status possess it equally and so are owed human rights protections equally, too. "Everyone" equally shares in personhood and human dignity and equally possesses human rights. This essay will return to the mutually reinforcing importance of these core categories for understanding who counts as "everyone" later on.

Natural Law

The immediate impetus behind the UDHR's promulgation in 1948 was the injustices carried out before and during World War II, particularly those perpetrated by the National Socialist government of Germany. But far from originating with the UDHR's drafters, the idea of what is meant by "human rights" hails from a long tradition of natural law reflection on justice.

Here it is important to be aware of the distinction between an idea or proposition and how its essence may be expressed in various formulations. While neither ancient Roman jurists nor Thomas Aquinas (A.D.1225–1274) possessed the precise idiom of "human rights," they clearly understood and accepted its logically prior corollary: that justice requires giving to another what is his right (*ius suum*, with *ius* the root word for justice).[4] So though a genuine development in the idiom of human rights occurred through Gratian's seminal work of canon law (the *Decretum*, completed c. 1140) and the early commentaries it generated (up to c. 1200)—wherein a more subjectivized idea

of *ius* as a power (*potestas*) or faculty (*facultas)* or liberty (*libertas*) of the individual was developed[5]—this new idiom was but a particular articulation of ideas on justice endorsed by Aquinas and others before him in the natural law tradition.[6]

What counts as right (and thus *a* right) within this tradition is settled by appeal to the natural law, i.e., the standard of the reasonable that is naturally inherent in human reflection on justice and morality. The Roman lawyer Ulpian (A.D. 170–223),[7] Aquinas,[8] and the early canon lawyers[9] saw more clearly than their ancient Greek predecessors in the natural law tradition that everyone is by nature equal and thus due their natural right in virtue of their human nature (hence why natural law ethicists are equally comfortable with the terms "natural" and "human," used as descriptions of fundamental rights).

Emerging out of the broad medieval natural law tradition, Francisco de Vitoria, Bartolome de Las Casas, and Francisco Suarez argued on behalf of the natural rights of native American Indians in the face of colonial exploitation in the 16th and 17th centuries.[10] From this same moral and juridical lineage, Hugo Grotius appropriated the idea and idiom of natural rights and, in doing so, acted as the bridge over which natural rights were carried from the medieval canonists and post-Reformation second scholastics to modern protestant political theorists. The natural rights theories of Grotius, Samuel Pufendorf, Jean Jacques Burlamaqui, Christian Wolff, Emer de Vattel, and John Locke[11] were, in turn, formative of the American Declaration of Independence of 1776, which, after mentioning the "Laws of Nature and Nature's God," declares: "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."

The philosophy of natural rights was to the fore in that other important 18th-century precursor to the UDHR, the 1789 French Declaration of the Rights of Man and the Citizen.[12] The key drafter of the American Declaration, Thomas Jefferson, had a role in the drafting of the French Declaration, as it was he who advised the Marquis de Lafayette on the creation of the first model for the eventual 1789 Declaration.[13] The final text of the French Declaration, influenced in part also by the Virginia Bill of Rights of 1776, invoked the "natural, inalienable, and sacred rights of man" and, "under the auspices of the Supreme Being" (Preamble), enumerated the "natural and imprescriptible rights of man" as "liberty, property, security, and resistance to oppression" (Article 2).[14]

Universal Declaration of Human Rights

The drafters of the UDHR knew from where they were getting their ideas. One of the most influential framers of what was to become the preamble to the UDHR, René Cassin, looked to the preamble of the 1789 French Declaration for inspiration.[15] Two of the most important template documents employed by the Canadian jurist John Humphrey in the composition of the very first draft of the UDHR, the "Pan American" declaration and a study sponsored by the American Law Institute, both drew heavily from the constitutional natural rights tradition.[16] And when the UDHR was adopted in Autumn 1948, its drafters' speeches made repeated reference to the 1776 and 1789 Declarations.[17]

The overarching thrust of the natural law/natural rights tradition up to 1948 insisted upon human rights as rooted in human nature itself, so it is entirely fitting that the UDHR begins with the statement, "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" and goes on to reference "human beings" in the context of human rights protection, both in its second preambular paragraph and its very first article. The sufficient condition of being human for qualifying for human rights protection is what makes the insistence upon *equal* rights credible: Since no one shares more or less in human nature than any other human being, no one has a greater or lesser claim on human rights protection.

The UDHR's invocation of dignity further illuminates the necessary and sufficient connection between human nature and possession of human rights. The very first draft preamble circulated was authored by John Humphrey and contained an alienable, extrinsic understanding of human dignity, "That there can be no human freedom or dignity unless war and the threat of

war are abolished."[18] The second preamble circulated was authored by René Cassin and contained a much more intrinsic understanding of human dignity: "[H]uman freedom and dignity cannot be respected as long as war and the threat of war are not abolished." The preambular statement that was eventually accepted was authored by Charles Malik, a Thomist philosopher and the leading philosophical influence on the UDHR's drafting,[19] and contained the phrases "inherent dignity" and "inalienable rights."[20]

Malik later explained the significance of these terms:

> [T]he doctrine of natural law is woven at least into the intent of the Declaration. Thus it is not an accident that the very first substantive word in the text is the word "recognition": "Whereas recognition of the inherent dignity and of the equal and inalienable rights, etc." Now you can "recognize" only what must have been already there, and what is already there cannot, in the present context, be anything but what nature has placed there. Furthermore, dignity is qualified as being "inherent" to man, and his rights as being "inalienable," and it is difficult to find in the English language better qualifications to exhibit the doctrine of the law of nature than these two.[21]

During debates over Article 1, Eleanor Roosevelt (chairperson of the drafting commission) pointed out that dignity was included to emphasize that every human being is worthy of respect.[22] Her remark was directed against the contention that dignity was not a right and therefore ought not to be part of any article of the UDHR. Roosevelt's point was that human dignity explains why we have rights in the first place. Her position would later be attested to by both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights which, in their second preambular paragraphs, affirm that human dignity founds human rights.[23]

The intrinsic ("inherent") account of dignity contained in the UDHR's preamble coheres perfectly with the UDHR's belonging to the natural rights tradition. Inherent dignity means that the categorical moral worth of individual human beings is intrinsic to (or rooted within) their nature as human beings. Hence, this dignity is properly *human* dignity. As such, the UDHR sets itself against all extrinsic accounts of dignity whereby an individual's basic worth is contingent upon some property non-essential to his or her nature, such as those proffered by Thomas Hobbes,[24] David Hume,[25] and Friederich Nietzsche.[26]

Instead, the UDHR aligns itself firmly in favor of easily the most influential account of dignity at the time of its drafting—the natural law account which was exemplified by, *inter alia*, Pope Leo XIII's encyclical *Rerum Novarum* (1891), Pope Pius XI's encyclical *Quadragesimo Anno* (1931), the preamble to the 1937 Irish Constitution (an overtly natural law constitution and the first ever to invoke individual dignity), Pope Pius XII's 1942 Christmas Address,[27] and the American Jewish Committee's draft "Declaration of Human Rights" (1944).[28]

The logically interdependent moral realities of human dignity and (equal) natural human rights cohere with the import of Article 6's invocation of personhood, "Everyone has the right to recognition everywhere as a person before the law." Personhood here is clearly understood in an inclusive sense: No one is to be excluded from being recognized as a person. In light of the positive references to "all human beings" (Article 1) and "all members of the human family" (first preambular paragraph), "everyone" in Article 6 ought to be interpreted as every human being. Johannes Morsink is correct to describe this as "stripped down" personhood,[29] a conception of personhood stripped down to what Anna Grear terms the "embodied vulnerability of the human sub-stratum."[30]

There was considerable debate as to whether the reference to juridical personhood in Article 6 should be retained, with the U.K. and U.S. delegations particularly reluctant to keep it (for jurisprudential, and, possibly, in the case of the latter, domestic political reasons). However, the majority of delegates present were impressed by the arguments of Cassin and others who pointed out that personhood had been used as a legal tool for denying the fundamental rights of human beings, such as Jews and African Americans. The

article was necessary according to Cassin because "persons existed who had no legal personality."[31] Recognizing personhood as inclusive of all individuals who share in a common rational nature, like human nature, is a feature of the natural law tradition.[32]

The contrary view is that of an exclusive account of personhood that divorces personhood from human nature and makes of it an exclusive, elite status higher than the status of simply being human.[33] But the exclusive account was alien to human rights thinking at the time of the UDHR's drafting; the dominant view was the inclusive understanding, as present within the U.S. Catholic Bishops' draft "A Declaration of Rights" (1946), the American Jewish Committee's draft "Declaration of Human Rights" (1944), and the American Declaration of the Rights and Duties of Man (1948).[34]

The incorporation of an inclusive account of personhood in the UDHR is perfectly appropriate because inclusive personhood perfectly coheres with intrinsic dignity. Common employment of the categories "dignity and personhood" in contemporary moral philosophy indicates that they are interchangeable, which is how they operate in the UDHR, too. There, they both signify the unique, fundamental moral worth of the individual *qua* human being.[35] And this is precisely how contemporary natural law scholars understand the interrelationship between these two categories:

> Although there are different types of dignity, in each case the word refers to a property or properties—different ones in different circumstances—that cause one to *excel*, and thus elicit or merit respect from others. Our focus will be on the dignity of a person or personal dignity. The dignity of a *person* is that whereby a person excels other beings, especially other animals, and merits respect or consideration from other persons...what distinguishes human beings from other animals, what makes human beings *persons* rather than *things*, is their rational nature.[36]

It was this last point that Malik intended to make by his insistence on including the clause "endowed with reason and conscience" in Article 1.[37] Not only are the affirmations of inclusive personhood and inherent dignity by the UDHR consistent, they help make credible the claim that all members of the human family have *equal* human rights.

The Right to Life of Unborn Children

The UDHR's reliance on the mutually illuminating and mutually dependent categories of equal human (natural) rights, inherent human dignity, and inclusive personhood means that it endorses human rights as belonging to human beings by virtue of their human nature. This itself entails that the deep logic (as well as *prima facie* meaning) of the UDHR requires recognizing that members of the human family living *in utero* possess human rights, and thus the right to life.

The right to life is centrally the right against being intentionally killed. It has dual application: horizontal (against the activities of other persons) and vertical (against activities of the state). The moral norm underpinning the right to life is exceptionless ("absolute") in the sense that once it is specified adequately (i.e., no *intentional*[38] killing), the right does not permit of further qualification, limitation, or "balancing."[39]

The right to life most certainly excludes all utilitarian attempts to justify the intended killing of innocents on the basis that such killings supposedly effect an overall net good when compared to the effects of the choice not to perpetrate them. The utilitarian view sees one course of action as more moral than another when it more fully instantiates (the most plausible version of) the principle of "the greatest good for the greatest number." Utilitarianism permits what, in reality, is immoral and contrary to respect for human rights partly because it fails to acknowledge human dignity.

As a uniquely supreme kind of worth, human dignity is priceless and incommensurable—there is no metric according to which it can be measured, calculated, and compared, even as regards other of its instantiations in human persons.[40] So it is rationally senseless to claim that furthering the interests of a majority can morally "outweigh" a violation of human dignity brought about through the intentional killing of an innocent or innocents.[41]

And yet many legal and other scholars argue that abortion, the intentional killing of an unborn

human being, is a human right. What is more, they appeal to the UDHR in so arguing. Their line of reasoning centers of the inclusion of the term "born" in Article 1 and is typified by the claim of Christina Zampas and Jaime M. Gher that "the term 'born' was intentionally used to exclude the [fetus] or any other antenatal application of human rights."[42] Zampas and Gher argue that a proposal was made to delete the term "born" precisely on the basis that it seemed to exclude the unborn from human rights recognition, and that this proposal was rejected.

Similarly, Rhonda Copelon, Zampas, Elizabeth Brusie, and Jacqueline deVore argue that a remark by the French delegate during drafting to the effect that the right to freedom and equality is "inherent from the moment of birth" was directed against a proposed amendment to delete the term "born," an amendment motivated by a concern to include unborn human beings within the ambit of human rights protection.[43] Therefore, they conclude, the term "born" in Article 1 counts against human rights protections for the unborn.

In fact, the converse is the case. Johannes Morsink demonstrates in his study into the origins of the UDHR that debates over the retention or rejection of the term "born" did *not* center on the question of abortion or the moral status of fetal life, but on whether human rights are inherent within human nature or, instead, are attributed to human beings from some source extrinsic to their very existence, such as society or law.[44] The contention by the French delegate that the right to freedom and equality is "inherent from the moment of birth" was directed against not a pro-life proposal but the Soviet position, whereby equality of rights before the law is "determined not by the fact of birth, but by the social structure of the state."[45]

The insertion of the term "born" in the first place was at the behest of a joint French and Philippine proposal.[46] It echoed Jean-Jacques Rousseau's *The Social Contract*[47] and Article 1 of the 1789 French Declaration of the Rights of Man and the Citizen, which Rousseau helped inspire ("Men are born and remain free and equal in rights"), which themselves echoed the Ulpian's proposition included near the beginning of Justinian's *Digest* of the 6th century, "by natural law all were born free."[48] Rousseau's moral opposition to abortion[49] indicates that he had no difficulty employing "born" as a signifier without implying that the value of "humanity" has no pre-natal application. Neither did the *Digest*, which affirms the civil rights of unborn children.[50] And neither did René Cassin of France, the co-proposer of the amendment that included the term "born,"[51] nor the Chilean delegate, Hernán Santa Cruz, who spoke in favor of the philosophy underpinning the term.[52] Both delegates stated their moral support for the human rights status of unborn human beings during the course of the UDHR's drafting.[53]

So while it is true that by dint of a philosophical misunderstanding, a few delegates (those of Mexico and Venezuela) objected to the term "born" on the grounds that it could imply disregard for the unborn child,[54] these objections were extraneous to the real import of what "born" signified. What it signified then—as now—is that human rights and human dignity inhere (are intrinsic to) human nature as per the moral relevance of that nature. Dignity and rights cannot inhere in human nature if they are contingent upon the materialization of developed or immediately exercisable (as distinct from latent or root) capacities proper to paradigmatic (healthy, mature, non-disabled) members of the human family. As such the intended meaning of the disputed qualifier counts *in favor* of unborn human rights.

Further support for this contention is that no delegate argued in favor of retaining the term "born" on the basis that it meant that only actual physically born human beings could claim human rights. The argument in favor of retaining the term was based exclusively on support for the view that both equal dignity and human rights are inherent in all human beings. (As Article 2 puts it: "Everyone...without distinction of any kind.") Malik, typically, was acutely aware of the true significance of this debate: "[T]he word 'born' means that our freedom, dignity and rights are natural to our being and are not the generous grant of some external power."[55]

Does the UDHR, then, affirm the rights of all human beings, including unborn human beings? The matter does not, to my mind, permit a univocal, unqualified judgment. Proposals were, in fact, made to explicitly include the unborn within the

terms of Article 3 (which at the time was draft Article 4), which enumerates the right to life. One such proposal was made by the Chilean delegate and stated, "unborn children, incurables, the feeble[-]minded [sic] and the insane have the right to life."[56] This suggestion would be discussed alongside a recommendation by Malik, "Everyone has the right to life and physical integrity from the moment of conception regardless of his or her physical or mental condition. Everyone has the right to liberty and personal safety."[57] Both proposals were rejected.

Two reasons were advanced against their adoption: the need for concision within the UDHR[58] and the fact that not all countries prohibited abortion in all circumstances.[59] No delegate argued that unborn children were not entitled to human rights protection *per se*. For instance, Cassin took a stand against Malik's proposal on the basis that it was not acceptable to every member, while also expressing his agreement with the proposal's substance.[60] Malik is also reported as requesting:

> [T]hat reference should be made in the summary record of the meeting to the statements made by the representatives of China, the Union of Soviet Socialist Republics, and the United Kingdom in connection with [the then] article 4.... [W]hile the delegations of those three countries wished to omit the phrase "from the moment of conception" in the interests of brevity, they considered that idea to be implied in the general terms of article 4.[61]

In response to Malik's request, the Chinese delegate stressed that the wording of the draft Article not only implied but actually contained the idea expressed by Malik's amendment;[62] the United Kingdom delegate stated that Article 4 could be understood to contain such an idea but did not necessarily do so.[63] The proposals to include "from the moment of conception" and "regardless of his or her physical or mental condition" were each voted on separately and were each defeated six votes to two.[64]

The proposal to explicitly protect unborn children was rejected for the sake of succinctness and generality, and because its inclusion may have proved an obstacle to some states signing the UDHR. No argument was made against the proposal to the effect that the unborn child does not possess human rights as such, and no argument was made to the effect that there is a human right to abortion. (Indeed, no attempt was ever made during the drafting of the UDHR to include even a heavily limited right to abortion.) Thus, out of the two distinct positions put forward on the issue, one explicitly argued that the unborn child possessed human rights, while the other position, which was officially endorsed, was an admixture of stylistic and sovereignty concerns. Out of the six votes against the proposal, two were clearly motivated by stylistic concerns (the votes of the United States and China), and three were primarily motivated by sovereignty concerns (the votes of the United Kingdom, the Union of Soviet Socialist Republics, and France). The *travaux préparatoires* shed no light on the intention behind the Australian vote. If it was motivated by a desire for concision, an approach urged by the Chairperson just prior to the vote,[65] then an evenly split intention between stylistic and sovereignty concerns would have formed the successful vote. At worst, therefore, the vote against the proposal was intended to make it easier for certain states to sign on to the UDHR. There was no principled, morally substantive opposition to unborn human rights or support for abortion rights.

Perhaps the best summation of the UDHR on the matter, when all relevant preambular paragraphs, articles, and debates are taken into consideration, including the most philosophically and historically attentive interpretation of the core terms inherent in each, is:

- Yes, the UDHR offers substantive moral support for the recognition of the human rights of unborn human beings as members of the human family;
- No, the UDHR does not explicitly include unborn children under its right to life; and
- No, the UDHR neither affirms a human right to abortion nor offers substantive moral support for a human right to abortion.

The UDHR's relationship to the human rights status of the unborn child is in some ways similar to the relationship between the original U.S. Constitution (inclusive of the Bill of Rights) and the human rights status of African Americans. Presupposing the overtly natural rights philosophy of the Declaration of Independence, the Constitution enumerated various natural rights and gave its endorsement to the fundamental, natural equality of all human beings.[66] Yet this endorsement was importantly deficient since the Constitution's protection of African Americans' natural rights was insufficiently explicit given the threatening cultural context facing them, and was even undermined by provisions like Article IV, section 2, clause 3.[67] Similarly as regards the Declaration itself, the decision to omit Jefferson's words against the King waging "cruel war against human nature itself" through royal support for the slave trade injured the humane tenor of the document (and was a decision made at the behest of southern opposition, and thus—as with the UDHR drafting decision to omit explicit reference of the unborn under the right to life—motivated by sovereignty and consensus concerns).

So despite these founding documents' natural rights underpinnings, they were ill-equipped to remove the legal possibility of a future Supreme Court decision like *Dredd Scott v. Sanford*, which harnessed cultural prejudices to reject the fundamental equality of African Americans and their natural right not to be held in slavery as the possession of another. The *Dredd Scott* majority construed the Constitution against the grain of its moral and philosophical underpinnings and held that colored people are "a subordinate and inferior class of beings"[68] who "had no rights or privileges but such as those who held the power and the Government might choose to grant them."[69]

And yet the inherent natural rights logic of both the Constitution and the Declaration of Independence was irrepressible. The dissent in *Dred Scott* spoke to it: "A slave is not mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence,"[70] and "slavery, being contrary to natural right, is created only by municipal law."[71] Dissent was assented to during Congressional debates over the Thirteenth and Fourteenth Amendments, wherein appeal to the natural, inalienable, equal rights of human beings was ubiquitous.[72]

Since then, there have been legally endorsed setbacks on the road to the proper recognition of the human dignity of all regardless of such accidental characteristics as skin color, not least *Plessy v. Ferguson*,[73] but when they have been overcome, it has been through (as Martin Luther King Jr. famously put it) living out the true meaning of the creed: "We hold these truths to be self-evident, that all men are created equal."

In a similar way the UDHR's affirmation of inherent human dignity, equal human rights, and inclusive personhood is oriented firmly toward a more explicit recognition of the human rights status of the unborn. Like the Reconstruction Amendments and the Civil Rights Act, a day may come when this more explicit recognition fully materializes in human rights law, even if the materialization must occur against the grain of the views of bodies tasked with operating faithfully according to the meaning of the UDHR.

Subsequent International Human Rights Law

Subsequent international human rights law has in fact provided more explicit—if still not fully explicit—recognition of the unborn child's human rights. Article 6(5) of the 1966 International Covenant on Civil and Political Rights protects the right to life of unborn children whose mothers have been sentenced to death. ("Sentence of death... shall not be carried out on pregnant women.") The *travaux* show the provision was added out of consideration for "the interests of the unborn child."[74]

This section proceeds from and is intelligible in light of Article 6(1), "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." As with the UDHR drafting, an unsuccessful attempt was made to explicitly include reference to the unborn under Article 6(1). A proposed amendment to insert the clause "from the moment of conception" into the right-to-life article was defeated by 31 votes to 20 (with 17 abstentions).[75] But the *travaux* make it clear that the vote was not lost due to a direct rejection of the idea that unborn children possess human rights or due to

any notion that there is such a thing as a human right to abortion. Rather, delegates were concerned with the lack of legal clarity arising from the invocation of conception as a legal marker and, to a seemingly lesser extent, with the need to respect state sovereignty in light of the incompatibility of the amendment with extant abortion legislation in various jurisdictions.

The 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) did not discuss the right to life of unborn children in the context of the abortion controversy. It did, however, recognize that the unborn child requires human rights protection in the child-centric Article 12(2)(a). In the context of ensuring that "everyone" enjoys the highest standard of physical and mental health, the ICESCR holds that "steps to be taken by the State Parties to the present Convention...shall include...the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child."

The 1959 United Nations Declaration on the Rights of the Child had, by this stage, already indicated that "child" includes the child "before as well as after birth." And the inclusion of this statement in the third preambular paragraph of the 1989 U.N. Convention on the Rights of the Child (UNCRC) forms what remains the most explicit affirmation of the human rights status of the unborn child by international human rights "hard" law: "[T]he child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."

Though appearing to be an entirely unambiguous affirmation of the human rights status of the unborn child, the significance of the UNCRC's preambular statement is qualified by the placement in the *travaux* "on behalf of the entire Working Group" the following statement, "[I]n adopting this preambular paragraph, the Working Group does not intend to prejudice the interpretation of article 1 or any other provision of the Convention by State parties."[76] This interpretative statement itself would be the subject of a legal opinion from the U.N.'s Legal Counsel, an opinion furnished after the Working Group had completed its work and that cast significant doubt on the legal effect of the interpretative statement.[77]

A point the opinion intimates is that in international law hermeneutics (as per Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, or VCLT),[78] the ordinary meaning of the preamble ranks higher than appeal to supplementary means of interpretation such as the *travaux*. Despite an element of ambiguity over its precise significance in international human rights law, then, the UNCRC's preamble remains a more explicit and more general affirmation of the unborn child's human rights than hitherto achieved. It is also part of a trend that is both clear and clearly faithful to the moral–philosophical foundations of the UDHR.

In the 1990s, another trend began pertaining to the status of the unborn in intentional human rights law. Of itself, this particular trend did not amount to a development of international human rights law but rather involved a radical shift in how United Nations bodies interpreted this law. So seemingly from nowhere and without offering anything like a reasoned justification the Human Rights Committee (HRC), a body established pursuant to Article 28 of the International Covenant on Civil and Political Rights (ICCPR), began declaring that compliance with the ICCPR requires the decriminalization of abortion in cases of "rape, incest, serious risks to the health of the mother, [and] fatal fetal abnormality."[79]

The HRC now also expresses concern at the "discriminatory impact" of abortion laws that criminalize most abortions within a jurisdiction and thus prevent women of lesser economic means (who cannot afford to travel) from procuring an abortion.[80] The body routinely challenges states with restrictive abortion laws and does so primarily by appeal to Articles 3,[81] 6,[82] and 7[83] of the ICCPR.

In its recent General Comment (No. 36) on Article 6, the HRC construes that article to effectively contain a near-unlimited right to abortion.[84] No effort is made by the HRC to offer anything like a *ratio decidendi* for rejecting the applicability of human rights to unborn children and for incorporating a right to abortion into the text of the ICCPR. The manifold "concluding observations" and "general comments" simply assert the existence of a right to abortion under that instrument.

Despite presentations, suggestions, and posturings to the contrary, the HRC's "concluding

observations" and "general comments" do *not* form part of binding international human rights law. The same goes for all U.N. treaty-monitoring bodies. This is something that even scholars very sympathetic to the activities of treaty-monitoring bodies accept.[85] The HRC is not a judicial-type body and does not have the legal power to develop, delete, or add to the ICCPR's provisions, as is clear from the text of the ICCPR itself.

Article 40(1) provides for states party to the Covenant "to submit reports [to the HRC] on measures they have adopted which give effect to the rights recognized herein [i.e., in the ICCPR itself]," while Article 40(4) requires the HRC to transmit reports and general comments to the state parties. Since this is the extent of the HRC's powers under the ICCPR, it acts *ultra vires* when it seeks to alter, add to, or diminish the rights recognized by the ICCPR or to otherwise amend that instrument.

The problematic nature of the HRC's approach to the human rights of the unborn child is mirrored in most other U.N. treaty-monitoring bodies. The Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee),[86] established pursuant to Article 17 of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), is perhaps the most insistent on a human right to abortion. The CEDAW Committee regularly appeals to Article 12(1) of CEDAW to support abortion rights. ("States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.")

Yet, like the ICCPR, the CEDAW makes no provision for abortion as a human right, either in Article 12(1) or elsewhere. This is ascertainable from a good faith reading of its actual textual provisions and confirmed by its *travaux* (which indicate that abortion was not understood as a human right component of "family planning" or any other CEDAW provision).[87] Constitutional scholars of almost every generation and nationality are familiar with a glaring disjunction between the underlying philosophy of a foundational legal text and an aspect of its current official interpretation. So it is with the current incompatibility between, on the one hand, the underlying moral philosophy of the UDHR—reflected in its explicit text—and the instruments promulgated pursuant to it, and, on the other, the free-floating interpretations of these human rights documents asserted by U.N. treaty-monitoring bodies, which somehow infer a right to abortion.

Disintegration of the Human Rights Philosophy

In the minds of many human rights scholars today, debates over the human rights status of unborn children are rather peripheral to the future of human rights. At most, they tend to assume that the status of the unborn matters really only insofar as it impacts upon the discrete matter of the right to abortion. (What matters for a clear majority of scholars is that the status of the unborn is resolved in such a way as to leave the right to abortion intact.) Very few think that the credibility of human rights *as a whole* stands or falls on the status of unborn children, and so very few are in the least bit troubled by how U.N. treaty-monitoring bodies implicitly—yet really—disparage the human rights status of unborn children.

But the basic credibility of human rights as a whole is at stake in these debates. This is not a circular claim; its veracity can be apprehended by appreciating diverse-yet-intertwined insights from a variety of philosophical sub-disciplines, something most human rights scholars and members of treaty-monitoring bodies are not readily in a position to do. These insights have enormous implications for human rights, though, and it is imperative to consider them.

Honest and scientifically informed thinkers in favor of abortion rights know that the unborn entity is a human being.[88] Usually, too, they subscribe to at least some vestigial respect for the idea that it is intrinsically wrong to kill innocent persons. The obvious solution to the dilemma is to deny that unborn human beings are moral persons (or, what is essentially the same thing, possess equal human dignity). For the denial to be minimally plausible, of course, it must appeal to a criterion of moral personhood (or of possessing human dignity) the unborn fail to satisfy. The standard of personhood that quickly became the dominant, consensus position was that of having

the immediately exercisable (as distinct from latent or root) capacity for self-consciousness.[89]

It was a position alien to the thought of the most influential fathers of the natural rights tradition when they considered personhood in the context of justice and rights.[90] These philosophers assumed that to possess human nature was to be a person. Theirs was an intrinsic, inclusive account of personhood. The revisionist account, on the other hand, posited personhood as contingent upon the experiencing of an advanced developmental stage wherein a relevant root capacity develops into a corresponding, immediately exercisable capacity. The root capacity that makes possible an immediately exercisable capacity is itself intrinsic to human nature and, thus, the immediately exercisable capacity is contingent upon an intrinsic feature of human nature. But the immediately exercisable capacity considered in isolation is, strictly speaking, non-essential to human nature and thus in that way extrinsic to it.

As extrinsic to human nature, the revisionist account of personhood excludes various human beings. This, of course, was the point. But even philosophers in favor of abortion quickly came to realize that it was not just unborn human beings who were excluded by this revisionist standard. Michael Tooley illustrated clearly in his seminal 1983 work, *Abortion and Infanticide*, published just 20 or so years after the legislative push for abortion rights fully kicked into gear, that newborn human beings were similarly "non-persons" according to the revisionist standard of personhood.[91] It was a simple matter of logical consistency.

Peter Singer's work helped popularize the argument Tooley was making, and today it is widely accepted among bioethicists that infanticide, in effect, the intentional killing of newborns, is substantially equivalent to the killing of children pre-birth in the sense that none of the beings killed are persons (only persons have a proper right to life).[92] The practical implications of this concession have been much less acute than the practical implications of the social consensus concerning abortion, though largely because the latter removes almost[93] all practical relevance from the former.

At the other ends of life's spectrum, that same revisionist standard of personhood has engendered a broad bioethical consensus in favor of the allegedly sub-personal nature of human beings who are alive but lacking any significant level of consciousness as a result of acquired, severe cerebral impairment (as occurs in cases of injury resulting in a so-called persistent vegetative state, or PVS).[94] Law in certain influential jurisdictions has followed suit and permits the "letting die" (in reality: deliberate killing via act or omission) of such profoundly impaired human beings since it is supposedly in their "best interests" to die.[95] (This rationale for legalized killing is tantamount to holding that a human being's life in a PVS-like condition is sub-personal and that therefore they themselves are not fully a person and do not possess equal human dignity.)

It did not take long for the rejection of inclusive personhood that predicated these sorts of decisions to trickle down into decisions to euthanize incompetent, non-PVS patients (e.g., those with severe dementia or in a coma) without their explicit request. And so non-voluntary euthanasia is often unofficially tolerated to the point of quasi-formal policy in jurisdictions like Belgium and the Netherlands.[96] All this is relatively well-known in moral philosophy and medical law.

What is much less well-known publicly is that a small number of serious philosophers have in the past 15 years or so applied the revisionist account of personhood to cases of adults with profound intellectual disabilities. Inevitably, the results have been troubling. The possession by an individual of a profound intellectual disability often entails his lacking a sufficiently robust ability for self-consciousness to satisfy the revisionist criterion for personhood.[97] The implication, not always unstated, is that these persons do not possess a right to life.

It is noteworthy that some of the most vehement opposition to this development comes from secular feminist ethicists. How do they argue against the de-personalizing of the profoundly intellectually disabled? Often by appealing to the unique worth of both human nature and natural, biological relationships between dependent human beings.[98]

Although it is abundantly clear to most serious scholars working on the interrelationship between bioethics and moral status that the revisionist

account of personhood renders many more categories of human beings non-persons beyond unborn children, human rights and other legal scholars who embrace the revisionist account for the purposes of abortion advocacy seem largely uninformed of this implication—or at least very rarely advert to it publicly. The wider implications of their account of personhood should trouble them massively, and yet they remain seemingly unperturbed.

The matter is even more problematic than that of human rights abandoning some of the most vulnerable categories of human beings and leaving them outside the scope of human rights protection. A further entailment of the revisionist account of personhood is only beginning to appear on the radar of moral philosophers. It can be appreciated by combining the aforementioned insights from the fields of bioethics and moral status with important insights from the field of value theory.

The divorce of personhood from human nature turns out to unravel human rights in its entirety. How? To begin with, a credible account of revisionist personhood cannot rely on magic. In other words, it cannot suppose that in the order of human development a human at point *p* is simply a non-person and at the very next developmental point, *p + 1*, is fully a person. Cognitive science rejects the idea that the immediately exercisable ability for self-consciousness is like a switch that is completely off and then suddenly, as if by magic, turned fully on.

Rather, the consensus and commonsense view is that the ability to experience self-consciousness develops gradually (and can be lost gradually, too, as in the case of dementia). Thus, from the very outset, the revisionist account of personhood was open to the possibility that a human being increases in personal value up to the point he or she becomes a full person. On this basis, bioethical references to "quasi" or "partial" or "potential" persons are very common, and usually indicate a moral worth on the personhood scale somewhere between null and full. The alleged increase in moral worth is not ad hoc: It tracks the human being's increasing though incomplete appropriation of the ability to do what counts as the criterion for personhood. No longer is there any need to appeal to implausible magic moments or magic points, leaving the plausibility of the revisionist account intact.

Or so it seemed. The reason why the solution appeared to work so well is that up to the point of achieving self-consciousness there was a gradated, proportionate, and isomorphic parallel between the human being's growth in and toward the relevant criterion and his moral worth. No arbitrary, ad hoc, abrupt change in moral status occurred.[99] But if the revisionist account of personhood was to be credible it had to be *fully* consistent. And that entails a very serious problem. For it is generally accepted by philosophers (and by cognitive scientists) that degrees of self-consciousness are found beyond a minimally substantive point that acts as a plausible anchor for revisionist personhood.[100] Indeed, it is likely more accurate to speak of different levels and depths of self-consciousness than of linear degrees, making the idea of an invariant, fixed point of self-consciousness corresponding to the personhood-conferring metric even less plausible.[101]

Hence, we are left with this picture by the revisionist account of personhood when informed by the dominant view of self-consciousness: There is a "point" at which a non-intellectually disabled developing human being achieves a level of the capacity for self-consciousness high enough to suffice for counting as a person, and, beyond this, there are human persons with higher levels of this capacity. If the revisionist account of personhood is to maintain internal consistency in light of this picture and is to avoid the arbitrary and ad hoc positing of a magic point at which an increase in moral status no longer tracks (in effect, is proportionate with) an increase in the capacity for self-consciousness, then it follows that it will not only need to accept the existence of quasi or partial persons, but of various degrees of "supra" persons too.

This is precisely the conclusion drawn over the past 10 or so years by respected philosophers like Jeff McMahan,[102] Richard Arneson,[103] and Christopher Knapp.[104] They are not particularly comfortable with the conclusion, since they are proponents of the revisionist account, but they are clearheaded and honest enough to follow their personhood argument where it leads.

It is obvious that the idea of a gradated series of supra persons over and above normal persons

destroys outright the idea of fundamental human equality. (The destruction is thoroughgoing, because there will be many supra persons with lesser moral worth than other supra persons on this account.) As the earlier treatment of the UDHR indicated, fundamental equality of human rights and human rights subjects are essential features of the basic meaning of human rights. So the revisionist account of personhood is incompatible with human rights even on the assumption that it can be just to exclude some more marginalized classes of human beings from human rights protection.

Now it might appear open to a proponent of the revisionist account to save it in one of two ways. He or she could simply abandon the idea of gradated personhood altogether, thus saving the account from serious internal inconsistency and from the elitism entailed by it. But that move introduces massive arbitrariness into the position: At every pre-magic level of the relevant capacity being reached, even at the level only ever-so-slightly below the magic level, the human being has no personal worth, while for every increase in the relevant capacity post-magic point it makes absolutely no difference at all to the worth of the human being. The obvious arbitrariness of this approach is recognized by almost all proponents of personhood revisionism, and so few, if any, of them today endorse it.

A more promising savings clause is this: Bite the bullet and insist on thoroughgoing internal consistency, yet deny that the differences in moral status above the "normal" personhood line are significant enough to require practical (as distinct from theoretical) abandonment of fundamental human rights equality. This move, too, however, is unsuccessful. If being situated a little below the personhood-conferring line makes one a partial person, and if it is the case that there is no principled difficulty with killing partial persons compared with killing persons, then it follows that relatively small differences in moral worth on this revisionist account can, in fact, entail drastic differences in what counts as permissible and impermissible treatment.

We now arrive at the deep, human rights–disintegrating flaw of the whole revisionist approach. This is something that even its most clearheaded proponents do not see clearly.[105] In proposing that there is any gradation at all within personhood, even only a gradation *below* a magic line (in effect, only in terms of partial personhood), revisionist proponents commit themselves to viewing personhood as a non-fundamental type of moral worth, one that shares a common metric by which it can be calculated and weighed, and therefore is commensurable with other of its instantiations; non-unique in any of its instantiations; non-fundamental (in effect, not an end in itself); and violable (since an entity participating to some extent in personhood can have his or her core interests intentionally harmed through being killed).

With these concessions made, one is thereby committed to seeing personhood in utilitarian, not natural rights, terms. As per the earlier treatment of the right to life, utilitarian ethics guides action by appeal to a greater good of some sort being produced by one choice over its alternative(s). To make sense of the idea of measuring moral-type goods against one another, there must be a common metric by which to measure them. Natural law ethics rightfully denies there is. The most fundamental morally relevant goods do not share a plausible common metric—what is the common denominator shared by life and friendship and artistic creativity, for example?

Because the most fundamental goods are personal goods, it stands to reason that there is no reductive common metric that can weigh the worth of persons against one another. Each individual person possesses a unique, incommensurable worth; the worth of persons is priceless, and as such their dignity is inviolable. This view of the human dignity proper to persons explains why each of us has a right to life against being intentionally killed, no matter how many other innocent, brilliant, or politically influential persons stand to benefit from the cessation of our existence. Utilitarianism, unwilling to recognize the incommensurable, fundamental, inviolable worth of any moral-type good, even persons themselves, stands unable to justify human rights.[106]

So for utilitarianism *no one* is a person in the true human rights sense; *no one* possesses inviolable, priceless human dignity. And any position that concedes that personhood has a measure and a price, so that some are more persons than others who are only "quasi" or "partial" persons, and

concedes that these others can have their most basic interests deliberately destroyed on the condition that persons overall benefit ("greater good"), is a position that is implicitly utilitarian[107] and cannot credibly affirm what is affirmed by Article 3 of the UDHR: "Everyone has a right to life."

Do not think this is a question of mere ethical theory. One of the factors behind the inclusion of that right in the UDHR was repugnance at the National Socialist euthanasia law targeting, in particular, the intellectually disabled[108]—a law justified on utilitarian grounds and with many legal, social, and scholarly precursors within enlightened, progressive Western democracies at that time.[109]

The revisionist account of personhood is fatal for the whole of human rights. Divorcing human nature from personhood and positing the attainment of some heightened, immediately exercisable capacity as the criterion for personhood will cash out in one of two ways. If it avoids directly entailing degrees of personhood, it will be utterly arbitrary and thus discrediting of human rights itself, and leave a variety of innocent, vulnerable human beings—born and unborn—without *any* human rights protection whatsoever. Or, if the divorce is managed in a way whereby it is non-arbitrary and internally consistent, it will end up rejecting the twin truths that all persons are fundamentally equal in moral worth and possess rights that protect them from having their interests deliberately harmed via utilitarian-type calculations. No man is an island, John Donne said, and the bell tolls for us all.

Paths Forward

There is an important role for academic-educational initiatives to explore the deep meaning of human rights. Too few leaders and thinkers are aware of the intellectual threat posed to human rights from within jurisdictions that historically championed them. It is remarkable, for instance, how under-discussed the concessions of McMahan, Arneson, and Knapp are in current debates and literature, given the tightness of their arguments and the stunning and devastating reach of those arguments' implications. Maybe those who expect to see a monster under the bed tend not to look.

Much more scholarly work needs to be done in this area and in human rights legal and moral theory more generally. This is very much a practical recommendation since the UDHR itself was based on a tradition of thought as much as on a tradition of law and practice.

An urgent and under-appreciated human rights issue is the rogue deliverances of human rights treaty bodies. It is imperative that adherents to authentic human rights *formally* and *openly* push back against treaty-monitoring bodies' undermining of human rights protections. Currently, treaty-monitoring bodies face little, if any, principled state opposition. The effect of this omission is to create the impression in the public, political, and, increasingly, judicial mind that such bodies are fair and even legally authoritative interpreters of human rights law. The falsity of this impression serves to weaken the meaning, standing, and integrity of actual international human rights law as found in human rights treaties.

Further, there is the real possibility that if states continue to remain passive toward or acquiesce in the faulty pronouncements of treaty-monitoring bodies, then those pronouncements could attain the status of customary human rights law and/or such passivity/acquiescence may count as "subsequent practice" for the purposes of interpreting the meaning of human rights treaty law as per Article 31(3)(b) of the Vienna Convention on the Law of Treaties. Of note as regards the issue of "subsequent practice" is that the International Law Commission has recently affirmed that treaty bodies' pronouncements can contribute toward "subsequent practice" if endorsed (or perhaps even non-opposed) by the relevant state.[110] So while currently it is very widely accepted, including by the International Law Association[111] and even revisionist human rights scholars,[112] that the conclusions and findings of treaty-monitoring bodies are not legally binding and do not form part of human rights law, this could very well change in the future—and change quite quickly at that.

Recommendations

What can be done? I will briefly outline four possibilities and offer a judgment on each. (No doubt there are more avenues to explore, and others should dedicate time to considering what these might be.)

1. **Make efforts to alter the consensus philosophical composition of these bodies in a way that makes them more faithful to the human rights philosophy.** States do have power to elect the members of these bodies. To the best of my knowledge, there has hitherto been little coordinated effort among states to promote the election of authentic defenders of human rights to various treaty-monitoring bodies—so there is much room for improvement in this regard. Realistically, though, in the short term, it will be a difficult task to coordinate the election of a sufficient number of authentic human rights defenders to a particular body so as to shift that body's majority view on important matters like the right to life. More immediately realizable, and probably more efficient, options are available.

2. **Engage with treaty-monitoring bodies when they are in the process of formulating a new General Comment.** This approach is one already taken by adherents to authentic human rights. This happened recently during drafting by the HRC of its General Comment 36 (on the right to life). Pro-life academics, nongovernmental organizations (NGOs), and states made submissions urging the HRC to reject the idea that the right to life somehow entails a right to abortion.[113] Their efforts were well-intentioned but ultimately doomed to failure.

   The current consensus philosophical position of the HRC, which is antithetical to authentic human rights, meant that deliberations over General Comment 36 were virtually certain to end up rejecting the right to life of unborn children and endorsing a right to abortion.[114] Unless approach (1) is successfully pursued—at least in part—approach (2) will be unrealizable.

3. **Use pro-life-inclined governments' formal responses to U.N. treaty-monitoring bodies' "periodic reviews" to advance criticisms of said bodies' questions** (which are often ideologically loaded against the meaning of the relevant treaty itself) and "jurisprudence." This is a more immediately realizable approach, does not involve a huge amount of coordination, and will have a positive impact.

   Current practice is generally for states to acquiesce in the supposed integrity of the review process by neither challenging the basis of the questions put to them nor pre-emptively responding to the likely "findings" of the body against them. At most, states that avoid amending domestic law in line with a U.N. body's expectations will cite their dualist legal system or some other intricacy of their domestic law. But often the questions and deliverances of the treaty-monitoring body will presuppose the existence of a "right" not part (either explicitly or implicitly) of the treaty of which the body is a function.

   States, therefore, can and should use their official responses to formally criticize and reject faulty interpretations of human rights treaties by U.N. bodies and highlight instances where such bodies are acting *ultra vires* by attempting to unilaterally amend binding international human rights law (the content of which is formed by textual provisions read in light of supplementary means of treaty interpretation, as per the VCLT). State parties can do this in both the "State Parties Reports," the initial step of the review process, and then in their response to the U.N. bodies' "Lists of Issues" (a response titled "Replies to LOIs").[115]

   U.N. bodies' "Concluding Observations," the final step of the review process, would thereby be forced to take notice of criticisms directed towards the U.N. body's assertions—and to formally engage with those criticisms in a way they do not currently have to when NGOs criticize U.N. interpretations of human rights during the oral presentation part of the periodic review process.

   Potentially, this could: (1) force U.N. bodies (or at least certain of its members) to critically reflect on their own operations, competence, and fidelity to human rights law; (2) encourage other states to question the deliverances of U.N. bodies on human rights grounds; (3) dampen judicial enthusiasm for citing the work of treaty-monitoring bodies; (4) lessen the aura of uncontroversial authoritativeness of

treaty-monitoring bodies in the public and official mind; and (5) motivate and provide official data for scholarly reflection on the trajectory of human rights law, theory, and practice.

More importantly, though, this measure would place a substantial (and possibly insurmountable) obstacle in the path of treaty bodies' pronouncements forming either customary human rights law or contributing towards "subsequent practice" as per Article 31(3)(b) of the VCLT.

The effectiveness of the implementation of this recommendation would be greatly enhanced if formal state objections to a treaty body's interpretation of human rights law were legally well grounded, in effect, if the objections cohered with the legal hermeneutics endorsed by Articles 31 and 32 of the VCLT (see discussion, *infra*). Usually only a small number of civil servants/department officials have direct responsibility for the drafting of official responses to U.N. bodies, so it should not be difficult to coordinate the practical implementation of this recommendation.

4. **In line with and supplementing the previous recommendation, states should also submit interpretative declarations to the human rights treaties they have ratified (or even just signed) outlining that they interpret these treaties in accordance with Articles 31 and 32 of the VCLT.** Normally interpretative declarations (which are distinct from reservations) are communicated by states upon signing, ratifying, or acceding to a treaty, but international law does not stipulate that their communication is restricted to those official acts. In fact, the International Law Commission accepts the legitimacy of the "late formulation" of interpretative declarations,[116] as does the U.N.[117] and the Council of Europe.[118]

The VCLT itself is uncontroversially authoritative in international law. It has been ratified by 114 states and is regarded as a codification of existing customary law. So it is difficult to imagine how an international actor could object to an interpretative declaration that affirms a particular state interprets a treaty it is party to in accordance with the VCLT.

The VCLT's attractiveness is in its reasonableness. Article 31(1) states that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Article 32 deals with supplementary means of interpretation in cases in which the meaning of a treaty provision is ambiguous. In particular, it mentions having recourse to the *travaux* as a supplementary means of treaty interpretation.

Of course, a good faith reading of the express terms of a human rights treaty in light of its object and purpose and supplemented by an awareness of its *travaux* cannot sustain the claim that there is an international human right to abortion. Hence it is no surprise that treaty-monitoring bodies that affirm such a right adopt nothing like a VCLT interpretative methodology (or any principled hermeneutic methodology at all—they simply trade in sheer assertion).

Entering an interpretative declaration indicating commitment to the VCLT would affirm the actual meaning of the treaty as well as legally and politically disarm the influence of treaty-monitoring bodies when they interpret that treaty in a free-wheeling manner expressive of their own philosophical convictions. All the effects outlined above in relation to point three apply here, too. The more states that can be encouraged to implement points three and four, the more treaty-monitoring bodies will lose political credibility—and the less they will develop customary legal authority or indirect positive legal authority from being considered as contributing towards "subsequent practice."

Conclusion

Here, I suggest two possible basic outlines for what the relevant interpretative declaration may look like, one more general and the other more targeted:

1. "The government of *x* declares that only interpretations of the present treaty which accord with Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which *x* has ratified, shall be considered by *x* for the purpose of amending domestic law."

2. As above with (1) with the addition of the following: "The government of *x* does not accept the authority of a third-party body to unilaterally alter treaty provisions agreed to by *x* upon ratification of the present treaty, either by deletion, addition, or amendment of treaty provisions. The present treaty makes no provision for such an authority."

What is needed is for one or a number of states to take the first step and to formally and substantially push back against the abuse of prestige by rogue treaty-monitoring bodies, an abuse that it greatly damaging the credibility and practical effect of genuine human rights. Doing so is practical; not doing so will make adherence to genuine human rights increasingly impractical.[119]

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CHAPTER 4

Freedom of Speech in International Human Rights Law

MICHAEL P. FARRIS *and* PAUL B. COLEMAN

The U.N. has a confusing approach to the meaning of the freedom of speech. Some documents and decisions provide robust free speech protections. However, due to the complex history of the U.N., there has always been a pro-censorship strand running through the U.N. system. If the pro–free speech "side" is to take precedence, U.S. action is needed. Free speech must be modelled and embraced at the national level and championed at the international level—starting with the Secretary General's ill-advised Plan of Action on Hate Speech. The remedy for any form of speech to be wayward is the right of others to demonstrate the error of the first speaker through logic, facts, and reason. The answer is always more speech.

Two requests were recently received for legal assistance. One was from a lawyer in an Islamic-majority nation. His client was being prosecuted for allegedly defaming the prophet of Islam, Mohammed. He has subsequently been sentenced to death. The second was from a lawyer in Canada. A street preacher had been arrested for quoting perhaps the most famous verse in the Bible—John 3:16—which speaks of God's love for the whole world. He dared to say these words at a lesbian, gay, bisexual, and transgender (LGBT) outdoor event—and now faces criminal penalties.

Although the details of the national laws vary, as do the political affiliations and worldviews of the lawmakers who enact restrictive statutes, these and countless other examples reveal a worldwide assault on freedom of speech. In many nations, draconian blasphemy laws exist with significant penalties, including the death penalty. Such laws are often used to settle scores between neighbors, attack opponents, and advance government authority. And in more recent times, loosely worded anti-terror, anti-extremism, or national security laws are being used to silence political opponents and any person or group considered an enemy of the state.

In the West, "hate speech"[1] laws are the biggest threat to freedom of speech.[2] "Hate speech" laws are extremely vaguely worded, and there is no universally agreed legal definition of "hate speech." As discussed below, the United Nations (U.N.) has recently launched a major new initiative to combat "hate speech"—spearheaded by the Secretary-General himself. The opening report states:

> There is no international legal definition of hate speech, and the characterization of what is "hateful" is controversial and

> disputed. *In the context of this document*, the term hate speech is understood as any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language.[3]

Similar statements can be found by all major international actors. For example, the Fundamental Rights Agency of the European Union once stated in a report that the "term 'hate speech,' *as used in this section*, includes a broader spectrum of verbal acts...[including] disrespectful public discourse."[4]

And a fact sheet produced by the European Court of Human Rights has explained:

> The identification of expressions that could be qualified as "hate speech" is sometimes difficult because this kind of speech does not necessarily manifest itself through the expression of hatred or of emotions. It can also be concealed in statements which at a first glance may seem to be rational or normal.[5]

The United Nations Educational, Scientific, and Cultural Organization summarized the situation as follows: "Hate speech is a broad and contested term.... [T]he possibility of reaching a universally shared definition seems unlikely."[6] Given that there is no universally agreed definition of "hate speech," identifying so-called hate speech laws is problematic. Nevertheless, some conclusions can be drawn based on a study of such laws across the West.[7]

Most of these laws criminalize speech that allegedly does one or more of the following: hates, offends, insults, belittles, vilifies, ridicules, despises, discriminates, or violates the dignity of those belonging to one or more of the following groups: sex, sexual orientation, gender identity, race, nationality, language, ethnic origin, social status, religion, belief, political affiliation, age, and disability. In some instances, the state itself can be a victim of "hate speech," as well as religious dogma per se (not just religious people).

Hence, there is no identifiable and agreed-upon category of speech that can be labelled "hate speech"; so-called hate-speech laws are powerful tools in the hands of those who wish to censor unpopular opinions, silence political opposition, and remove irritating voices that speak out against the orthodoxies of the day. To choose one typical example among many, Chapter 11, Section 10 of the Finnish Criminal Code states the following:

> A person who makes available to the public or otherwise spreads among the public or keeps available for the public information, an expression of opinion or another message where a certain group is threatened, defamed or insulted on the basis of its race, skin colour, birth status, national or ethnic origin, religion or belief, sexual orientation or disability or a comparable basis, shall be sentenced for *ethnic agitation* to a fine or to imprisonment for at most two years.[8]

It is under this provision that a leading member of the Finnish Parliament, and former Minister of the Interior, is now facing four separate police investigations for alleged "hate speech." Päivi Räsänen's alleged crime? Tweeting an image of some Bible texts and writing a church booklet on sexual ethics *16 years ago*.[9]

Such cases are becoming common across Europe and the West. Catholic cardinals have been investigated for preaching homilies, journalists have been arrested and fined, and private conversations among citizens have resulted in criminal prosecutions.

In the face of global assaults to freedom of speech, never has the need for free speech champions been greater. And the U.N. is well-placed to be at the forefront of such efforts. It has a number of bodies and mechanisms that can promote freedom of expression, as well as foundational human rights treaties with strong protections for freedom of expression.

However, this is only half the story. The human rights treaties also contain language that encourages states to censor speech. U.N. bodies and mechanisms often encourage state-censorship. And many U.N. member states use the U.N. system to advance their censorious agenda globally.

As this essay makes clear, at the heart of the U.N. system is a contradictory—even schizophrenic—approach to freedom of expression, with both a pro–free speech and pro-censorship approach in

existence at the same time. This can be traced back to the very founding of the U.N., and it reverberates through to the present day.

Before tracing the historical debates that have led to this present-day schizophrenia, it is first worth considering why a robust defense of free speech is necessary.

I. In Defense of Freedom of Speech

Preventing the U.N. from tipping toward censorship is of pressing importance given the deep moral and political significance of free speech. Free speech is of such great significance that defenses of the right to speak freely are manifold. These defenses are, broadly speaking, either *pragmatic* or *principled*, meaning that they appeal either to the pragmatic reasons for protecting speech or to moral principles why states lack authority to restrict certain kinds of speech.

Defenses from the two categories are often used in tandem, as by John Stuart Mill, one of the most famous and influential defenders of free speech. Mill makes the pragmatic argument that protections for speech are an indispensable aid to our search for truth, since "*history teems with instances of truth put down by persecution*."[10]

At the same time, Mill proposes a principled understanding of the limits of state authority: The state is only permitted to interfere with actions in order to prevent "evil" or "injury" to others, leaving an expansive "region of human liberty" that includes, first, "liberty of conscience in the most comprehensive sense" and second, "the liberty of expressing and publishing opinions."[11] This liberty to speak and publish, Mill reasons, "almost is of as much importance as the liberty of thought itself" and "is practically inseparable from it" as it rests "in great part on the same reasons."[12]

As in Mill, so also in general, free speech defenses—especially those that seek a principled reason for limiting state authority over speech—rely on a distinction between actions and speech. This speech–act distinction is quite old and finds nuanced treatment even in Montesquieu. As Montesquieu put it, laws ought only seek to punish "overt acts," and "words do not constitute an overt act; they remain only in idea."[13] Because speech is not action but only ideas expressed aloud, Montesquieu argued, laws against speech tend to be vague and therefore to give the state broad, arbitrary power.[14] Thus Montesquieu offers a principled reason based in distinction between speech and action to caution against policing speech.

This same interest in the distinctive characteristics of speech appears in what is perhaps the most important of the historic defenses of free speech, namely, the argument from natural law and natural rights. Certainly natural rights arguments, based in early modern theories of natural law, "powerfully shaped the way that the Founders thought about the purposes and structure of government."[15] The protections for free speech enshrined in the First Amendment emerged from the influence of such theorists of natural rights as William Blackstone, Benedict Spinoza, and John Locke.[16] In this liberal tradition, the right to free speech is, along with other natural rights, grounded in the idea that "every man has property in his own person," to use Locke's phraseology.[17]

Locke's argument was that natural law gives us each certain duties to God that allow us to claim certain natural rights against all worldly powers. These natural rights include, famously, life, liberty, and property. We have property in ourselves because, Locke argued, we ultimately each belong to God and have been deputized by God, "sent into the world by his order and about his business."[18] God has given us certain duties to perform, authorizing us to execute the natural law to which he will hold us accountable.

Because we are accountable to God for performance of our duties under the natural law, we cannot allow ourselves to fall under tyranny. Tyrannical rule threatens to take away life and freedom, both of which are indispensable to our efforts to serve God.[19] Watchfulness against tyranny includes carefully adjudging what aspects of life fall under the respective jurisdictions of "the civil governor, which is the ruler" and "the individual governor, which is conscience."[20]

"Each individual alone," Locke believed, "is responsible for their own salvation," and therefore the ruler must allow citizens to teach publicly any doctrine that does not by its very nature "plainly undermine the very foundations of society."[21] Locke's point was put in more explicit terms by Spinoza, who wrote that individuals hold an "indefeasible natural right" to free speech, except when

the opinions expressed "by their very nature nullify the [social] compact."[22]

The natural rights tradition, therefore, bequeaths to us the idea that we all, simply because we are humans, have an indefeasible and inalienable right to speech that, while not entirely without limits, is nevertheless quite substantial. We have the right to speak freely because to speak is not to take action but only to express our ideas. And our ideas we cannot possibly allow any outside power to regulate, since God himself will hold us accountable for our ideas and beliefs.

Thus, while the state has legitimate authority to regulate our *actions* insofar as doing so is necessary to prevent us from taking away the life, liberty, or property of others, there is a strong presumption that individuals have authority to speak as they will. The state must therefore tread carefully when it seeks to interfere with speech—since in regulating speech the state can easily undermine the very liberty it exists to secure.

II. Free Speech Versus Censorship at the U.N.'s Founding

Principled and pragmatic defenses of freedom of speech were deployed by Western nations at the very founding of the U.N.—and both were met with significant opposition from Communist-led nations that placed a far greater emphasis on the reaches of state power. A two-decade-long debate unfolded, the results of which can be seen today.

With the launch of the United Nations in San Francisco in 1945, work soon began on an international bill of human rights—a major priority for the U.S. and many other Western nations following the horrors of World War II. Three years later, the Universal Declaration of Human Rights (UDHR) was launched, followed by a steady succession of international and regional human rights treaties, most of which enshrine the fundamental right to freedom of expression.[23] However, provisions were also adopted within international human rights treaties that appear to undermine this fundamental right by *obligating* states to prohibit the impossibly vague and subjective notion of "advocacy of…hatred"—known today as "hate speech."

This inherent conflict reflects the political and historical circumstances in which the core documents were drafted.[24] Moreover, this conflict continues through to the present and helps explain why parts of the U.N. machinery herald freedom of expression as a fundamental human right and lament restrictions on this right, while other bodies (or sometimes even the same U.N. body) call for greater restrictions on this right. And it explains why, in 2019, the U.N. Secretary-General can launch a strategy to combat (undefined and arguably undefinable) "pejorative or discriminatory language"—while at the same time saying this in no way undermines freedom of expression.[25]

As discussed below, at the heart of international law lies an insurmountable challenge that the U.N. seeks to navigate: the protection of the "right kind of speech" and prohibition of the "wrong kind of speech"—even though such categories are wholly subjective and impossible to determine.

At the start of the international human rights project, freedom of speech was considered by many nations to be an absolutely essential freedom that must be protected in any international human rights treaty. For example, in 1946, the U.N. General Assembly declared in its very first session: "Freedom of information is a fundamental human right and is the *touchstone of all the freedoms to which the United Nations is consecrated*."[26] And the preamble to the UDHR states, "[T]he advent of a world in which human beings shall enjoy freedom of speech and belief…has been proclaimed as the highest aspiration of the common people."[27]

On the other hand, there were consistent voices from the Soviet Union and other communist-led states that unbridled freedom of speech would simply lead to more fascism and more war. Both sides made reference to Adolf Hitler and Nazi Germany. Predominantly Western nations argued that freedom of speech must be robustly protected in order to stop totalitarian regimes such as Nazi Germany from removing the civil liberties of their citizens. Notably, for example, after coming to power in 1933, Hitler immediately passed an "emergency decree" ordering that "restrictions on personal liberty, on the right of free expression of opinion, including freedom of the press, on the right of assembly and the right of association… are permissible beyond the legal limits otherwise prescribed."[28] Predominantly communist-led states argued that too much freedom of speech led to the rise of the Nazis in the first place.

Such diverging views persisted for the entire drafting period of the UDHR, as well as the other core international human rights treaties drafted in the years that followed. Hence, international law on the right to freedom of speech reflects a patchwork of influence comprised of two opposing views. We will now review the drafting of four major provisions in three different key texts, in order to better understand how the historic debates, resulting in an inherent contradiction, carry through to the present day.

UDHR, Article 19

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[29]

Article 19 of the Universal Declaration of Human Rights is a bold declaration of the right to freedom of speech—and does not contain any limitation clauses. However, this was not without controversy during the two-year UDHR drafting process. During the discussions in the Sub-Commission on the Freedom of Information, two clauses were proposed that would limit this right. Only two experts objected to both versions of the limitation clauses—the Soviet and Czechoslovakian delegates. However, this was not because the amendments restricted freedom of speech, but because they did not restrict it enough. Nevertheless, the majority of the Sub-Commission voted to delete the proposed limiting clauses altogether.[30]

Undeterred, the Soviets continued their objections, and several more attempts to restrict freedom of speech and freedom of assembly were made. Thus, during the Third Committee of the Human Rights Commission in June 1948, the Soviet delegation proposed amendments that would put limits on both freedom of speech and freedom of association. It was submitted that the "use of freedom of speech and of the press for the purposes of propagating Fascism and aggression or of inciting war between nations shall not be tolerated."[31] Moreover, "All societies, unions and other organizations of a Fascist or anti-democratic nature, as well as their activity in any form, are forbidden by law under pain of punishment."[32] Again, however, all amendments intended to deny freedom of speech and assembly to those labelled as "fascists" were defeated. It was the view of the majority that despite "hating fascism as intensely as did the USSR,"[33] tolerance should mean tolerating even the intolerant.

Much like the concerns over the term "hate speech" today, it was not clear to the delegates of many Western nations what was meant by the term "fascist," particularly as the Soviet delegation had defined it as "the bloody dictatorship of the most reactionary section of capitalism and monopolies."[34] Thus, to the Soviets, "there was only a difference of degree and not one of kind between Nazi Germany and the Western democracies."[35] With such a vague definition of "fascist," there was real danger that it could mean anything that the state chose it to mean, and its proscription could be used to restrict people or groups that were not state-approved.

Canada, along with other Western nations, made its opposition to the loose terminology clear, and the U.N. report notes,

> The Canadian delegation could not accept the theory that human rights should be limited to those sanctioned and sanctified by the communist doctrine, while all others were to be outlawed as fascist. The term "fascism" which had once had a definite meaning...was now being blurred by the abuse of applying it to any person or idea which was not communist.[36]

Before the final text was adopted, the Soviet delegation gave another insight into its position. A Soviet representative argued:

> It was of no use to argue that ideas should only be opposed by other ideas; ideas had not stopped Hitler making war. Deeds were needed to prevent history from repeating itself. Not only must ideas be fought by other ideas but fascist manoeuvres and warmonger's machinations must also and especially be made illegal and the necessary punitive measures must be provided for.[37]

Therefore, in a document created to limit the reach of the state, the Soviets pushed for provisions that would extend state power, with "punitive measures" against ideas seen as "necessary." However, the majority disagreed, and the final version of Article 19 did not explicitly exclude any particular people or group from protection. The Soviet notion that there were "dangerous ideas[,] the diffusion of which should be prevented"[38] was rejected. Hence, at a time when fear of fascism was perhaps at its greatest—and indeed served as a primary motivation for the UDHR itself—the framers were not prepared to single out any speech as being unworthy of protection.

ICCPR, Article 19. With the drafting process beginning at roughly the same time as the UDHR but finishing nearly two decades later, the International Covenant on Civil and Political Rights (ICCPR) is a binding treaty that has been ratified by most countries. ICCPR Article 19 protects the right to freedom of speech, the final version of which reads as follows:

> **1. Everyone shall have the right to hold opinions without interference.**
> **2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.**
> **3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:**
> **(a) For respect of the rights or reputations of others;**
> **(b) For the protection of national security or of public order (ordre public), or of public health or morals.**[39]

Article 19(1) protects an absolute right to freedom of opinion. This was relatively uncontroversial and was adopted unanimously by the drafting committee in 1961.[40] Similarly, Article 19(2), which protects freedom of speech in very similar terms to UDHR Article 19, "was adopted by 88 votes to none with just 1 abstention."[41]

However, unlike the UDHR, Article 19(3) introduces limitations on the right to freedom of speech. Hence, the right to hold opinions without interference is absolute; the right to express those opinions is qualified. And the limitation clause generated much debate over the course of more than one decade. Debate centered around various topics, including the reference to "special duties and responsibilities," which does not appear in any other article in the treaty; the distinction between a right to "seek" and a right to "gather" information; and whether the limitation clause should be short and general in nature or list every limitation on speech imaginable (with a list 25 possible limitations generated by the drafting committee).[42]

While a more general formulation was eventually voted through by 71–7 (with 12 abstentions),[43] this was not without considerable opposition by the Soviet bloc, which by the 1960s "had become the champion of extensive restrictive language."[44] The 1961 summary of the debate is worth quoting in full, given that both sides of the argument are repeated almost verbatim today:

> Those who held that additional specific restrictions should be included in article 19 laid stress on the continued existence of such evils as national, racial, and religious hatred or prejudices, war propaganda or the dissemination of slanderous rumours, and on the dangers these presented to peaceful and neighbourly relations among the nations in the era of nuclear weapons; States should therefore be able to prohibit such activities....

> Those who opposed such specific restrictions as mentioned above feared that they might convert article 19 into a means of limiting freedom of information. While no one could quarrel with the objective of such restrictions, they held, it would be most difficult to determine, in general and in any specific case, what constituted e.g. war propaganda or incitement to national or racial hatred and what was legitimate information; there was also the question

> as to what authority would be empowered to decide such issues. There was a danger that Governments might allow only such information to appear as they favoured. Propoganda, prejudice and similar evils were best overcome by giving free play to all views, thus permitting truth to prevail.[45]

These paragraphs represent a near-perfect summation of today's debate over freedom of speech. One side of the debate argues that the state must be empowered to restrict evils such as "hate speech" in order to protect individuals, groups, and society at large from the harm that negative speech causes. The other side argues:

- It is impossible to draw the line between so-called "hate speech" and otherwise legitimate speech;
- It is highly questionable what authority would be empowered to decide such issues;
- It is possible—indeed, probable—that government actors would play favorites with speech; and
- The correct response to bad speech is always more speech, not less.

Following robust debate and some compromises, ICCPR Article 19 was ultimately adopted with almost universal support and only a handful of minor reservations.[46] It largely matches UDHR Article 19, as well as the protections for freedom of speech in other international and regional human rights treaties.[47]

However, the story does not end there, as the Soviet bloc was far more successful in pushing through ICCPR Article 20—a complete anomaly in the treaty as it imposes an obligation without a corresponding right—and Article 4 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Both provisions *obligate* states to *prohibit* certain forms of speech, and both were highly controversial at the time they were drafted.

ICCPR, Article 20. Article 20 of the International Covenant on Civil and Political Rights reads:

> **1. Any propaganda for war shall be prohibited by law.**
> **2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.**

Originally, the ICCPR included an article that stated, "Any advocacy of national, racial or religious hostility that constitutes an *incitement to violence* shall be prohibited by the law of the state."[48] However, this article was dropped during the Second Session of the Drafting Committee.[49]

During the years that the Commission on Human Rights met, the issue continued to be discussed at length, with the Soviet bloc pushing for the prohibition of speech in addition to the limitations laid out in Article 19. The Polish representative argued that simply condemning incitement to violence did not go to "the root of the evil," but "merely tackled its consequences, and...would only serve to hide the real nature of the problem."[50] Similarly, the representative from Yugoslavia submitted that while incitement to violence should be prohibited, "it was just as important to suppress manifestations of hatred which, even without leading to violence, constituted a degradation of human dignity and a violation of human rights."[51]

The predominantly Western nations fought against such a prohibition, and Eleanor Roosevelt of the United States argued that it "would be extremely dangerous to encourage Governments to issue prohibitions in that field, since any criticism of public or religious authorities might all too easily be described as incitement to hatred and consequently prohibited. Article [20] was not merely unnecessary, it was also harmful."[52]

As the debate summary text reveals, while there was "a general agreement that advocacy of national, racial, or religious hatred and war propaganda were evils, strong doubts were expressed as to whether these evils could be prohibited by the law of a state or by an international legal instrument."[53] Furthermore, it was feared that such a prohibition would "prejudice the right to freedom of opinion and expression," as "a government could invoke the article to impose prior censorship on all forms of expression and to suppress the opinions

of opposition groups and parties."[54] The General Assembly report of 1961 summarized the opposing views as follows:

> The view was expressed that "incitement to violence" was a legally valid concept, while "incitement to discrimination" or "incitement to hostility" was not. On the other hand, it was argued that to prohibit only incitement to violence would not represent progress in international legislation. Often it was hostility or discrimination that led to violence. Any propaganda which might incite discrimination or hostility would likely incite violence and should therefore be prohibited.[55]

The votes on Article 20 reflect "a see-saw of influence"[56] which alternated between the predominantly communist support for a strong prohibition on speech, and the predominantly Western support for free speech. Over a period of seven years, "advocacy of hatred" provisions were added to the draft, deleted, added again, then deleted again—and ultimately added for good.

Hence, despite the opposition, Article 20 was incorporated into the ICCPR. As Jacob Mchangama observes, "The voting record reveals the startling fact that the internationalization of hate-speech prohibitions in human rights law owes its existence to a number of states where both criticisms of the prevalent totalitarian ideology as well as advocacy for democracy were strictly prohibited."[57]

ICERD, Article 4. A similar story can be told with the International Convention on the Elimination of All Forms of Racial Discrimination, a treaty that was adopted in 1965. ICERD Article 4 requires states to undertake "immediate and positive measures designed to eradicate all incitement to, or acts of...discrimination." Despite the requirement to have "due regard" for the principles embodied in the UDHR—including freedom of speech—nations that accede to the treaty must nevertheless "declare an offence punishable by law all *dissemination of ideas* based on racial superiority or hatred, incitement to racial discrimination."[58]

Moreover, states must "declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination and shall recognize participation in such organizations or activities as an offence punishable by [criminal[59]] law."[60] This is considered by supporters of international "hate speech" measures to be "the most important" provision[61] and was undoubtedly "one of the most difficult and controversial of the Convention."[62]

During the drafting of the ICERD, it was clearly recognized that racism was a great moral evil. However, there was also concern about giving the state the power to use coercive criminal law to regulate the speech and private associations of its citizens. While the communist representative of Hungary declared that his country could not sign a convention that permitted fascist organizations to exist, the U.S. maintained that "citizens must still be allowed the right to be wrong."[63]

The dividing lines were as clear as ever: While the U.S. draft of Article 4 restricted its scope to speech "resulting in or likely to cause acts of violence,"[64] the USSR/Poland draft made no such condition.[65] As the debates continued, Czechoslovakia proposed an amendment to the U.S. draft that would delete the words "resulting in acts of violence"; Poland tabled an amendment that would further expand the power of the state to combat racist speech; and Ukraine sought to criminally punish citizens who paid subscriptions to fascist organizations.[66]

All were unacceptable to the United Kingdom representative, Lady Gaitskell, who said that the amendments "infringed the fundamental right of freedom of speech."[67] Freedom of speech, she argued, is "the foundation-stone on which many of the other human rights were built; without freedom of speech, many cases of racial discrimination remained completely undiscovered."[68] While she maintained that the U.K. was taking steps to tackle the problem of racial discrimination, the right of all organizations, "even fascist and communist ones,"[69] to exist and to make their views known must be defended, even though those organizations held views which the majority of the people utterly repudiated. The views of such organizations were tolerated, however, on one condition—that their speech "did not involve incitement to racial violence."[70] Moreover, the U.K.'s position was "based on the belief that in an

advanced democracy the expression of such views was a risk which had to be taken."[71]

On the other hand, the communist nations of Czechoslovakia, Hungary, Poland, and Yugoslavia argued that freedom from discrimination should take precedence over the rights to freedom of speech and assembly.[72] With reference to the position of the United Kingdom, the Czechoslovakian representative "felt that it was no proof of democracy that movements directed towards hatred and discrimination were allowed to exist. Her delegation was passionately dedicated to freedom of speech, but not when it was misused in the service of hatred, war and death."[73]

As with the ICCPR, the predominantly Western liberal democracies, joined by nations from Latin America, were unable to garner enough votes to limit the far-reaching scope of Article 4, and freedom of speech once again made way for state censorship. During the adoption of the ICERD in the General Assembly, it was the Colombian representative who most articulately challenged the impending threats to freedom of speech. He stated:

> To penalize ideas, whatever their nature, is to pave the way for tyranny, for the abuse of power; and even in the most favourable circumstance it will merely lead to a sorry situation where interpretation is left to judges and law offices. As far as we are concerned, as far as our democracy is concerned, ideas are fought with ideas and reasons; theories are refuted with arguments and not by resort to the scaffold, prison, exile, confiscation or fines.[74]

The warning of the Colombian representative is no less important today. ICERD Article 4, together with ICCPR Article 20(2), empower the state to use coercive means to eradicate speech that is deemed by the state to be hateful. As Mchangama notes, "The idea that deliberate state action—even at the expense of individual liberty—is the principal vehicle for social change and human progress is a hallmark of socialism, fascism, communism, and in some cases, forms of progressivism."[75]

As ICERD Article 4 and ICCPR Article 20(2) were passed, states that ratified the treaties were required to take positive measures to introduce "hate speech" laws. And although some nations placed reservations against these provisions at the time of ratification, they neglected to follow their own reservations in the years that followed.

From the 1970s onwards, the international measures passed at the U.N. were incorporated at the national level. For example, one of Italy's "hate speech" laws explains that the provision was adopted "for the purposes of implementing Article 4 of the Convention,"[76] and one of Belgium's "hate speech" laws notes that "[t]his Act fulfils the Belgian obligations under the International Convention on the Elimination of all Forms of Racial Discrimination of 21 December 1965."[77] Similarly, Article 266(b) of the Danish Criminal Code—at the heart of the Danish cartoons controversy several years ago—reads, "This provision was inserted in the Criminal Code in 1971 in connection with Denmark's ratification of the International Convention on the Elimination of All Forms of Racial Discrimination, to ensure full compliance with Article 4 of that convention."[78] And Cyprus's relatively recent "hate speech law" states in the preamble: "For the purpose of harmonization with the act of the European Union entitled 'Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.'"[79]

Despite the principled defense of free speech that was given on behalf of many nations during the drafting process of the international documents, "hate speech" laws gradually spread throughout the liberal democratic nations that had once opposed them. Having incorporated the international provisions into national legislation, most nations have since taken the opportunity to expand the reach of the "hate speech" laws—and the power of the state.

III. Free Speech Versus Censorship in Current U.N. Interpretation

Various U.N. bodies are tasked with interpreting international human rights law. Each year, various parts of the U.N. machinery churn out countless reports, resolutions, and recommendations. These include thematic reports by special rapporteurs on multiple issues, country reports by bodies tasked with monitoring states' compliance with treaties, reports by the Human Rights Council and General

Assembly, reports by the High Commissioner for Human Rights, and many, many more.

It is therefore often inaccurate to state that "the U.N. says so" regarding any given topic, given that the U.N. comprises many different parts, which on occasion say different things. This is certainly true for freedom of speech, as the inherent free speech contradiction within foundational U.N. treaties has reverberated throughout the U.N. system, leading to contradictory statements in the decades that followed.

The following is not an exhaustive collection of everything the various U.N. bodies have said about the freedom of speech, but it provides a sample of how the fundamental right is being interpreted by various U.N. bodies.

Support for Freedom of Speech. Many U.N. documents convey broad support for freedom of speech. For example, the U.N. Human Rights Committee is tasked with monitoring member states' implementation of the ICCPR, as well as providing its interpretation of provisions within the treaty.[80] In its major interpretation of ICCPR Article 19, known as General Comment No. 34, the Committee interprets the right to freedom of speech broadly, stating:

> Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.[81]

Moreover, restrictions on freedom of speech must pass a three-part test in order to be valid: "the restrictions must be 'provided by law'; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3 [Article 19]; and they must conform to the strict tests of necessity and proportionality."[82] The Committee goes on to note that "[r]estrictions must not be overbroad"[83] and that

> [w]hen a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.[84]

The U.N. also has a number of independent experts dedicated to different issues, known as special rapporteurs. Similar to the U.N. Human Rights Committee, these rapporteurs have been generally supportive of freedom of speech. For example, in 2006 several rapporteurs issued a joint report with their interpretation of the ICCPR. They stated:

> Article 20 of the Covenant was drafted against the historical background of the horrors committed by the Nazi regime during the Second World War. The threshold of the acts that are referred to in article 20 is relatively high because they have to constitute advocacy of national, racial or religious hatred. Accordingly, the Special Rapporteur is of the opinion that expressions should only be prohibited under article 20 if they constitute incitement to imminent acts of violence or discrimination against a specific individual or group.[85]

Although the rapporteurs repeat the vague terminology of ICCPR Article 20(2), their emphasis is clearly towards freedom of speech. The threshold of acts referred to in Article 20(2) must be high because, according to the rapporteurs, the context for this provision was nothing less than the horrors of the Nazi regime.

Similarly, the Rabat Plan of Action, released by the U.N. Office of the High Commissioner for Human Rights in 2012, states:

> Article 20 of the Covenant requires a high threshold because, as a matter of fundamental principle, limitation of speech must remain an exception. Such threshold must take into account the provisions of article 19 of the Covenant.... This implies, among other things, that restrictions are clearly and narrowly defined and respond to a

> pressing social need; are the least intrusive measure available; are not overly broad, so that they do not restrict speech in a wide or untargeted way; and are proportionate so that the benefit to the protected interest outweighs the harm to freedom of expression, including with respect to the sanctions they authorize.[86]

In the same year, the special rapporteur on the promotion and protection of the right to freedom of opinion and expression published an extensive report on the right to freedom of opinion and expression, in which he stated,

> The threshold of the types of expression that would fall under the provisions of article 20 (2) should be high and solid.... Moreover, while States are required to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence under article 20 (2) of the Covenant, there is no requirement to criminalize such expression. The Special Rapporteur underscores that only serious and extreme instances of incitement to hatred...should be criminalized.[87]

Similarly, in a special report focused on tackling religious hatred, the special rapporteur on freedom of religion or belief stated, "[T]he guarantees of freedom of expression as enshrined in article 19 of the Covenant can never be circumvented by invoking article 20. Prohibitions must be precisely defined and must be enacted without any discriminatory intention or effect."[88]

Moreover, all these U.N. bodies call out blasphemy laws as being incompatible with international human rights law. For example, the U.N. Human Rights Committee has stated: "Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3."

The Rabat Plan of Action states: "States that have blasphemy laws should repeal them, as such laws have a stifling impact on the enjoyment of freedom of religion or belief, and healthy dialogue and debate about religion."[89] The U.N. Special Rapporteur on freedom of religion or belief has concluded that "States that still have blasphemy laws should repeal them, as such laws may fuel intolerance, stigmatization, discrimination and incitement to violence and discourage intergroup communication."[90] And the former special rapporteur on the promotion and protection of the right to freedom of opinion and expression "urges States to repeal [blasphemy laws] and to replace them with laws protecting individuals' right to freedom of religion or belief in accordance with international human rights standards."[91]

Similarly, the current special rapporteur on the promotion and protection of the right to freedom of opinion and expression has recommended that states "[r]eview and, where necessary, revise national laws," because "[n]ational legislation increasingly adopts overly broad definitions of key terms, such as...hate speech, that fail to limit the discretion of executive authorities."[92] In the same report, the special rapporteur notes, "In an exchange with the Government of Pakistan, I raised concerns that recent legislation aims to limit 'extremism' and 'hate speech' without specifically defining either term.... European human rights law also fails to define hate speech adequately."[93]

However, despite clear problems with censoring speech under a banner that has not and cannot be adequately defined, this is the clear direction that parts of the U.N. have pursued.

Support for Censorship. Given the inconsistent and often contradictory nature of international law and its interpretation by various U.N. bodies, it is of little surprise that, over time, countries with abysmal free speech records have felt empowered to use the U.N. machinery to advance a censorious agenda. For example, for more than 15 years, the Organization of Islamic Cooperation (OIC) advanced through the United Nations system the idea that "defamation of religions" should be illegal. This manifested in a draft resolution introduced by Pakistan in the Commission on Human Rights in 1999. This draft was initially titled "defamation of Islam"[94] but was broadened to "defamation of religions."[95] The Commission adopted the resolution (Resolution 1999/82) without a vote.[96]

Discussions surrounding the resolution nevertheless focused on the defamation of Islam, and the resolution, as approved by the Commission on Human Rights, highlights Islam in particular as being "frequently and wrongly associated with human rights violations and with terrorism."[97] It also "expresses concern" at the "incite[ment of] acts of violence, xenophobia or related intolerance and discrimination towards Islam and any other religion."[98] Resolution 1999/82 also:

> [u]rges all States, within their national legal framework, in conformity with international human rights instruments to take all appropriate measures to combat hatred, discrimination, intolerance and acts of violence, intimidation and coercion motivated by religious intolerance, including attacks on religious places, and to encourage understanding, tolerance and respect in matters relating to freedom of religion or belief.[99]

The Human Rights Council approved similar resolutions on defamation of religions through 2010. The General Assembly passed a resolution on defamation of religions from 2005 to 2010. The first defamation of religions resolution in 1999 only included "defamation" in the title; by 2009 the resolution mentioned "defamation" twelve times.[100]

However, with each passing year, support for the resolution dwindled in both the Human Rights Council and the General Assembly. Accordingly, in March 2011, the OIC, through Pakistan, introduced a new resolution to the Human Rights Council.[101] Adopted without a vote, Resolution 16/18, "Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence and Violence Against, Persons Based on Religion or Belief." The Human Rights Council and General Assembly has adopted similar resolutions ever since.

Resolution 16/18 has been called a positive improvement on the language of the resolutions on defamation of religions because it focuses on the promotion of the rights to freedom of religion and freedom of speech and emphasizes preventing harm done to people rather than to ideas or beliefs. After its passage, then–United States Secretary of State Hillary Clinton lauded the resolution for "reject[ing] the broad prohibitions on speech called for in the former 'defamation of religions' resolution, and support[ing] approaches that do not limit freedom of expression or infringe on the freedom of religion."[102]

However, others have argued that the shift to Resolution 16/18 from the defamation of religions resolutions has a "grim [reality]: the revised approach represented in Resolution 16/18 is no more than a diplomatic veneer of global consensus on the thorny subject of freedom of expression and defamation of Islam."[103] Indeed, it is important to note that the Organization of Islamic Cooperation spearheaded the passage of Resolution 16/18, as it had the defamation of religions resolutions.

In a statement before the Human Rights Council adopted Resolution 16/18, Zamir Akram, Ambassador from Pakistan, said, "I want to state categorically that this resolution does not replace the OIC's earlier resolutions on combatting defamation of religions which were adopted by the Human Rights Council and continue to remain valid."[104] Therefore, from the perspective of the OIC, Resolution 16/18 and its subsequent resolutions do not signal a move away from the defamation of religions movement. Instead, the newer language is merely a pragmatic way to increase support for its cause.

This is particularly concerning given that Resolution 16/18 challenges the fundamental freedoms guaranteed by international human rights treaties. Its ambiguous language allows for states—including those with blasphemy laws—to continue to determine what conduct or speech is permissible, rather than outlining clear criteria that apply in all states. And because Resolution 16/18 is vaguely worded, the risk is that states can use it to justify their already existing blasphemy laws, and those states without such laws may feel justified in instituting new rules.

However, it is not just a collection of member states that are pushing an increasingly censorious approach. Other parts of the U.N. apparatus do so, too. For example, in 2009 a number of special rapporteurs criticized the defamation of religion movement, but seemed pleased that it had morphed into a debate on censoring "hate speech," stating:

> Whereas the debate concerning the dissemination of expressions which may offend certain believers has throughout the last ten years evolved around the notion of "defamation of religions," we welcome the fact that the debate seems to be shifting to the concept of "incitement to racial or religious hatred," sometimes also referred to as "hate speech."[105]

The idea that blasphemy or its international equivalent, defamation of religion, is unacceptable but the alternative framework of prohibiting "hate speech" *is compatible* with freedom of speech is shared by other U.N. bodies. For example, in its report on Greece, the Committee on the Eradication of Racial Discrimination, tasked with monitoring member state compliance with the ICERD treaty, stated:

> The Committee is concerned about the continuing existence of legal provisions concerning blasphemy and the risk that they may be used in a discriminatory manner that is prohibited under the provisions of the Convention (art. 5 (d) (vii)).
>
> The Committee recommends that the State party abolish articles 198 and 199 on blasphemy from its Criminal Code.[106]

However, in the preceding paragraph of the very same report, the committee urged Greece to "effectively prevent, combat and punish racist hate speech," stating:

> [T]he fundamental right of freedom of expression should not undermine the principles of dignity, tolerance, equality and non-discrimination as the exercise of the right to freedom of expression carries with it special responsibilities, among which is the obligation not to disseminate ideas on racial superiority or hatred.

Similarly, the U.N. Human Rights Committee habitually calls on member states to prohibit "hate speech," including criminal prohibition. For example, in 2016, it noted in regard to Slovakia that "hate speech legislation does not cover sexual orientation and gender identity" and recommended the country "adopt measures to tackle hate speech on the grounds of sexual orientation and gender identity."[107] In 2018, it told Norway to take "effective measures to prevent hate speech" and "systematize the regular collection of data on these crimes, including the number of reported cases, investigations launched, prosecutions and convictions."[108]

Moreover, it noted Norway should "strengthen the investigation capacity of law enforcement officials on hate crimes and criminal hate speech, including on the Internet, and ensure all cases are systematically investigated, that perpetrators are prosecuted and punished and that appropriate compensation is awarded to the victims."[109] And, in 2019, it called on the Netherlands to "[i]ntensify its efforts to prevent hate speech, particularly by politicians and high-level public officials."[110]

Having briefly surveyed the U.N.'s various interpretations of the key treaty law, we can therefore conclude the following:

- U.N. bodies appear broadly supportive of freedom of speech and regularly voice opposition to blasphemy laws—whether these laws appear at the national level or through their international equivalent of defamation of religions;
- The *very same* U.N. bodies are broadly supportive of "hate speech" laws and increasingly call for greater censorship of "hate speech"; and
- Rather than continuing to fight for international blasphemy laws, supporters of blasphemy prohibitions such as Pakistan and the 57-member state body, the Organisation of Islamic Cooperation, have broadly accepted the alternative vague terminology promoted by Western nations, knowing that this language will suffice for their purposes.

This all reached a head in 2019, with the U.N.'s new Strategy and Plan of Action on Hate Speech—supported by almost all member states.

A Decisive Move Toward Censorship? In May 2019, U.N. Secretary-General António Guterres released a synopsis of the U.N.'s new Strategy and Plan of Action on Hate Speech that has the potential

to influence every part of the United Nations, from the Secretariat to the General Assembly to the agencies.[111]

In a speech at U.N. Headquarters in New York, Guterres called "hate speech" "an attack on tolerance, inclusion, diversity and the very essence of our human rights norms and principles," and said "it undermines social cohesion, erodes shared values, and can lay the foundation for violence, setting back the cause of peace, stability, sustainable development and the fulfillment of human rights for all."[112] While he recognized that international law does not prohibit "hate speech" but instead prohibits incitement to discrimination, hostility, and violence, he tied "hate speech" to genocide in Rwanda, Bosnia, and Cambodia, and to recent violence in Sri Lanka, New Zealand, and the United States. His message is clear: "Hate speech" must be stopped at all costs.

The two stated goals of the U.N. Strategy and Plan of Action on Hate Speech are to "[e]nhance U.N. efforts to address root causes and drivers of hate speech" and to "[e]nable effective U.N. responses to the impact of hate speech on societies." Guterres and the synopsis document claim that addressing hate speech does not mean suppressing freedom of speech, and that the strategy will not infringe on that right. Yet given the broad terms laid out in the synopsis, this is almost certainly a misguided promise at best—and a deliberately misleading promise at worst.

The launch campaign for the Strategy and Plan of Action on Hate Speech was enthusiastically supported by Western nations keen to criminalize "hate speech," Islamic nations keen to criminalize blasphemy, and authoritarian nations keen to criminalize anyone who poses a threat to state power. The U.N.'s new definition of "hate speech" applies to "any kind of communication," including "behaviour," which could include any number of actions, even involuntary ones. Under this definition there is a very low threshold for speech to be considered "hate speech."

The synopsis acknowledges that the definition of "hate speech" goes beyond ICCPR article 20(2), but states that "hate speech" as defined in the document "may to [sic] be harmful." While the synopsis currently focuses on what the U.N. can do to address and combat "hate speech" and does not in its current form explicitly call for the criminalization of "hate speech," calls for prohibition will likely follow, not least because other parts of the U.N. machinery use the term "hate speech" in a different way and *do* call for the prohibition of criminal "hate speech."

Only time will tell how the U.N. will proceed with this campaign, but its introduction marks what could be a decisive step towards censorship.

IV. Freedom of Speech and Our Future Direction

What, then, does the future hold in the battle for freedom of speech? There are four immediate actions that can be taken to defend and uphold freedom of speech.

Reform International Law. First, international law should be reformed to better protect freedom of speech. As detailed above, the vague wording of ICCPR Article 20 and ICERD Article 4 has resulted in the global spread of "hate speech" laws—as well as providing cover for blasphemy laws and other severe speech restrictions. As Amal Clooney and Philippa Webb have persuasively argued, "CERD Article 4 should be deleted by the agreement of States Parties or excluded through reservations."[113] Similarly, Clooney and Webb argue, "States should enter reservations to ICCPR Article 20 to prohibit speech only where it intentionally incites violence or a criminal offence that is likely to follow imminently (or is otherwise concretely identified) as a result of the speech."[114]

If international law cannot currently be reformed—and there is certainly a lack of political will at this moment in time—states should add reservations to these articles *and* follow their reservations at the national level. The reservations of the U.S. could be emulated by other nations. They state:

> [ICCPR] article 20 does not authorise or require legislature or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.

> [T]he Constitution and laws of the United States contain extensive protections of

> individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under [ICERD] articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.

Repeal National "Hate Speech" Laws and Blasphemy Laws. Second, even if the governing treaty law remains exactly the same, the speech restrictions of many nations go well beyond the permissible limits of these provisions. Hence, national laws should be repealed in line with the fundamental right to freedom of speech. As the special rapporteur on the promotion and protection of the right to freedom of opinion and expression recommended in 2016, U.N. member states should "[r]eview and, where necessary, revise national laws. National legislation increasingly adopts overly broad definitions of key terms, such as terrorism, national security, extremism and hate speech, that fail to limit the discretion of executive authorities."[115] Similarly, as the Rabat Plan of Action states: "States that have blasphemy laws should repeal them, as such laws have a stifling impact on the enjoyment of freedom of religion or belief, and healthy dialogue and debate about religion."[116]

Repealing excessive speech restrictions is not unthinkable or even unlikely. For example, in the United Kingdom a diverse array of campaign groups, civil liberty organizations, and politicians successfully called for the word "insulting" to be removed from section 5 of the Public Order Act 1986. Section 5 made it a criminal offence to use "threatening, abusive or insulting words...within the hearing or sight of a person likely to be caused harassment, alarm or distress." The campaign was overwhelmingly successful, and the law was changed in 2013.[117] In the same year, section 13 of the Canadian Human Rights Act was repealed. The section had prohibited "the communication of hate messages by telephone or on the Internet" and made it unlawful to "expose a person or persons to hatred or contempt." Referred to as "a good, albeit belated, first step at reform,"[118] the law was seen to cause a greater threat to liberty than the harm it was meant to address.[119]

As Clooney and Webb state, "In order to recognize a higher measure of protection for speech than what is necessarily provided for under international human rights law, national parliaments may need to enact and amend domestic legislation, or even domestic constitutions or bills of rights."[120] This can and should be done immediately.

Rescind the U.N.'s Current Plan on "Hate Speech." Third, the U.S. and other nations that protect and promote freedom of speech should urge Secretary-General Guterres to rescind the U.N. Strategy and Plan of Action on Hate Speech in the interest of protecting freedom of speech. If the Secretary-General fails to rescind the Plan of Action, member states should urge the Secretary-General to significantly amend the Plan of Action to make it compatible with the fundamental right to freedom of speech. If the Secretary-General fails to either rescind the Plan of Action or make significant amendments to it, the U.S. and other nations that protect and promote freedom of speech should officially disassociate from Plan of Action.

Promote a Robust Free Speech Standard. Fourth, restrictions on "hate speech" should only be valid when the speech constitutes incitement to imminent violence or other criminal offences. A higher free speech threshold will allow citizens to effectively regulate their conduct, as well as allowing the law to be applied without its current arbitrariness.

This is the standard adopted by the U.S. Supreme Court,[121] which has taken a markedly different position than every other nation in the world—upholding freedom of speech through the First Amendment to a far greater degree than all 192 other U.N. Member States. Under this standard, speech can be punished—if likely to incite imminent lawless action—but not for simply causing offence.

As we have seen, this was the free speech standard that would have been adopted under international law had the Soviet Union and other Communist nations not prevented it. If such a free speech standard is to be adopted in other nations today, U.S. leadership is greatly needed.

Conclusion

The U.N. has a confusing approach to the meaning of the freedom of speech. The UDHR Article 19, ICCPR Article 19, and various interpretations by the U.N. Human Rights Committee and Special Rapporteur on Freedom of Expression provide robust free speech protections. However, due to the complex history of the U.N., particularly the East/West positions throughout the drafting process of foundational human rights treaties, there has always been a pro-censorship strand running through the U.N. system.

If the pro-free speech "side" is to take precedence, positive U.S. action is needed. Free speech must be modelled and embraced at the national level and championed at the international level—starting with the Secretary General's ill-advised Plan of Action on Hate Speech. To persuade a skeptical world, the idea of free speech must be convincingly argued in principle and demonstrated in practice.

Almost a century ago, Justice Oliver Wendell Holmes stated:

> Those who won our independence…knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones.[122]

In other words, the remedy for any form of speech to be wayward is the right of others to demonstrate the error of the first speaker through logic, facts, and reason. The answer is always more speech. And as a Colombian delegate reminded the U.N. General Assembly over 50 years ago, "[I]deas are fought with ideas and reasons; theories are refuted with arguments."[123] Today, the idea of freedom of speech itself must be fought for.

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CHAPTER 5

Religious Freedom in International Human Rights Law

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Efforts to mitigate religious repression profit immeasurably from the status of religious freedom as a genuine human right. This status derives enormous credibility from the prominent presence of religious freedom in the Universal Declaration of Human Rights (UDHR), which stands as the founding charter of human rights. Today this status is threatened by arguments from Western scholars and practitioners that religious freedom is not a distinct human right, that it is not a universal human right, and that it ought to be curtailed by newly emergent claims on behalf of sexual orientation and gender identity. This status is bolstered, therefore, by new arguments, rooted in natural law and in the concept of religion, that religious freedom is a universal, moral, pre-political human right.

Few human rights are violated as widely today as is religious freedom. The Pew Research Center has reported consistently for a decade that about three-quarters of the world's population lives under regimes that violate religious freedom at high levels. In China and Nigeria, religious freedom is ever more endangered, while in Burma, Egypt, Syria, Uzbekistan, and many other places it remains beleaguered.[1]

One who wishes to confront, criticize, and seek to mitigate this repression, which spans regions, religions, ideologies, and cultures, will want to assert with confidence and credibility that religious freedom is indeed a human right. This confidence and credibility are immensely fortified by the prominent presence of religious freedom in the Universal Declaration of Human Rights (UDHR) of 1948,[2] which stands as the founding charter of human rights; was developed and expanded in the subsequent human rights tradition; and has been appealed to thousands of times, all over the world, by dissidents, framers of constitutions, activists, victims, lawyers, and diplomats.

Even more so, advocates of religious freedom will gain confidence and credibility from being able to say not only that the nations of the world have declared that religious freedom is a human right and agreed to abide by this right in binding legal conventions, but also that religious freedom is a human right *prior to* and *apart* from such agreements—a right to which everyone, everywhere is entitled by virtue of being human.

The need for this credibility and confidence has become ever greater at the present moment, when, apart from being violated on the ground, religious freedom is being called into question within some

of the very quarters from which human rights have received their strongest support: scholars of law and politics, international lawyers and diplomats, and policymakers in developed democracies. They question religious freedom on several grounds, three of which this essay will examine. To wit:

- One criticism is that "religious freedom is not special," meaning that it is indistinct from other rights like freedom of speech, expression, and conscience, and thus does not warrant being considered a right of its own.

- A second line of skepticism holds that religious freedom is not a universal human right, but is rather the product of discourses and power in the modern Western world.

- A third criticism does not question religious freedom as a universal human right, but rather calls for its sweeping and unprecedented curtailment on behalf of newly emergent claims for sexual orientation and gender identity.

The time is ripe, then, for a fresh defense of religious freedom as a universal human right. Such a defense rests on natural law, particularly on an important feature of natural law—basic goods—of which religion is one. This essay begins with a look at religious freedom's place in the Universal Declaration of Human Rights, its evolution in human rights law, and its advocacy on the part of states and nongovernmental organizations (NGOs). The following section presents the core defense of the human right of religious freedom on the basis of natural law. Then, the essay looks at the three contemporary challenges to the human right of religious freedom just enumerated and offers a response to these challenges on the basis of a natural law defense of religious freedom. Finally, it offers recommendations for the promotion of religious freedom.

A Declaration of Universality

Historian Johannes Morsink, in his thorough and authoritative history of the origins and formation of the UDHR, tells of a debate among the drafters over whether the document would be a mere declaration, as it turned out to be, or an international legal convention, which is binding among states and endowed with powers of oversight, enforcement, or adjudication. Without such legal powers, some drafters argued, the document would have no teeth.[3]

The UDHR. Ironically, Morsink points out, the declaratory status of the UDHR may have been crucial to its remarkable historical influence as a set of principles that could be endorsed and invoked without having to engage legal machinery. The UDHR, adopted by the United Nations General Assembly on December 10, 1948, has been "the moral backbone and source of inspiration" of an entire body of human rights law, including some "two hundred assorted declarations, conventions, protocols, treaties, charters, and agreements" and several regional conventions and organizations; is referenced by some 60 domestic constitutions, of which at least 26 grant the UDHR superiority over domestic legal systems;[4] is the founding reference point of organizations dedicated to promoting human rights; has been invoked by dissidents and victims; is taught by schools and universities around the world; and has been embraced by religious bodies, not least the Catholic Church, which includes some 1.3 billion members worldwide.

Religious freedom acquired great global prestige by being included in the UDHR. It is the subject of Article 18, while religion is also included in the list of distinctions by which human rights ought not to be denied in Article 2. Here is Article 18 in full:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

The article is brief and concise—edited down from a much longer draft version—and, like the preamble, packed with content. Characteristic of the UDHR as a whole, it accords this right to "everyone"—that is, each human being. Religion is presented as one of a trio of protected activities, along with thought and conscience, a juxtaposition that would persist in human rights law, where

"freedom of religion or belief," for instance, is often found. This partnering has not stood in the way of religion receiving distinct protection, and religious freedom's inclusion with thought, conscience, and later, belief, underline the critical importance of inward assent in the rationale for religion's protection.

Inward assent also underlies the freedom to change one's religion—to exit a religion, join a religion, or reject religion altogether. The Article then closes with an enumeration of several dimensions of religion, all of which suffer violation in reality and any of whose omission serves to justify the violation of religious freedom. When authorities construe religion solely as a private matter, they purport to justify the violation of its public expression; when they construe it merely as an individual matter, they aim to justify the suppression of its communal expression; when they ignore religion's manifestation in teaching, practice, worship, or observance, they pave the way for quelling any of these dimensions.

The UDHR, including Article 18, was the product of strenuous efforts to achieve consensus across geography, culture, and religion over a period of two years. A U.N. Human Rights Commission, consisting of representatives of 18 countries, was charged with producing an international bill of rights, while a drafting committee, made up of representatives of eight countries, worked closely together in composing the document. Among the members of the commission were a Chinese Confucian, a Lebanese Catholic, a Soviet Communist, an Indian Hindu, and members hailing from Australia, Iran, the Philippines, and other countries. During the fall of 1948, all 58 members of the U.N. General Assembly met regularly in some 150 meetings to negotiate the document.[5] Finally, the UDHR passed with 48 members voting in favor, eight members abstaining, and two absent.[6]

Was religion, and Article 18 in particular, an obstacle to consensus? The drafters sought to minimize religious controversy while maintaining the robustness of the human right of religious freedom. Morsink explains that "the drafters went out of their way to avoid having the Declaration [UDHR] make a reference to God or to man's divine origin."[7] The most difficult controversies encountered in the drafting of the UDHR can be seen in the eight abstentions. Six of these eight were communist states, including the Soviet Union, two Soviet republics, and three Eastern European communist bloc states, all of which spoke in one voice. Religion was not their stated objection, though, but rather threats to their sovereignty. A seventh, South Africa, likewise feared empowerment of international condemnation of its practices of Apartheid.

During the drafting process, the Soviet Union had proposed that Article 18 include language spelling out the right not to believe any religion, but the proposal was rejected on the argument that such a right was already implicit in freedom of thought.[8] The only country to abstain on the basis of religion was Saudi Arabia, who saw Article 18's clause about the right to change one's religion as contrary to Muslim teachings about apostasy and a cover for Christian missionary activity. Other Muslim delegates, though, supported the change, including one from India and one from Pakistan.[9] On the whole, it is remarkable how little religion or religious freedom stood in the way of passing the UDHR.

Subsequent Developments. Since 1948, religious freedom has expanded its presence in international law. The International Covenant of Civil and Political Rights of 1966[10] renders human rights a binding legal obligation and sets forth religious freedom in its own Article 18. Religious freedom's most expansive articulation in international law came in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination,[11] proclaimed by the U.N. General Assembly in 1981, which spells out the widest array of dimensions of religious freedom of any of the international human rights documents. Like the UDHR, though, the 1981 declaration is just that—a declaration of principles and not a legally binding convention. In 1986, a United Nations mandate established what came to be called the Special Rapporteur on the Freedom of Religion or Belief,[12] whose task is to identify obstacles to freedom of religion or belief and to propose ways to overcome them. Four people have held the position since. Religious freedom also appears in the constitutions of about 90 percent of the world's sovereign states, a shared legal status that buttresses the principle's universality, though in many cases does not correspond to actual practice.[13] Still, for all of these developments,

religious freedom remains what one advocacy group calls an "orphaned right," one that enjoys far fewer legal mechanisms to promote and protect it than comparable human rights.[14]

The International Religious Freedom Act (IRFA). Partly compensating for this weakness is the rise of religious freedom in the foreign policies of developed democracies in the past two decades. The prototype is the policy of the United States, which the U.S. Congress established through the IRFA in 1998.[15] Advocated first by evangelical Protestant Christians who sought to combat the global persecution of Christians that emerged after the Cold War, and then by a broad coalition of Protestants, Catholics, Jews, and Muslims, the law was passed by the U.S. Senate 98–0 and established an architecture for the pursuit of religious freedom in U.S. foreign policy.[16] The law established an Ambassador-at-Large for International Religious Freedom, an Office for International Religious Freedom in the U.S. State Department, and an independent U.S. Commission on International Religious Freedom (USCIRF). Both the State Department office and the Commission issue annual reports on religious freedom around the world; the State Department office recommends action against violator states, and the Secretary of State may designate some of these as Countries of Particular Concern.

In 2016, the Frank R. Wolf International Religious Freedom Act strengthened the IRFA by establishing "entities of particular concern" to cover non-governmental actors like the Islamic State, creating a list of "designated persons" who violate religious freedom, and expanding the scope of protection to non-theistic beliefs and the non-practice of religion. In 2018, U.S. Secretary of State Mike Pompeo hosted a Ministerial to Advance Religious Freedom, which brought together foreign officials from 106 countries and several hundred civil society leaders to form networks and consensus on religious freedom, an event that was repeated in 2019 and is scheduled to take place a third time in 2020.[17] A recent important development was the signing of an executive order by President Donald Trump to prioritize religious freedom in U.S. diplomacy, foreign assistance, and the training of foreign service officers on June 2, 2020.[18]

Following the United States' lead, the European Union, Canada, the United Kingdom, Austria, Germany, Italy, the Netherlands, and Norway have adopted religious freedom into their foreign policies through diverse mechanisms and initiatives. Canada retreated, though, shuttering its Office of Religious Freedom in March 2016. Buttressing the international promotion of religious freedom is also the work of NGOs and transnational actors, which span religions and, for the most part, remain robustly nonpartisan. Added to this are the numerous religious bodies that promote religious freedom.[19]

So if religious freedom's place in international law is firmly ensconced but weak relative to other human rights, the foreign policies of democratic states and the work of NGOs lend support to religious freedom that rivals and even exceeds that which other human rights enjoy. Still, over the decades since the UDHR was proclaimed, controversies have ensued over religious freedom and have increased in recent years. During the Cold War, religious freedom was a bone of contention and promoted by the United States through measures such as the Jackson–Vanik Amendment of 1974, which called for the emigration of Jews from the Soviet Union.

The UIDHR. Religious freedom also remained controversial among the world's Muslims. Disputes between Muslim-majority countries and the United States, particularly over the freedom to change one's religion and belief, stalled the adoption of the 1981 declaration for two decades and explain why this declaration never became a legally binding instrument. Deepening division still, several Muslim-majority countries, among them Egypt, Pakistan, and Saudi Arabia, promulgated the Universal Islamic Declaration of Human Rights (UIDHR) in 1981,[20] whose name mimicked the UDHR, but whose *raison d'etre* was to establish an alternative to the dominant tradition—that sharply *curtails* religious freedom in substance.

This document articulates religious freedom but adds "within the limits prescribed by the Law," meaning Sharia Law, and implies a prohibition of spreading ideas declared to be false by the standards of Islam.[21] In 1990, the Cairo Declaration of Human Rights in Islam[22] was adopted by foreign ministers of the Organization of the

Islamic Conference (OIC) (now the Organization of Islam Cooperation)—and contained no article on religious freedom at all. During the 2000s, several Muslim-majority member states of the United Nations sponsored resolutions condemning "defamation of religion," which most Western states rejected as sanctioning blasphemy laws that sharply restricted the speech and religious practices of non-Muslims and Muslim dissenters.

Resolution 16/18. Important developments in this debate came on March 24, 2011, when the U.N. Human Rights Council unanimously adopted Resolution 16/18,[23] which called on member states to promote religious freedom and the protection of religious minorities, while also undertaking measures to combat religious intolerance. This measure did not deliver the OIC the victory that it was looking for, yet allowed the OIC to claim that its position had support at the U.N. In July of that same year, the U.N. Human Rights Committee adopted General Comment 34 on the International Covenant on Civil and Political Rights (ICCPR),[24] which held that "[p]rohibitions of displays of lack of respect for a religion or other belief system, *including blasphemy laws*, are incompatible with the Covenant." This measure was a more distinct defeat for the OIC's campaign. Efforts to advance a defamation resolution, however, continue to this day.[25] Religious freedom remains a controversial principle among Muslim religious and political leaders around the world—and accounts for one of the strongest strains on a universal consensus on the human right of religious freedom.

Again, voices in the West have also come to call into question the human right of religious freedom in recent years. Three major strands of this criticism have arisen, which are taken up below. All of these controversies, all placing strain on the human right of religious freedom, call for a renewed defense of this right's universal validity.

An Argument for Universality

As the UDHR was being drafted, the United Nations' Educational, Scientific and Cultural Organization (UNESCO) formed a Committee on the Theoretical Bases of Human Rights, which brought together leading scholars of the day to consider conceptual issues underlying the UDHR, especially that of its universality: Can it be said that the rights that the UDHR enumerates and the principles that the preamble articulate are universal and common to the many belief systems found among the 58 members of the United Nations?[26]

Jacques Maritain. Among these scholars, perhaps the most influential in defending the UDHR was the French philosopher, Jacques Maritain. Maritain is widely known for his quip, "We agree about the rights, *provided we are not asked why*." In his 1951 book, *Man and the State*, Maritain elaborated his insight thus:

> How is an agreement conceivable among men assembled for the purpose of jointly accomplishing a task dealing with the future of the mind, who come from the four corners of the earth and who belong not only to different cultures and civilizations, but to different spiritual families and antagonistic schools of thought? Since the aim of UNESCO [United Nations Educational, Scientific, and Cultural Organization] is a practical aim, agreement among its members can be spontaneously achieved, not on common speculative notions, but on common practical notions, not on the affirmation of the same concept of the world, man, and knowledge, but on the affirmation of the same set of convictions concerning action. This is doubtless very little, it is the last refuge of intellectual agreement among men. It is, however, enough to undertake a great work; and it would mean a great deal to become aware of this body of common practical convictions.[27]

The agreement of the world's states on human rights did not require a foundation in a single philosophical school of thought or religion, Maritain argued. Imposing such a requirement would render such an agreement next to impossible.

Maritain did not leave matters there, however. A few pages later, he took a different tack, asserting that "from the point of view of intelligence, what is essential is to have a true justification of moral values and moral norms." He then declared that "[t]he philosophical foundation of the Rights of man is Natural Law."[28] Why did Maritain make

such a strong claim for natural law, using the definite article, "*the* philosophical foundation," putting forth a "true justification," and calling it essential? Do human rights depend on a particular theory or tradition of thought after all? If so, what, then, do we make of his often-quoted quip, "provided we are not asked why"?

Broadly speaking, Maritain's claims are not contradictory. One can argue that convincing nations to sign a mutual declaration on human rights does not require that this declaration espouse a particular philosophical or religious justification for human rights, while also arguing that natural law is essential for making sense out of human rights. But why is natural law essential? If it is essential, how can we affirm this without demanding that human rights agreements be tethered to a philosophical doctrine?

An answer to these questions lies in the insight that natural law is not first and foremost a philosophical doctrine. Rather, it is simply the moral law that every human being knows through the exercise of her rationality. The popular 20th-century writer, C. S. Lewis, argued in his classic, *The Abolition of Man*, for what he called the Tao, which is the moral law that people across time and place have affirmed—norms commending beneficence, fairness, and respect for elders and condemning lying, adultery, and murder, for instance. In the appendix of the book he supports the claim with evidence from a wide variety of cultures.[29] The breadth and width of these norms are known through basic, shared human capacities.

Human rights, likewise, are not first and foremost the conclusion of a philosophical argument, but rather are entailed in the natural law itself. This answer departs somewhat from Maritain's argument in that it does not assert natural law as the "philosophical foundation for human rights." Natural law theory is not one of many doctrinal options for grounding human rights (albeit the option that Maritain thinks is the best one). Rather, human rights are simply a part of the natural law itself. Were there no natural law, we would not be merely lacking a good philosophical argument for human rights, rather, there would be no human rights at all. No natural law, no human rights.

Human Rights and Natural Law. In what sense are human rights a part of the natural law? Only a brief explanation is possible here, mindful that the connection between natural law and human rights is explored in other papers in this series. Human rights are entitlements that every human being justly asserts vis-à-vis every other human being (including every group of human beings and the state).[30] The ground of these entitlements is the dignity, or inestimable worth, of the human person. Because human rights belong to every human being and are grounded in the inherent worth of the person, they are natural rights—and not rights that depend for their validity on law, culture, or institutions. The rights that people justly assert logically correspond to obligations on the part of other human beings. If a person has a human right not to be tortured, everyone else has an obligation not to torture him, and so on. These obligations are binding on everyone, can be known by everyone, and are thus equivalent to the universal norms that make up the natural law.[31]

The key elements of this argument are found in the UDHR's preamble, beginning with its rich opening sentence: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." The word "recognition" conveys an acknowledgement of something that is true prior to and apart from the document and whose validity is not conferred or bestowed by the document. What is recognized first is dignity and the inherent and universal character of this dignity, meaning that it belongs to human beings; is not given or taken away by a state or institution; and is not dependent upon the culture, mores, or religion of this or that time or place.

Similarly, that human rights are "inalienable" and held "equally" by all human beings also means that rights are attached to essential features of being human, or human nature. That rights are connected to universal moral norms is implied by their "foundational" connection to justice, which consists of moral norms, and by the next sentence's link between contempt for human rights and "barbarous acts" that can only be judged to be such by the standards of moral norms. While the preamble to the UDHR does not espouse a doctrine of natural law, or any doctrine at all, it does assert natural rights, the rights that I have argued are embedded in natural law.

None of this implies that philosophical arguments are unimportant. If human rights are embedded in natural law, theories of natural law can help people to understand what the natural law consists of, how people know it, how it furthers human flourishing, how precisely it entails rights, and how it can survive the criticism of skeptics.[32] People do not need theory in order to grasp natural law, but can benefit from it nonetheless, much as a person can operate a car without an owner's manual or a mechanic's education, yet profit from both.

Scholars have articulated numerous theories of natural law over the centuries and continue to do so today. The argument at hand does not depend on any one theory of natural law. However, a defense of the human right of religious freedom benefits greatly from one concept found in certain natural law theories—that of basic goods. The concept is most prominent in, though not exclusive to, the thought of a school known as the New Natural Law theory.[33]

Basic Goods and New Natural Law. What are basic goods? As old as Aristotle is the insight that there are some goods that humans pursue as instrumental to other good or ends, and other goods that humans pursue for their own sake.[34] Goods sought for their own sake, which New Natural Law theorists call basic goods, include knowledge, life, health, play, work, aesthetic appreciation, friendship, and others.[35] Basic goods are dimensions of human fulfillment; to realize them is to flourish. They direct the will, are grasped through intelligence, and are intrinsically valuable. Therefore, they enhance the human dignity that arises from free will and intelligence. To violate a basic good is to violate a dimension of a person's dignity, and so human beings have rights to pursue and enjoy these goods. Basic goods contribute to human rights by specifying the aspect of human flourishing that each particular human right promotes and protects. For instance, behind the right to life, the right not to be tortured, and the right to an education are, respectively, the basic goods of life, health, and knowledge.

Let us now turn to the human right of religious freedom. Can religious freedom be tied to human dignity, and thus human rights, through basic goods? If so, then we would say that the human right of religious freedom protects a human good, one that contributes to and is constitutive of human flourishing. But what is that good? Religion, I propose.

Defining Religion. What, then, is religion? Here we confront a challenge. Many scholars are skeptical that a coherent, universal phenomenon called religion exists. Some think that it is impossible to define religion both broadly enough to include what people think of as the major religions of the world and narrowly enough to exclude phenomena that people usually conceive of as something other than religion, such as nationalism. Other skeptical scholars believe religion to be a modern Western concept that colonizers have imposed on non-Western peoples.[36] Still others view religion as little more than superstition, irrational and prone to violence.[37]

Other scholars, however, regard religion as meaningful, definable, and universal.[38] One of these is Martin Riesebrodt, the late scholar of religious studies at the University of Chicago, who, in his 2010 book, *The Promise of Salvation*, proposed a way to think about religion that he believed could elude the objections of other scholars and zero in on what religions are about.[39] His approach is simply to focus on what people do when they practice religion, why they do it, and what they hope to gain from it. In contrast to scholars who treat religion as a system of beliefs, a referent to ultimate meaning or the realm of the sacred, Riesebrodt centers upon practices, which he believes are common to every religion and integral to how ordinary practitioners of religion understand what they are doing.

Sociologist Christian Smith of the University of Notre Dame, a scholar of religion, was persuaded that Riesebrodt had proposed a promising view of religion and undertook to refine it further.[40] Here is Smith's modification of Riesebrodt's view, formulated as a definition:

> Religion is a complex of culturally prescribed practices, based on premises about the existence and nature of superhuman powers, whether personal or impersonal, which seek to help practitioners gain access to and communicate or align themselves with these powers, in hope of realizing human goods and avoiding things bad.[41]

Again, practices are the central phenomenon: Reading sacred texts, prayer, worship, burning incense, and scores of other behaviors that have meaning in the context of an ongoing community.[42] What most pivotally distinguishes these practices according to Smith is their orientation toward superhuman powers, entities that practitioners believe are neither fashioned by nor dependent on humans. These powers might take the form of "God, gods, spirits, higher beings, holy, numinous, ultimate concern, and sacred," but might also be impersonal powers, as are found in dharmic religions, including Hinduism, Buddhism, Sikhism, and Jainism.[43] Religions also involve beliefs, implicit or explicit affirmations about superhuman powers and what these powers require of humans.[44] Finally, critical to ordinary people's experience of religion are the benefits they hope to gain and the evils they hope to avoid by way of the practices through which they seek to align themselves with superhuman powers. These range from healing an illness, to success on an examination, to help in living virtuously, to enlightenment, to redemption from sin, to union with God. They are the kinds of things in which everyone has an interest.

Smith, drawing upon Riesebrodt, argues that this way of thinking about religion identifies the important features that major world religions share, rules out phenomena like Marxism and nationalism that are not religion, and describes why people find religion appealing. Any one religion, of course, will say far more about the character of the superhuman power and about how humans rightly relate to it. The concept at hand, though, describes religion as a shared human phenomenon.

Smith's and Riesebrodt's concept of religion is quite similar to that which New Natural Law theorists argue is a basic good. *Mutatis mutandis,* these theorists understand religion to be harmony with a transcendent (more than human) source of meaning and of benefits of the most important sort.[45] This harmony, or right relationship, is a basic good, one that humans seek for its own sake. That religion is sought for its own sake is not contradicted by the fact that people seek benefits through religion. Religion is not separate from and instrumental to these benefits, rather the benefits are part and parcel of the experience of religion. A person does not become a Christian in order to gain heaven as if gaining heaven is a separate phenomenon from being a Christian. Rather, gaining heaven is what a Christian experiences through her faith. All of the benefits gained and evils avoided through religious practices, as well as the broader right relationship with a superhuman power that enfolds these benefits, amount to the basic good of religion.

As a basic good, religion manifests human dignity. To violate a person's practice or expression of religion is to violate an intrinsically valuable aspect of his flourishing. In New Natural Law thought, moral norms arise from the requirements of respect for basic human goods. Here the moral norm is that no person, political faction, militant group, community, or government may interfere with a person's practice of religion, including that practice in collaboration with others in a religious community. Implied in this moral norm is a right of religious freedom that every person justly exercises vis-à-vis every other person and group, including the state. It is a natural right, a human right that is entailed in the natural law itself.

Interior Commitment. Integral to the right of religious freedom, and implicit in Smith's definition of religion and in religion as a basic good, is another feature of virtually all religion—interior commitment. From religion to religion, this commitment involves the will, the heart, the enlightened mind, sincerity, authenticity, and purity of motivation. Religions also call for criteria for outward conformity to moral norms, dietary laws, rituals, and other activities, but usually these are also to be performed with sincerity and the right motivation.

This interior commitment cannot be coerced. Were a person to conform outwardly to religion out of fear of harm or for social gain, the commitment would not be genuine. So, too, the search for religious truth and the ability to reject religious commitment out of conscience is also entailed in religious freedom. The early Christian writer, Lactantius, made this point early in the fourth century:

> Torture and piety are widely different.... For if you wish to defend religion by bloodshed and by tortures, and by guilt, it will no longer be defended, but will be polluted and profaned. For nothing is so much a

> matter of free-will as religion; in which, if the mind of the worshipper is disinclined to it, religion is at once taken away, and ceases to exist.[46]

Almost 17 centuries later, Abdurrahman Wahid, a Muslim and the first president of Indonesia following the fall of the dictatorship of Suharto in 1998, argued quite similarly:

> The fact that the Qur'an refers to God as "the Truth" is highly significant. If human knowledge is to attain this level of Truth, religious freedom is vital. Indeed the search for Truth (i.e., the search for God)—whether employing the intellect, emotions, or various forms of spiritual practice—should be allowed a free and broad range. For without freedom, the individual soul cannot attain absolute Truth, which is, by Its very nature, unconditional Freedom itself.

> Intellectual and emotional efforts are mere preludes in the search for Truth. One's goal as a Muslim should be to completely surrender oneself (islâm) to the absolute Truth and Reality of God rather than to mere intellectual or emotional concepts regarding the ultimate Truth. Without freedom, humans can only attain a self-satisfied and illusory grasp of the truth, rather than genuine Truth itself (haqq al-haqiqi).[47]

If religion is a basic, intrinsic dimension of human flourishing, and if its authentic practice must be free, then it is unjust to coerce, prevent, or unduly restrict it, and justice requires that it be protected by law. This is the essence of the human right of religious freedom. Put slightly differently, religious freedom means that nobody, alone or in community, should pay a penalty for the practice of her religion.

Religious freedom is not an absolute right. It does not grant people license to do anything they wish in practicing their religion. The UDHR, the ICCPR, the 1981 declaration, and important statements of the right such as the Catholic Church's landmark declaration of 1965, *Dignitatis Humanae*, make this point.[48] The ICCPR's Article 18, for instance, says, "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."

Controversies, of course, abound, both in human rights law on a global scale and in the constitutional traditions of countries, regarding the boundaries and extent of these limitations. Sorting out these controversies, finding the right balance between religion and other goods, is the subject of entire fields of academic study and traditions of case law. Broadly, a New Natural Law approach would hold that the practice of religion is morally restricted by instances in which it violates the basic goods of others, just as nobody ought to violate the good of religion in another person by way of advancing another basic good.

The task here is the more modest one of pointing to a basis for thinking that religious freedom is a universal human right. It is important that religious freedom enjoy this status if it is then to be balanced against other rights. Increasingly, though, this status is being questioned.

Challenges to Universality

In those countries and sectors of the international community that honor a right to religious freedom, who view it as a human right or civil right that merits being upheld in the law, disputed questions center around the proper nature of government support for, or establishment of, religion; whether religious freedom grants religious citizens exemptions from otherwise applicable laws; and to what degree, in what ways, and for what reasons religious freedom is to be limited or restricted by other goods and principles.

These debates presuppose a commitment to religious freedom and, broadly, to religion as a good. If religious freedom were not valued in the first place, then there could not be controversies about how religious freedom is to be balanced against other considerations. The debate shifts to a new plane, then, when religious freedom, and even religion itself, are called into question. Of course, numerous regimes over the past two centuries have sought to suppress religious freedom and even eradicate religion out of a conviction that religion is socially pernicious.[49] However, when

religious freedom and even the value of religion itself are called into question within the very countries and communities that have upheld the human right of religious freedom over the years since the UDHR articulated it in 1948, a new and worrisome trend unfolds for advocates of religious freedom. Let us look at three strands of this trend and how a natural law defense of religious freedom would respond.

Disfavoring Religion. One strand consists of legal scholars and philosophers within the liberal tradition who argue against the special status of religion in the law, holding that it merits no special protection or support from the government that is not accorded to secular moral beliefs and ethical commitments. With respect to the First Amendment to the United States Constitution, they would object to protections for the "free exercise" of religion that are not extended to other beliefs, and to prohibitions on the establishment of religion but not on other commitments or communities. With respect to establishment, their proposal might actually entitle religion to receive support from the government with fewer qualifications and questions—say, in matters of education or the provision of social services—and in this sense does not disfavor religion.[50] Conversely, though, in liberal democracies with established religions, their proposal would strip these religious communities of their privileged status.[51]

What is consistent across the different versions of these arguments is that religion does not merit distinct favor, protection, support, or exemptions. "What If Religion Is Not Special?" asks law scholar Micah Schwartzman.[52] Religion may well receive protection and support, but only as a member of a larger class of phenomenon such as speech, expression, belief, conscience, or the like. To give religion a separate status, they generally argue, would be unfair.[53]

These scholars direct their arguments toward constitutional liberal democracies, especially the United States, and not toward international law. Their arguments, though, contain implications for human rights. Logically, they would call into question the place of religion in Article 18 of the UDHR and of the ICCPR, as well as much of the 1981 declaration. If religion deserves no special protection or support, then human rights law would be left upholding freedom of belief or conscience alone. As a result, the many ways in which the practice—and not just expression—of religion is protected in law would lose their justification. To take just one example, religious schools and charities might lose the freedom to hire and fire employees on the basis of their adherence to the norms of that religion.

What does the natural law case for the human right of religious freedom outlined above make of this argument? Most directly, it would question these scholars' common characterization of religion as a matter primarily of beliefs. Were religion little more than beliefs, it would indeed be difficult to argue for its special status, at least on grounds of natural reasoning. Apart from the claims of a particular religious tradition, on what grounds would religious beliefs have more warrant to protection than secular beliefs? Criteria such as ultimacy or transcendence would have a hard time ruling out some set of non-religious doctrines or even establishing their superiority to other criteria. Scholars such as Cécile Laborde consider religion to involve not only beliefs but also associative qualities, as well as certain practices, but here again the conclusion is the same: None of these features earns religion the right to be privileged over secular analogues.[54]

In the natural law argument at hand, though, there is in fact something distinctive about the phenomenon of religion: It entails right relationship between humans and a superhuman power. From this relationship flows the central role of *practices*, which aim to secure this relationship as an intrinsic good and to derive benefits from it. Beliefs are important because they properly express the character of the superhuman power, the practices that bring about right relationship with this power, and the actions that are consistent with this right relationship.

No religion, however, is about beliefs alone. Rather, beliefs attend the practices and the right relationship with the divine. This combination of right relationship, practices, and beliefs is indeed distinct from convictions, ethical doctrines, moral beliefs—and even from other communities formed around secular beliefs. An orientation toward a superhuman power makes religion different and a basic good, an intrinsically valuable dimension of flourishing. As argued, this good, and the practices

and the beliefs that are entailed in it, exercised individually or in community, are the basis for the norm that protects it—the right to religious freedom that is found in the international human rights documents and the vast majority of domestic constitutions. Nothing in this argument denies that non-religious beliefs and individual conscience also deserve forms of protection, as they commonly receive through rights of conscience, belief, and speech. In New Natural Law thought, they are connected to the exercise of the good of knowledge. But they do not amount to the good of religion, which merits a right of its own.

The Privileging Religion Critique. A second strand of skepticism of religious freedom's universality is a variant of the first one, also holding that religious freedom privileges religion as belief and also criticizing the status given to religious freedom, though in this case, the focus is on international law and the foreign policies of Western democracies. Composed mostly of post-modern scholars who look askance at claims of universality and heavily suspect the role of power in sustaining these claims, this strand asserts that religious freedom law and policy wrongly empowers some forms of religion over others. "The identification of religion and faith communities with a right to freedom of belief and believers," writes political scientist Elizabeth Shakman Hurd, "leaves little room for alternatives in which religion is lived relationally as ethics, culture, and even politics but without, necessarily, belief and, as a matter of command, not freedom." The advocacy of religious freedom, she argues, "endows those authorities with the power to pronounce on which beliefs deserve special protection or sanction."[55]

Behind these scholars' criticism is an interpretation of history that holds that religious freedom emanates from a certain way of conceiving religion that arose at a particular time and place in global history, namely through the Protestant Reformation, which incubated a version of Christianity that is individualized, creedal, and belief-oriented. Believing that religion is a matter of inner conviction, early modern thinkers such as John Locke argued that it cannot be coerced, and thus birthed religious freedom into modern politics and eventually into modern human rights law, these critics argue.

Reflecting their post-modern convictions, these critics also argue that religious freedom is a manifestation of Western power and imposed on non-Western countries in colonialist fashion. It is no coincidence that the United States, a country founded in a Protestant and Enlightenment milieu, and now the world's most powerful, took the lead in shaping the UDHR and was the first country to develop a religious freedom foreign policy. These critics focus on Islam, in particular, as the target of this imposition and tend to view religious freedom as a tool of the West in its rivalry with Islam in general and in the war on terrorism in particular, especially since the attacks of September 11, 2001. Religious freedom, they argue, is not prominent within or adaptable to Islam, and so it is not surprising that Muslims resist it. By and large, they are unsympathetic to the pursuit of religious freedom.

Here again, a natural law defense of religious freedom takes issue with religion conceived of as belief, conceptualizing religion instead as right relationship with a superhuman power. Riesebrodt and Smith show that religion thus conceived has been practiced across an extraordinarily wide array of cultures, geographic locales, and historical epochs.[56] Nor is the concept of religion the product of the modern West. Long predating the Reformation, thinkers like Cicero, Augustine, Lactantius, Tertullian, and Thomas Aquinas wrote of religion as a natural human phenomenon.[57]

Riesebrodt makes the case that most religions, both ancient and modern, have conceived themselves as one among several religions, thus picturing religion as a general phenomenon.[58] The principle of religious freedom, too, finds vivid expression centuries before Protestantism in the early Christian thinkers, Tertullian and Lactantius, as well as in a wide array of religious communities, including the Catholic Church, Judaism, Islam, Hinduism, and others. For that matter, countries in the modern West, including predominantly Protestant countries—which we ought to expect to be paragons of religious freedom—have included egregious violators of religious freedom, as well as strong promoters.

Germany under the anti-Catholic *Kulturkampf* of Otto Von Bismarck (1872–1878), France under the Third Republic (1870–1940), and England prior

to the relaxation of harsh restrictions on Catholics and non-Conformists in the first half of the nineteenth century, for instance, were all purveyors of sharp curtailments of religious freedom. Finally, human rights law, which these critics claim to be shaped by religion as belief, does not conceive religion either as mere belief or as the activity of the lone individual, but also as practice and communal action, and thus does not bear the image of the influence claimed to have shaped it.

Restricting Religious Freedom for Emergent Claims. A third challenge to religious freedom does not directly question its universality but purports to restrict its traditional scope significantly in the name of allegedly competing universal principles. This is the challenge to religious freedom posed by newly emergent claims regarding sexuality and abortion. Like the first challenge, this one expands developments within constitutional liberal democracies to the international plane.

The challenge is exemplified by a recent report to the U.N. Human Rights Council by the U.N. Special Rapporteur on Freedom of Religion or Belief, Ahmed Shaheed, based on information gathered from 42 countries and several consultations that took place around the world between May and December 2019.[59] In it, the rapporteur argues that women, girls, and LGBT+ persons around the world experience widespread violence, human rights abuses, and unjust discrimination through the actions of states and non-state actors, as well as through the standing laws and policies of states.[60] What misdeeds does he cite in particular? Some are actions that the human rights community has long condemned as harmful, including female genital mutilation, marital rape, early and forced marriage, polygamy, dowry killings, beatings, coercive gender reassignment surgery, and personal status laws that prevent women from leaving violent relationships.

In addition, though, the rapporteur cites religiously grounded actions and norms that deny the sorts of claims that have attained legal standing recently in developed democracies, including rights based on sexual orientation and gender identity, as well as ones that have attained status in the past half-century or so, namely "sexual and reproductive rights," including to abortion and contraception. He asserts that the right to freedom of religion or belief belongs to individuals, not religions, and in the ensuing paragraphs writes favorably of arguments against deferring to the autonomy of religious institutions in matters where they allegedly discriminate on the basis of sex, sexual orientation, and gender identity.[61] He cites the conclusions of several international legal bodies that sex-based discrimination, which is prohibited in major human rights conventions, includes "gender" discrimination, which he says is discrimination arising from "socially constructed roles, behaviours, activities and attributes," and includes sexual orientation and gender identity.[62]

Sexual Orientation and Gender Identity. Essentially, the Special Rapporteur would globalize truncations of religious freedom of the sort that have arisen in developed democracies whereby religious schools, universities, and charities, as well as merchants and medical professionals, are prohibited from hiring and conducting their activities in a way that adheres to traditional beliefs about sexuality, marriage, and life.[63]

How would a natural law defense of religious freedom, and of human rights in general, regard the Special Rapporteur's claims? New Natural Law thought offers a particular defense of norms regarding sexuality, marriage, and life that converge with the norms of virtually every historical civilization and have only recently been challenged by certain international bodies: The sexual act is properly exercised only in marriage, which by definition is between man and woman; marriage, a form of friendship, and life are the basic goods that sexual acts instantiate; persons with sexual attractions towards members of the same sex merit compassion and respect, but these attractions should not be the basis for a person's identity or made the basis for legal discrimination claims; and, every person is born a man or a woman, defined by reproductive capacities, and to alter these capacities is a form of mutilation—not a basis for identity. Finally, abortion is the taking of human life (a basic good), which begins at the moment of conception, as the scientific community overwhelmingly affirms.[64]

From this standpoint, the acts of violence and forms of abuse that fall under the human rights prohibitions found in the human rights documents to which states actually have agreed are ones that

New Natural Law, any natural law thought, or any proponent of human rights, would also prohibit. These acts—female genital mutilation, marital rape, and so on—violate the goods of life, of health—including bodily integrity—and of marriage. In addition, any human rights violations committed against people who identify as LGBT+, including forms of violence and draconian punishments (based on status or identity) that indeed exist in many countries, ought to be condemned and can be condemned on the basis of existing human rights law. This set of victims may be identified as part of a pattern, just as human rights organizations condemn other patterns of violations.

To assert, however, that religious justifications for laws and policies based on traditional norms about sex, gender, and marriage—and the actions that religious organizations (religious communities, schools, charities, nongovernmental organizations (NGOs), etc.) and religious individuals (merchants, teachers, etc.) undertake in accordance with these norms—now amount to unjust discrimination or a violation of human rights amounts to an unprecedented curtailment of religious freedom in international law. To hold that the internal governance of religious organizations according to traditional norms is now rightly subject to government scrutiny, and even regulation, is an especially harsh claim in light of long-standing religious freedom norms.

It threatens the ability of religious communities to organize themselves, hire and train their leaders, and conduct their activities according to their basic teachings and the ability of their leaders and members to live according to their consciences. The report also opposes provisions in domestic law that protect the conscience rights of health care providers who are unwilling to perform abortions or supply contraception.[65] In these proposed measures, the good of religion is being violated in the name of principles that have no foundation in basic goods, are not found in natural law, and lack universal support.

Misallocation of Consent. Nowhere in any internationally recognized human rights convention or declaration that actual states have signed or assented to can be found the words sexual orientation or gender identity. It is only certain international legal committees, commissions, and global organizations that have sought to interpret existing language in conventions and declarations—most frequently, sex discrimination—so as to mean sexual orientation, gender identity, or the like. But this interpretation is not what the states who signed or ratified these agreements consented to, and it runs afoul of the norms and laws of the overwhelming majority of states. Today, only 28 out of 193 U.N. member states (or 15 percent) have laws permitting "same sex marriage." Almost nowhere in international law can there be found a right to abortion, whereas the right to life holds pride of place in the major human rights documents—as well as in humanitarian law.[66] The Special Rapporteur's report, along with the efforts of those who aim to impose onto international law these novel interpretations, then, amount to what Pope Francis has called "ideological colonization."[67] Rights based on sexual orientation or gender identity and a right to abortion are inconsistent with natural law, virtually nonexistent in international law, and do not constitute a just or legally valid restriction upon religious freedom.

Recommendations

In order to strengthen the human right of religious freedom in the policies of states and international organizations, and the consensus of humankind in actual practice around the world, the following five recommendations are offered.

1. **States and their leaders ought to act consistently on behalf of religious freedom at home and abroad.** The promotion of the international human right of religious freedom is weakened when states and their leaders promote it inconsistently at home and abroad. Too often, leaders are willing to defend religious freedom only to the extent that it corresponds to their political or ideological position, while sacrificing it in other instances. In recent years in the West, for instance, religious freedom has been denied to Christians and traditional Jews and Muslims who wish to follow traditional norms of sexuality and marriage in running their institutions, as well as to Muslims who wish to build a mosque or Muslim women who wish to wear a headscarf (as in France). Religious freedom, however, belongs to people of all faiths and no

faith, and is jeopardized for everyone when it is denied to anyone.

2. **States who have not adopted the promotion of international religious freedom as a foreign policy priority ought to do so, and states who already promote religious freedom ought to strengthen this promotion.** The more states take up religious freedom, the stronger and more credible it will be as a universal human right. Strong promotion means appointing an official to promote religious freedom and granting her high status in the foreign policy ministry or department, establishing an office of religious freedom, granting funding to the promotion of religious freedom, requiring diplomats stationed in other countries to promote religious freedom, training foreign service officials in religious freedom, and promoting religious freedom through foreign aid.

3. **U.N. member states and their representatives in the United Nations and other international bodies ought to oppose vigorously efforts to insert into international treaties, conventions, and declarations interpretations that the signing parties did not agree to and that threaten religious freedom.** These efforts are carried out by determined activists who do *not* speak for the world's nations and who have gained control of bodies such as the committees that oversee the international conventions, such as the Convention on the Elimination of Discrimination Against Women. The U.N. member states who signed the agreements ought to vigorously oppose such nonconsensual impositions and insist that these bodies be constituted by persons committed to acting faithfully to the norms of international agreements.

4. **Advocates of religious freedom around the world ought to form a transnational network in the pursuit of religious freedom.** Religious freedom as a universal human right will be more credible and robust the more it is promoted by a coalition of actors who mirror its universality. The wide range of actors who promote religious freedoms around the world ought to coordinate their efforts even more deliberately. These actors include heads of state and top foreign policy officials, ambassadors and embassy officials, members of parliaments, the U.N. Special Rapporteur (notwithstanding the criticism above), human rights organizations, NGOs dedicated to religious freedom, religious leaders, and business leaders. Networked together, they could act more powerfully to oppose governments and societal actors who violate religious freedom. The recent ministerials held by the U.S. Ambassador-at-Large for International Religious Freedom Sam Brownback and U.S. Secretary of State Mike Pompeo are efforts to build such a network, as is the work of the All Party Parliamentary Group for International Freedom of Religion or Belief.[68]

5. **Scholars, teachers, and religious leaders ought to teach and promote natural law as a basis for human rights in general and for the human right of religious freedom in particular.** Although the human right of religious freedom does not depend on any one justification in order to secure consensus, it does depend upon a consensus of states and people who support it. Natural law can contribute to such a consensus by supplying a justification for this human right that all persons can grasp through the exercise of their reason, does not depend upon the claims of particular religious traditions, yet is compatible with the claims of most religious communities.

Conclusion

What emerges from this essay are two urgent respects in which advocates of religious freedom are met with the task of promoting the universality of this human right. First, it is critical that they formulate ever more sound and persuasive grounds for holding that religious freedom is a true human right—one to which every person is entitled by virtue of his or her humanity and not dependent upon its appearance in a document or institution. This is a task for scholars, especially in the fields of philosophy, jurisprudence, and religious studies. Second, advocates of religious freedom are challenged to make efforts to deepen the universal popular legitimacy of the human right of religious freedom by promoting it through international institutions, national institutions, NGOs, the

international law community, universities, modes of popular communication, and other forums. The human right of religious freedom, then, demands to be deeply grounded and widely accepted.

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This paper is one in a series of essays on the natural law and natural rights foundations of internationally recognized human rights. The "First Principles of International Human Rights" essays propose reforms of the human rights movement for the increased protection of the fundamental and inalienable rights of all people.

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CHAPTER 6

Equality and Non-Discrimination in International Human Rights Law

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"Equality and non-discrimination" law, much of which impinges on cultural traditions and religious sensitivities, are matters warranting robust public discussion—which is preferable to invoking equality to sneak in a privileged ethic while pretending to be agnostic about the common good. Within a global setting in which fundamental value divergences are acute, it is important to recognize a global margin of appreciation in interpreting contested rights claims and protecting a range of acceptable practices to vindicate the values of pluralism, subsidiarity, and democratic will. No global body is authorized to impose a diktat over a morally charged controversy with a far-reaching social agenda, disregarding the agreement of states and national democratic processes.

This *Special Report* will examine the original understanding underlying "non-discrimination" in article 2 and associated articles of the Universal Declaration of Human Rights (UDHR). It will examine how these have evolved through the expansive and contested interpretations of human rights bodies as a method of standard-setting, which has been criticized as advancing a subjective ideological agenda, and the problems this has caused when situated against the existing corpus of human rights norms. Policy recommendations are offered with a view to maintain the integrity of international human rights laws, which remains the dominant, if troubled, contemporary language of global morality.

The principle of "non-discrimination" is a key provision in the UDHR,[1] serving both as a foundational principle that informed the reading of all other human rights in the UDHR—as well as a substantive right itself. Article 2 of the UDHR reads:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

During much of the UDHR drafting process, it was intertwined with "equality," both being "two

sides of the coin.[2] Eventually, "non-discrimination" was disentangled from "equality" and found expression in a "strong and lean"[3] article 2, which applies only to UDHR rights. The concept of "equality" took up residence under UDHR article 7, which reads: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

The second paragraph of article 7 of the UDHR only applies to UDHR rights, while the first prohibits "discrimination of any kind."[4] Egalitarian values permeate the other substantive articles,[5] as did framing other rights in terms of "everyone" and "no one."

Article 1 of the UDHR declares that "all human beings" as "members of the human family are "born free and equal in dignity and rights." This supports the inherence theory of rights, without specifying any philosophical basis, whether the Judeo-Christian concept of *imago Dei* or humanist Kantian precepts.[6] It clearly rejects racial discrimination, such as Aristotle's view that some people were slaves by nature[7] and Nazi Aryanism, which necessitated article 2.[8] While earlier human rights documents addressed the "Rights of Man,"[9] the UDHR was not a sexist document. Originally, article 1 read "[a]ll men," but was later altered, through the activism of delegates Bodil Begtrup of Denmark and Hansa Mehta of India to read "[a]ll human beings."[10] Drafting debates also demonstrated a concern about the economic privileges associated with feudal orders.[11]

Minority Rights Treaties as Prologue

Two primary ways the UDHR radically departed from its precursors are reflected in article 2.

Universality of Human Rights. First, it universalized the application of human rights to all persons everywhere. This is reflected in the first paragraph of article 2 that all persons are entitled to all UDHR rights "without distinction of any kind." Previously, human rights instruments in the form of the minority treaties underwritten by the League of Nations were confined to protecting ethno-cultural minority groups in certain selected European states emerging out of the dissolution of the Austro-Hungarian empire.

This inter-war experiment held states accountable for the treatment of persons within their jurisdictions by empowering any League of Nations member to draw the League of Nations Council's attention to a treaty infraction and by providing that treaty-related disputes could be referred to the Permanent Court of International Justice. It was believed that minority issues would be "depoliticized" by being removed from the sphere of diplomatic relations to that of "law" and impartial third-party resolution, minimizing the interference of powerful states in the internal affairs of weaker ones.

One might recognize in this mechanism of providing international accountability through a permanent monitor the infrastructural design for the modern human rights regime, although this was flawed in various aspects. It was selectively applied only to those European states like Poland or Czechoslovakia who were "beholden" to the Principal Allied Powers for their territorial gains; these states were disgruntled[12] because they felt they were treated unequally in being subjected to international supervision, compared to other European states. Indeed, Switzerland was celebrated for its treatment of the "minorities question" through its focus on common political ideals shared by all citizens, distinct from the German ideology of defining political community by blood (*Volkstrum*).[13]

The prototype of these treaties was the Polish Minority Treaty,[14] in which the rights of "Polish nationals belonging to racial, religious or linguistic minorities" were recognized as "obligations of international concern." However, while provisions like article 7 referenced the equality of "all inhabitants of Poland" under the law, the international mechanism only applied to members of minorities with grievances. While "equality and non-discrimination" found "judicial recognition"[15] in these minority treaties, the UDHR applied this more broadly to individuals *qua* human beings, irrespective of membership in a minority group.

Territorial Status. Second, the second paragraph of article 2 affirmed that UDHR rights were to be enjoyed wherever a person lived, regardless of territorial status. The reference to "non self-governing territories"[16] was designed to ensure that the UDHR included people living in colonies. This

is important, considering that article 22 of the League of Nations Covenant provided for civilizationally superior states to "tutor" the "backward" people of mandated territories, as a "sacred trust of civilization" until their people were deemed ready for independence. Although mandatory powers were obliged to make annual progress reports to the Permanent Mandates Commission, to be under tutelage connoted the inferior status of a ward, not a co-equal sovereign nation. This scheme sought to mitigate the rapacity of colonialism; however, grading peoples into degrees of being "civilized" cultivated resentment. This was rejected with the advent of the peoples' right of self-determination, which gained momentum in the 1960s, when "the subjection of peoples to alien subjugation, domination and exploitation" was declared to violate fundamental human rights.[17] Notably, some of the colonial and Allied Powers long resisted the inclusion of racial-equality clauses in general instruments like the League of Nations Covenant and U.N. Charter proposed by Asian and other leaders[18] for fear that this would delegitimate colonial rule or race-based immigration policies such as Australia's "White Australia" policy.[19]

Today, it is accepted that many of the non-binding UDHR standards[20] have attained the status of customary international law (CIL).[21] They have also been embedded in the major human rights treaties, and their influence is evident in the ubiquity of equality and non-discrimination in constitutions globally. The general human rights corpus today is grounded on the "International Bill of Rights" consisting of the UDHR and the 1966 Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR). These covenants give expression to UDHR standards and elaborate upon them. Subsequently, topic-specific multilateral treaties dealing with the elimination of specific forms of discrimination as they relate to race, women, and disabled persons were adopted. Discrimination was also addressed in numerous non-binding declarations in relation to religious intolerance; indigenous people; and national, ethnic, cultural, religious, and linguistic minorities.[22] Equality and non-discrimination also feature prominently in regional human rights instruments.[23]

The Inter-American Court of Human Rights, a regional human rights court[24] declared "equality and non-discrimination" to be *jus cogens*. Thus, its status as a foundational human rights principle is unquestioned. However, the dynamic concept of equality, like liberty, is an open-textured term whose content is elusive. There are varied conceptions and formulations of equality and a range of grounds or personal characteristics on which basis discrimination is prohibited in law and policy, all carrying different human rights implications in terms of proscribed and prescribed conduct. [25]

The Challenges of Formal Equality

Formal equality does not address the substantive content of the law but focuses on treating like alike in terms of burden and privilege. It proscribes unequal treatment of persons within the same class, while permitting treating what is unlike differently. All moral and legal arguments can be framed in the form of an argument for equality. Equality is, as Peter Westen forcefully argued,[26] "an empty vessel with no substantive moral content of its own." It is parasitic on an anterior moral standard; the bare invocation of "equality" provides no moral guidance on permissible differentiation.

Every substantive equality claim[27] draws content from a particular philosophical view of equality, justice, and human flourishing, which determines what differences are relevant and warrant equal or different treatment. None of these are uncontroversial. Substantive equality has led to dissimilar treatment through positive action or methods like quotas and special rights to remove systemic barriers or stereotypes that disadvantage particular groups in terms of their participation in political and economic life. The goal may be to prevent status harms and to secure equality of result in terms of welfare and "equal respect and concern"[28] in terms of equality as lifestyle for all social groups.

The question then is, as a matter of international human rights law, what is the content of "equality and non-discrimination" and who may authoritatively determine this, particularly when morally controversial issues are involved? In an age of identity politics, these principles have become staples in legal and political discourse, shifting away from common humanity

by positing a privileged class and a disadvantaged class and prescribing a project of achieving "equality" between them.

From the original focus on combatting racial discrimination, various social agendas, particularly those based on sexuality issues that blur status and conduct, have been polarizing and divisive. While gaining traction amongst a coalition of U.N. experts and officials, supportive states, and non-governmental organizations, the sexuality agenda also attracts strong criticism and rejection. For example, the African Group stated at a Human Rights Council discussion on sexual orientation and gender identity (SOGI) issues that:

> [W]e take strong exception to any attempt to try to distort the noble cause of fighting racism to promote and advocate specific forms of unacceptable social behaviour falling outside the scope of internationally agreed human rights norms and protection....[S]uch attempts are condescending and disoriented, as they constitute a form of imposition of cultural values on others, and undermine the very notion of human rights and their universality.[29]

There is no universally accepted, univocal conception of equality and non-discrimination in a plural world. Norms must be rationally justified—not merely asserted—and enjoy broad support. Equality is not an absolute value and, in particular contests of applications, conflicts between competing rights and goods may arise. Classifications that satisfy tests such as reasonableness, necessity, or proportionality[30] may be considered legitimate in various forums in determining how much "equality" is required. Ultimately, the just interpretation and implementation of human rights requires "sensitivity to cultural diversity and the validity of other ends."[31]

Historical Intent: Underlying Philosophy and Relevant UDHR Articles

The UDHR elaborated upon the United Nations (U.N.) Charter's commitment to "human rights and fundamental freedoms" for all "without distinction as to race, sex, language or religion."[32] This list of four prohibited categories is the only way the U.N. Charter gave content to human rights,[33] aside from the "principle of equal rights and self-determination of peoples," which refer to a collective entity. While the list of prohibited grounds expanded in subsequent texts and the jurisprudence of quasi-judicial and judicial bodies, the focus for the first 30 years of the U.N. Charter was on racial discrimination, given issues like U.S. segregationist policies, apartheid in South Africa, and the Indian caste system. [34]

To ascertain what model of equality and non-discrimination is espoused, the UDHR must be read holistically, not discretely, as an integrated document.[35] Articles 1 and 2 have a descriptive function in seeking to guarantee human rights through an equality paradigm applicable to all members of the human family. Article 1 speaks positively of the reason and conscience all humans share, while article 2 is framed negatively as proscription. Equality is not just a right but reinforces the very universality of rights, as everyone is a human rights beneficiary. The U.N. Charter and International Bill of Rights[36] "devote more attention" to preventing discrimination than any other single category of human rights.[37] Freedom from discrimination has been called "the most fundamental of the rights of man...the starting point of all other liberties" and an "indispensable element of the very notion of the rule of law."[38]

UDHR Articles 2 and 7: Fused and Later Separated

Article 2 of the UDHR principle of non-discrimination is violated when differential treatment is accorded to an individual or group on the basis of personal characteristics. Any item in article 2 can be used to interpret other UDHR articles. For example, a person cannot be barred from the article 21 right of participation in government on the basis of language.

What UDHR article 7 added to the principle of non-discrimination was positive state obligations to protect individuals from discrimination by ensuring equality before the law and the equal protection of the law, as well as protection from incitement to discrimination. [39] It creates a separate right not to be discriminated against, including rights not mentioned in the UDHR.

Given the UDHR's individual-centric orientation, there is no minority-rights clause. However,

it was thought that article 2, in referencing race, color, language, and national origin would provide a "strong protective wall around membership in ethnic, cultural and linguistic minority groups."[40] These adjectives describe the only groups currently recognized as "minority groups" in international law, rejecting a more sociological approach under which any numerical minority could be considered a minority for legal purposes.[41]

The UDHR's drafting history[42] shows that article 2 shared a common origin with article 7. Originally, both were fused in a single draft provision authored by John P Humphrey,[43] divided, merged again,[44] and then finally found expression as two separate articles.[45] Both use the prohibition against discrimination in slightly different ways.[46] Rene Cassin[47] redressed Humphrey's over-emphasis on non-discrimination and discounting of the accountability component of "equality before the law,"[48] by fashioning a separate article with the emphasis on equality before the law, which was removed from the first sentence of draft article 2. He thought that both articles contained similar, but not identical, ideas: Article 2 was the "non-dynamic part of the equality package,"[49] while what became article 7 sought to implement and translate the principle into practical reality by granting everyone legal protection against discrimination within his or her own country.[50]

UDHR Article 2 lists 10 protected categories, which goes beyond the four grounds mentioned in the U.N. Charter. To combat the fascist, racist Nazi denial of equality, the Communist delegates insisted upon adopting the prohibition against discrimination as a "drafting principle" that would "deeply affect the meaning of every article they wrote."[51] Their intent was to ensure the UDHR was "a secular document,"[52] acceptable to persons from all religious and non-religious persuasions. The use of terms "such as," which preceded the list, was meant to demonstrate the exemplary rather than exhaustive nature of the list:[53] "no inequality could be justified on the basis that the given distinction was not specifically mentioned in this article."[54] Nonetheless, article 2, paragraph 1 does not establish a "general rule of equality but only of equality in regard to" UDHR rights. Article 2 does not establish "the right to equal treatment as a human right, *but only as a principle of the Declaration*."[55]

During the drafting process before the Sub-Commission for the Prevention of Discrimination and Protection of Minorities (SCPDPM) for example, the Indian delegate, Minocheher Masani, proposed adding "color." The last three items, "property, birth or other status," at the end of the first paragraph of UDHR article 2 were discussed in depth.[56] In particular, "other status" would seem to encompass any possible basis for distinction, although article 2 itself is confined to UDHR rights—unlike article 7, which is broader in reach, similar to article 26 of the ICCPR.

The origins of these terms are worth examining. Before the SCPDPM, Soviet Delegate Alexander Borisov proposed including "property status or national or social origin,"[57] clarifying that "national origin" meant national characteristics rather than state citizenship (nationality).[58] There was some contestation over including "property status," as the U.K. and U.S. representatives thought "property" should be deleted, leaving "status," which they considered inclusive enough.

Discussions of Property, Birth, and Other Status in the UDHR

The Soviets considered "property status" necessary as it could affect how other UDHR rights, like the equal right to education, would be enjoyed, as the poor in many countries receive no education or inferior education. The intent was to ensure equal rights for the rich and poor, regardless of economic wealth.

In a later drafting session, Ukraine representative Michael Klekovin wanted to insert the concept of *soslovie* (class or social status) after "property status." While the concept was discussed, no English equivalent could be identified. The Ukrainian proposal was directed against feudal class privilege, which was determined by birth, not wealth.[59] Klekovin accepted the Chinese representative PC Chang's proposal to add the word "or other" between the words "property" and "status", to read "property or other status."

Soviet delegate Alexei Pavlov later proposed before the Third Committee that the word "class" be added after "property or other status," explaining that the U.S.S.R. amendment aimed to abolish economic privileges certain groups enjoyed in feudal Europe. While Rene Cassin thought that

"property or other status" covered these concerns, he supported the inclusion of "class."

The Chairwoman of the Human Rights Commission, American First Lady Eleanor Roosevelt, observed that the Commission added the words "or other" to the original phrase "property status" to accommodate views like that of Pavlov's.[60] A small drafting committee proposed that the Russian version of article 2 should contain the world "*soslovie*"; its literal translation in English should be "estate," but instead, the term "birth," rather than "class," would be used in the English version. Thus "birth" in article 2 was designed to prohibit discrimination "on the basis of inherited legal, social and economic differences" in the enjoyment of all UDHR rights. Morsink noted that many of the drafters understood and accepted this call for "a far-reaching egalitarianism."[61] Thus, the reference to "birth" in article 2 prohibited discrimination based on socio-economic factors, distinct from the "metaphysical and moral meaning" [62] of birth under article 1.[63]

The importance of the specific meaning of "birth," which was vigorously debated, was evident in criticism directed at the style committee for shifting the placement of "birth" from the end of the list (when it was associated with the later social and economic items) to the middle (when it was associated with "race, sex, language and religion"). Soviet delegate Alexander E. Bogomolov said such placement deprived "birth" of its intended meaning, rendering it ambiguous or having biological implications. Eventually, "birth" was restored to its original place and context, thereby also restoring "its original meaning of (mostly inherited) social and economic privileges."[64] In other words, the term "other status" originally was designed to address inherited economic privileges.

Post-UDHR Developments and International Human Rights Standard-Setting

In 1966, the ICCPR[65] and ICESCR[66] were open for ratification and entered into force in 1976. Article 2(1) of the ICCPR and Article 2(2) of the ICESCR are non-discrimination clauses under which state parties guarantee the enjoyment of covenant rights "without distinction of any kind, such as" (ICCPR) and "without discrimination of any kind as to" (ICESCR) the 10 prohibited grounds listed in article 2 UDHR.[67] General Comment No. 20 of the ICESCR Committee observed the use of "other status" indicated the changing nature of discrimination over time to include grounds comparable to expressly recognized grounds. This process involves value judgements.[68]

Article 2 of the covenants express the principle that "the implementation of human rights under international law is primarily a domestic matter," reflected in the exhaustion of domestic remedies rule. International implementation "is essentially limited to the supervision of domestic measures by political, quasi-judicial or judicial organs."[69] Article 2 of the ICCPR has an "accessory character" and can only be violated in conjunction with the concrete exercise of any Covenant right which gives rise to state duties; it does not establish "independent subjective rights."[70] The covenant does not treat equality and non-discrimination as absolute values as covenant rights draw distinctions: Article 6(2) of the ICCPR prohibits imposing the death sentence on persons under 18 or pregnant women; article 25 confines rights of political participation to citizens; while article 2(3) of the ICESCR allows developing countries to distinguish between nationals and non-nationals in granting economic rights. Both covenants contain articles that specifically mention equality.[71] Article 27 of the ICCPR recognizes the rights of persons belonging to ethnic, religious, or linguistic minorities to individually or communally enjoy "their own culture, to profess and practice their own religion, or to use their own language." The adjectives qualify and identify which minority groups have rights under the covenant, and General Comment No. 23 recognizes that state parties need to undertake positive measures to ensure this right is not violated.[72] These provisions make non-discrimination the "dominant single theme" in the ICCPR.[73]

Like UDHR article 7, ICCPR article 26 is an autonomous right to equality that applies to rights not mentioned in the covenant.[74] While "equality before the law" relates to enforcing laws, "equal protection of the law" directs the legislature not to enact discriminatory laws, and may entail a positive duty to enact special measures[75] with possible horizontal effects on others, for example, in the workplace.[76] Article 26 explicitly lists grounds of

prohibited discrimination by guaranteeing "all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[77] These "especially reprehended personal criteria" run "an increased risk of a violation of the prohibition of discrimination"[78] and may help to establish or disprove the reasonableness of a classification.

Article 26 of the ICCPR obliges states to take active measures against discrimination. Both ICCPR articles 2 and 26 prohibit discrimination *only* where distinctions are unsupported by reasonable and objective criteria [79] or where there is no need to secure compelling social values. As such, determining whether there is discrimination and what is reasonable must be done on a case-by-case basis, and this "depends on subjective value judgements as well as on the respective cultural, religious and social traditions of different societies."[80] For example, a system of progressive taxation requiring people in higher income brackets to pay more taxes does not violate ICCPR article 26, serving the legitimate purpose of equitable wealth distribution.

Nonetheless, the unclear meaning and boundaries of the right of substantive equality in article 26 of the ICCPR is such that the article remains "extremely controversial" with respect to its historical background and interpretation given its "potentially great explosive force."[81] The Netherlands considered denouncing the ICCPR and re-ratifying it with a reservation to article 26 in response to a Human Rights Committee (HRC) decision relating to equality of women.[82] As prevailing social views are not always determinative of what is reasonable, the question of *who decides* whether a rule is reasonable "may be as significant as the test for what constitutes discrimination."[83]

Within the U.N. regime, specialist human rights treaties and declarations have been adopted that expand on prohibited grounds of discrimination, including age, disability, nationality, and sexuality, and embracing a complex range of factors including identity, belief, and behavior. Some monitoring bodies have advocated controversial implementation methods, as when the HRC endorsed reverse discrimination through reserved seat quotas in elected local bodies for women and reserved elected positions for certain castes in India.[84]

Unlike the 1966 covenants,[85] topic-specific human rights treaties have described what "discrimination' constitutes."[86] These treaties have expanded upon the specific obligations "equality and non-discrimination" entail,'[87] such as positive action, including temporary affirmative action, to eradicate sexual stereotypes (Convention on Elimination of Discrimination Against Women [CEDAW], article 5), or to correct historical injustices. The CEDAW targets both direct and indirect discrimination. The Committee on Elimination of Racial Discrimination (CERD) condemned segregation as discrimination,[88] while the CEDAW committee issued recommendations treating violence against women as systemic discrimination.[89]

Discrimination is addressed through methods like education and laws criminalizing the advocacy of racial or religious hatred, as article 20 of the ICCPR requires. The Convention on Rights of Persons with Disabilities seeks to promote equal treatment when possible, while respecting the different needs of the disabled by requiring states under article 5(3) to "ensure that reasonable accommodation" is provided. These treaties recognize that adopting special measures to accelerate *de facto* equality do not constitute discrimination, which goes beyond viewing equality and non-discrimination as largely "last resort procedural provisions,"[90] in embracing a substantive conception.

Developments and Trends: Juridical Status and Interpretive Disagreement

While there are core equality and non-discrimination provisions in primary international human rights instruments, their variable formulation and interpretation has "led" to a spectrum of different results."[91] They contain open-textured terms like "any social condition" or "other status," catch-all clauses to potentially accommodate any distinction, and which could be abused. This gives rise to the problem of who should decide what constitutes a category of prohibited discrimination and on what basis? Typical of U.N. human rights monitoring bodies, the Human Rights Committee has found that the list of prohibited grounds under article 26 of the

ICCPR was not closed and that "nationality" was covered under "other status."[92]

In one of the great controversies of our time, discrimination on the basis of sexual orientation or preference has been enlisted before domestic courts and international forums in matters relating to laws criminalizing homosexual conduct, efforts to equalize the age of consent regarding heterosexual and homosexual conduct,[93] and same-sex marriage. Such issues may be characterized as a matter of public morality to be determined by elected legislatures or as implicating justiciable constitutional rights to equality or privacy. Although a constitutional right in some jurisdictions, the claim that prohibiting discrimination on the grounds of sexual orientation is an international (as opposed to regional) human right is a contested one. The suggestion that equality arguments can add "decisive weight" to complex legal debates by helping "to depoliticize issues or at least to make them more politically digestible"[94] is somewhat disingenuous. This is to use equality rhetorically, in the sense that no one wants to be against "equality"—but it evades the need to justify an alternative ethic privileged under the guise of equality.

While the substantive issues concerning rights based on sexual orientation will continue to be debated globally, we must resort to the test of international legality and the doctrine of sources to ascertain whether a putative norm has acquired the status of international law (*lex lata*) or whether it remains a political claim/soft law (*lex ferenda*).

Customary Human Rights Law

In order to be recognized as a matter of customary international law, a putative norm must have both "extensive and virtually uniform"[95] state practice and *opinio juris,* a sense of legal obligation by states as distinct from comity, tradition, or expediency.

In proving consistency of practice, the sample size cannot be selective. For example, the Singapore High Court upheld the constitutionality of a law criminalizing homosexual conduct by males, attributing no weight to jurisdictions that decriminalized homosexual conduct and the positions of international and regional organizations. What is adopted elsewhere may not be suitable in Singapore. While Canada and the United States have decriminalised homosexual conduct, other countries continue to criminalise it "such as Botswana, Malaysia, Sri Lanka, Sudan, Tanzania, Yemen and the Solomon Islands."[96]

These divergent approaches do not demonstrate the "extensive and virtually uniform" practice required for a norm to attain CIL status. Indeed, the evidence indicates that a significant number of states do not consider there to exist a binding international legal obligation to decriminalise homosexual conduct, given their retention of laws criminalising sodomy. This points to the lack of international legal status of a putative norm prohibiting the criminalisation of sodomy, which is at best *lex ferenda,* not *lex lata*.[97]

Even if a CIL norm evolves with the support of most states, it may not apply to a persistent objector state.[98] When a CIL norm is opposed by a state, the issue is what rank it receives within a monist or dualist municipal legal systems, whether it is superior, co-equal, or inferior to the constitution and statutes, for example. In a monist system, a CIL may be directly received as part of the national legal system and may be applied by a court for various purposes, such as to influence interpretation or to ground a cause of action.

However, the automatic reception of a CIL norm within the domestic legal system does not settle the rank a CIL norm may enjoy within a municipal system. It may carry the same or greater weight than statutes or the common law (case law). In a dualist system that emphasizes national sovereignty and self-determination, CIL is not automatically part of domestic law, but must first be incorporated into national law—such as through express judicial recognition and acceptance or a statutory enactment—in order to have legal effect. There is no uniform global approach on how international law is ranked within a domestic legal system, whether it has constitutional, statutory, or common law status,[99] such that close attention must be paid to the context.

Controversial Claims Based on Sexual Orientation

While equality and non-discrimination may be a foundational human rights principle, a controversial interpretation of it involving discrimination on

the basis of sexual orientation does not command universal consensus that it enjoys legal status. A global examination of national approaches demonstrates widespread dissent both within and between states and between inter-governmental organisations.

Within the U.N. regime, the creation of the controversial mandate of the U.N. Independent Expert on Protection against violence and discrimination based on sexual orientation and gender identity (SOGI) met robust resistance. In particular, the lack of clarity of the vague terms of "sexual orientation" and "gender identity," which were not enshrined in international law, was such that member states were concerned that the mandate could not be carried out fairly.[100] Political strategies to mainstream the SOGI agenda within the U.N. human rights regimes include groups of states issuing joint statements before the Human Rights Council, rather than risking defeat by introducing it as a resolution for the U.N. General Assembly to vote on. The latter may be met by counter-resolutions.[101] High level U.N. bureaucrats[102] actively support the SOGI agenda, and some states use the Universal Periodic Review process to draw attention to SOGI issues.[103]

The Absence of Consensus Around New SOGI-Based Rights

For every Council of Europe recommendation to combat SOGI discrimination,[104] there is a competing view that the attempts to add SOGI as protected categories to international treaties does not, in fact, seek equal treatment—but instead seeks special rights for a specific group of individuals united only by their sexual conduct and subjective internal sense of gender. The lack of clarity around the meaning of SOGI discrimination contributes to these concerns. In Western societies that have adopted SOGI non-discrimination laws, mere disagreement over same-sex marriage has led to state punishment of religious believers.[105]

A report prepared for the Organisation of Islamic Conference (OIC) views SOGI-based claims as "the most controversial subject" pitching "traditional societies in the Muslim and most African countries as well as many of the religious communities against Western societies," where activists are "lobbying hard" to claim SOGI "as one's inherent human right based on individuals' choice and consent."[106] The OIC Report underscores that Muslims hold "no specific animus against homosexual individuals"; rather, they disapprove of sexual behavior that goes against their religious beliefs.[107] The report considers that special rights for so-called "sexual minorities," which is not a legal term of art,[108] are unnecessary as international human rights law has enough clear provisions to combat human rights violations, including violence and discrimination, against any person or group on any ground. The report considers that sexual orientation has no legal foundation in human rights law and that this vague term was never defined or accepted in any human rights instrument or U.N. document by the consensus of member states.

The OIC report considers that "the slanted narrative of 'genderless marriage' and 'alternative form of family'" based on one's "claim of genetically predisposed 'sexual orientation'" as a basis of seeking "specific protective laws" is a "suicidal social experiment."[109] Islamic teachings, and indeed, mainstream Judeo-Christian teachings, do not support homosexual conduct as an identity or the norm.[110] It recognises that debates about whether homosexuality is inborn and immutable or whether reparative therapy is possible for gender identity disorder are heavily politicized.[111]

The OIC report supports the traditional view of marriage and family, which it considers "under assault" by those who argue marriage is based on so-called heteronormative biases or based on sex stereotypes and who seek to radically redefine it as the "union of any two persons."[112] Indeed, a person identifying as homosexual and a heterosexual person have the equal right to marry someone of the opposite sex, provided other conditions are observed, for example, age, blood relation, and not already being married. What is being demanded is not equal access to marriage as an existing good, but demands for "the transformation of that good,"[113] that is, to redefine marriage.

There are, of course, human rights to which *all* human beings are entitled, regardless of sexual orientation or preference, such as the right to vote, to a fair trial, and equal pay for equal work. As such, each claim must be examined on its merits to see if it is based on an objective and reasonable

classification. But these sharply divergent views underscore a lack of consensus about the issue of whether the emerging claims of rights based solely upon sexual orientation and gender identity constitute universal human rights.

Same-Sex Marriage and Subsidiarity in Europe

Some jurisdictions, including Western Europe, have recognized same-sex marriage based on a constitutional right to privacy or equality.[114] However, the European Court of Human Rights (ECHR) in *Schalk and Kopf v Austria* also recognizes that states have a valid interest in legally protecting the traditional definition of marriage.[115] There was little common ground between contracting states in Europe about such sensitive areas of social, political, and religious controversy, owing to the differing cultural, historical, and philosophical differences of these states. Further, the Constitutions of Poland, Bulgaria, Slovak Republic, Croatia, Slovenia and Hungary affirm marriage as a union between a man and a woman, underscoring the lack of even a regional—much less a global—consensus on whether equality and non-discrimination require the recognition of 'same-sex marriage.'

Thus, regarding controversial issues like same-sex marriage or euthanasia,[116] European states enjoy a wide margin of appreciation, with the ECHR leaving the matter to the national authorities and democratic deliberation. To act otherwise would be to "lose sight of the subsidiary nature" of the ECHR's international enforcement machinery.[117] The domestic margin of appreciation goes hand in hand with European supervision. The court has permitted restrictions on convention rights such as expressive freedoms where the domestic laws of the contracting parties lack "a uniform European conception of morals" and where the views taken by these laws as to what morals require varies both in time and place. Given that national authorities were in "direct and continuous contact with the vital forces of their countries," the ECHR considered these state authorities were better positioned than international judges to give an opinion on "the exact content of these requirements" and the necessity of restrictions.[118]

Human Rights Treaty Law

No U.N. human rights treaty explicitly prohibits discrimination on the grounds of sexual orientation, although regional treaties or some domestic constitutions have done so.[119] Indeed, activists have opined there are "two particular omissions" in the UDHR: Sexual orientation and gender identity are not mentioned in article 2. Nor does article 16 explicitly establish rights for same-sex couples to marry and found a family. The issue was clearly not raised during the drafting of the UDHR in 1948 or during the drafting of the 1966 covenants.

This omission is described as "understandable" since "a new normative context around sexual orientation and transgender status has only emerged in the past 20 years."[120] While there is a growing trend of international human right bodies recognizing these, the issue remains fiercely contested. The grounds of prohibited discrimination are not closed, and attempts are being made to declare or imply a new right and park it under the apparently all-encompassing category of "other status," or to expansively read existing rights or principle. This raises the question of what constitutes a legitimate interpretative approach in construing treaties.

If a treaty vests an adjudicatory body with powers to make binding judgements, this creates binding treaty obligations for state parties only, not for third parties.[121] If the treaty declares pre-existing CIL or has the effect of crystallizing CIL at the moment of adoption or subsequently generates a CIL rule through widespread consistent state practice, the treaty norm is generally binding *qua* CIL norm, not *qua* treaty norm.[122] Factors like the extensiveness of ratification, the number of reservations affect the assessment of whether such extensive consensus has been reached, pointing to the generality of a putative CIL norm.[123]

In the absence of a U.N. human rights court, regional human rights courts, such as the Inter-American Court of Human Rights for example, have read "any other social condition" under article 1(1) of the American Convention on Human Rights to include "sexual orientation discrimination," which could be limited only by "weighty reasons."[124] These decisions bind state parties in contentious cases as a treaty obligation.[125]

Certain human rights bodies may have monitoring or quasi-judicial powers, but no U.N. treaty

authorizes a treaty body to issue binding decisions on state parties when considering their state reports, only "concluding observations"[126] and recommendations; such bodies may also issue general comments on specific treaty clauses that are hortatory, not mandatory. When optional protocols authorize individuals to send communications alleging human rights violations to a monitoring body, that treaty body may examine the communication and transmit its views with its recommendations to the concerned parties.[127] They do not have judicial power to issue binding judgements or to declare law by fiat, though the interactions of these bodies with state parties may provide evidence of emerging norms.

In this dialogical process, these bodies can push an agenda through publicity, as when the HRC frequently raises sexual orientation issues in relation to criminal law, the workplace, and the lack of anti-discrimination legislation or educational programs to combat negative attitudes toward homosexuality.[128]

Many human rights bodies with cosmopolitan drives have sought to promote their vision of substantive equality by expansively interpreting what equality and non-discrimination requires or by a radical interpretation of the text not contemplated by the authors of an instrument. A prominent example is when the HRC, under ICCPR articles 2 and 26, opined that sex (a biological concept) could be interpreted to encompass sexual orientation and gender identity (social constructs) in *Toonen v Australia*.[129] The decision itself was based on the committee's view that the right to privacy under article 17(1) of the ICCPR was violated by the Tasmanian Criminal Code criminalizing homosexual conduct. In a later decision, the HRC stated that sexual orientation was covered by the "other status" grounds of article 26, rather than as an aspect of sex.[130]

To read sexual orientation into "sex" is a method that has no basis in historical intent or, indeed, the conventional method of treaty interpretation, as set out in the Vienna Convention of the Law of Treaties (VCLT).[131] What the text meant to the parties collectively when they were negotiating or ratifying the treaty in question needs to be examined to see whether there was intent to include a particular implicit ground of discrimination.[132] The point is to detect the parties' intention, not to supplant them, as U.N. bureaucrats do not have legislative powers to speak for the international community—nor do U.N. monitoring bodies have determinative power to declare what the treaty means. It does not appear from any of the discussions during the 20 years between the adoption of UDHR article 2 and ICCPR articles 2 and 26 that there was *any* contemplation of the non-discrimination clause requiring states to repeal laws criminalizing certain forms of sexual conduct. During that time, most nations had laws against homosexual conduct and similar practices, which were considered contrary to public morality.[133]

Article 31 of the VCLT provides that treaties shall be interpreted "in good faith" to ascertain the "ordinary meaning" given to treaty terms "in their context" and "in light of its object or purpose."[134] Recourse to the *travaux preparatoires* is permissible to confirm a reading, under VCLT article 31, unless such reading is ambiguous, obscure, or leads to a "manifestly absurd or unreasonable" result under VCLT article 32. Article 31(3) provides that any subsequent agreement or subsequent practice regarding the interpretation of the treaty may be considered. For example, if most state parties, after signing a treaty containing no express "sexual orientation discrimination" prohibition, evince a pattern of repealing laws criminalizing homosexual conduct and relate this to a need to comply with international human rights obligations, this may furnish evidence of state agreement that the treaty was meant to address and invalidate such laws. Absent such patterns, the evidence is less compelling, as when a state party attaches a declaration or reservation indicating contrary intent. Indeed, if a state repeals such legislation without reference to the need to fulfill human rights obligations, this does not provide material evidence of CIL, as reasons for amending a law may lie in political compromise and desire to please special interest groups or constituents.

There is no necessary connection between legalizing a once-criminalized practice in the name of equality, non-discrimination, and accession to a human rights treaty; what is required is a sense of legal compulsion as proof of *opinio juris*. State parties vary widely in their attitudes and practices toward homosexual conduct, from treating it as a right to treating it as a violation of a public good.

Where legislatures genuinely object to certain conduct and are not seeking to persecute people on the basis of a "status," there can be no consensus that a treaty with a non-discrimination guarantee should be read as prohibiting distinction on grounds of sexual orientation. Even if it is the view of the treaty-monitoring committee, these views do not bind state parties or reflect the emergence of a CIL norm, as the practice of state parties must be factored in.

Argument by Reiteration

Toonen is celebrated as a strategy for advancing the SOGI agenda in an international forum at a stage in history when the agenda had little traction before legislatures and courts, producing a decision that could be used to precipitate domestic legal changes. While the views of human rights treaty bodies are not enforceable and easier for states to ignore than legally binding judgements, it has been noted these are "widely published, and carry significant moral and persuasive authority."[135] A HRC decision influenced the Australian Parliament to enact laws rendering Tasmania's law against homosexual conduct ineffective. There is a tendency to use quasi-judicial language to confer an aura of authority upon these bodies' recommendations.[136] Further, non-binding HRC decisions are treated like precedent, framed as asserted rules of law, and cited repeatedly by U.N. bureaucrats,[137] committees,[138] and even some foreign courts[139] sympathetic to expansive readings of equality, non-discrimination, and privacy rights.

Many U.N. bodies and officials later cited *Toonen* as though it were authoritative precedent: This is an exercise in self-validation and *not* an accurate assessment of state practice and *opinio juris*, nor is it a legitimate interpretation of a legal right. Similar to the "living tree" approach to constitutional interpretation, in which the constitution as an organic instrument is read in a "progressive" manner to adapt it to changing times, elite judges or bureaucrats are assumed to know what progressivism requires, despite difficulties because "progress is a comparative of which we have not settled the superlative."[140] This type of interpretive method discounts historical intent, precedent, and even principle, in favor of the judicial imposition of subjective political preferences as an exercise in counter-majoritarianism. It is unclear why a judge would do a better job than "majoritarian politics" in discerning what a progressive rights interpretation might be, given there is no uncontroversial theory of what minority interests deserve protection.[141]

"Living tree" approaches may be endorsed in certain jurisdictions, but they also attract criticisms of judicial overreach or juristocracy. Some consider that the rule of law and separation of powers is undermined where courts operate as second legislative chambers, a role certain judiciaries assiduously reject.[142] Various regional human rights courts and U.N. bureaucrats appear to favor reading human rights treaties as "living instruments,"[143]—discounting historical intent—and allow their preferred value-laden interpretations to be advanced. This renders texts infinitely malleable, enlisted to serve whatever the interpreter deems a worthy cause. The strategy of reiteration is to keep repeating opinions until they achieve actual or perceived canonical status, with successive iterations relying for authority mostly upon one another. Each victory is celebrated as the acme of progressivism, and dissenting views are silenced through intimidation, shaming, and slurs.

State parties of human rights treaties do not regard comments by treaty bodies as legally binding,[144] though their statements may exert political pressure and influence national courts. Hence, a wide divide may exist between state practice and the opinions of treaty bodies and U.N. personnel,[145] which are neither authoritative nor persuasive. The question of how and who should interpret open-textured treaty terms boils down to one of institutional competence and propriety.

Soft-Law Instruments

Activists have invoked soft international law declarations or political documents in legal non-discrimination arguments as a political strategy to advance certain interpretations of texts or in hopes of generating CIL. While some see soft-law norms in instruments like General Assembly resolutions carrying the support of some states as evidence of an emerging trend pointing to a human rights norm, others view them as indicating the absence of *opinio juris* in the face of sustained opposition, thus depriving the resolution of any legal authority.[146]

Private actors, describing themselves as a "distinguished groups of human rights experts" and activists, have issued non-binding documents such as the 2007 *Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (YP),[147] which they characterize as representing the current state of international human rights law as it relates to SOGI issues. This document claims to draw on treaty provisions and CIL norms that deal with equality and non-discrimination in general.[148] The YP were updated and extended in 2017. Efforts have been made to promote it[149] and track its impact.[150]

Rather than reflecting the existing state of international law, the YP introduces radical interpretations of existing and novel rights, raising the banner of preventing "discrimination" to promote a radical agenda with implications for law, family life, and sexuality. These have been challenged as "an affront to all human and especially natural rights"[151]and rejected, demonstrating a failure of consensus.[152] Certain YP principles threaten to truncate other human rights, such as expressive freedoms that, it argues, must not be exercised in a way that "violates the rights and freedom of persons of diverse sexual orientations and gender identities." Demands that education be enlisted to promote respect for diverse sexual orientations or that society support gender transitioning and reassignment programs are controversial: They seek to use state power to impose moral fiats, precipitating clashes with social conservatives and those of religious conscience, particularly of the Abrahamic faiths.

The YP are not the product of government negotiation and agreement, but of a group of self-selecting experts, U.N. bureaucrats, and LGBT (Lesbian, Gay, Bisexual, and Transgender) pressure groups attempting to present a radical social policy vision as binding norms. Some states have utilized it as a tool: France made an explicit reference to the YP in a Joint Statement on SOGI it sponsored issued in December 2009, although Ireland, Malta, and Poland demanded this reference be removed.[153] Nonetheless, it is clear that activists will continue to rally around the YP to try shape debate around its terms, to enhance its appearance of being authoritative, and to pass off *lex ferenda* as *lex lata*.[154] This, is in spite of criticisms that it constitutes a misinterpretation of the non-discrimination clauses contained in long-established human rights instruments and that sexual orientation is a vague term lacking legal foundation in any international human rights instrument and not agreed to by the general membership of the UN. Furthermore, Principle 2 of the YP seeks to elevate discrimination on grounds of SOGI to an effective trump—*with no room for reasonable accommodation* since equality is to be realized "whether or not the enjoyment of another human right is also affected."[155]

This is nothing short of a power grab in service of a political project, without consideration for other human rights. *Yogyakarta Principles* drafter Michael O'Flaherty offered a provocative view that the reference in article 3 of the ICCPR to the "equal right of men and women" to enjoy ICCPR rights gave an elevated status to the prohibition against sexual discrimination. Since he deems sex interchangeable with sexual orientation, he relied on article 3 for the radical proposition that article 3 apparently "appears to elevate the suspect nature of sexual orientation-related discrimination to a higher level than that of the other listed categories."[156]

Judicial reception towards using the YP as a guide to interpreting broad concepts like privacy and equality have been mixed. While the Nepalese Supreme Court cited YP definitions of SOGI,[157] the Philippines Supreme Court held that the obligations outlined in the YP "were not reflective of the current state of international law," had no grounding in the list of formal sources under article 38(1) of the Statute of the International Court of Justice, and were not binding at international law.[158] The petitioner, it argued, had not "undertaken any objective and rigorous analysis" to ascertain the "true status" of "these alleged principles of international law" which were at best, *de lege ferenda*, or simply "well-meaning desires." The court observed:

> [N]ot everything that society—or a certain segment of society—wants or demands is automatically a human right. This is not an arbitrary human intervention that may be added to or subtracted from at will. It is unfortunate that much of what passes for human rights today is a much broader context of needs that identifies many social desires as rights in order to further claims

> that international law obliges states to sanction these innovations. This has the effect of diluting real human rights and is a result of the notion that if "wants" are couched in "rights" language, then they are no longer controversial.[159]

The judicial role in addressing emotionally-charged social issues in which "societal attitudes are in flux," where even "the psychiatric and religious communities are divided in opinion," was not to impose its own views. Rather courts should "apply the Constitution and the law," uninfluenced by public opinion, confident in the belief that "our democracy is resilient enough to withstand vigorous debate."[160] Soft law norms may precipitate debate, but it is not a foregone conclusion that they will "harden" over time to become binding law.

Problems with New Interpretations of Equality and Non-Discrimination

In implementing human rights, much harm can be done "if not entrusted to the care of impartial, efficient and reliable institutions."[161] Within the domestic context, debates over individual rights are struggled over "through a process of public debate, informed by the opinions (rarely unanimous) of professional elites." Authoritative institutions may revise decisions. To prevent the imposition of the *diktat* of an unelected, unaccountable bureaucratic elite and the politicization of human rights law, "We need to have something like that [the equivalent of domestic processes and debate] in a form suitable to the international arena."[162]

This is particularly important in relation to equality and non-discrimination, given their potential far-reaching effects in encompassing *all* laws and policies—even their potential horizontal application to private actors. Given the proclivity of many U.N. human rights actors to adopt expansive value-laden interpretations of this principle and to discount historical intent or general state agreement, it is important to be aware of the negative impact certain strains of substantive equality poses to freedom of public discourse, democratic will and other competing human rights and goods, contrary to the principle that human rights should be universal, indivisible, and mutually reinforcing.

Taking Seriously the Law of Sources and the Universality of Human Rights

The principle of equality and non-discrimination is central to the human rights movement,[163] given that human rights are the only universal rights. However, to assert that everyone should enjoy equal rights is rhetorical, providing little guidance on how to implement and realize a human right. Because of its open-textured nature, there is a danger that equality and non-discrimination may become empty vessels to be filled with one's preferred political philosophy or prey to political capture. This is evident in the use of non-discrimination to drive changes to law and sexuality, for example. Given the diverse conceptions of equality, this cannot be discussed in the abstract, but must be grounded in history and context. While law is not static and does change, it must be changed by legitimate processes.

In order to uphold the integrity of human rights law, a distinction must be preserved between *core* human rights as legal rights and *contested* political claims. Caution is needed against the sort of reckless activism that ignores the fact that rights have duties and that the existence of a duty "has to be established beyond pointing to the value of the right to the right-holder."[164] Attempts to use human rights terminology to legitimate a politically charged agenda will politicize human rights and devalue their currency. The legitimacy of human rights will be undermined where it acts to service the one-sided championing of liberal progressivist or fundamental libertarian values, "some of which run counter to the cardinal beliefs of various religious traditions." To maintain credibility, human rights law must operate as the "*ius gentium* of our times, the common law of nations."[165]

The development and application of human rights law must adhere to general international law principles and doctrines that largely rest on state consent, mitigated by the idea that this is constrained by higher law principles drawing from the natural law/natural rights tradition. Human rights law must broadly have the support of the will of the international community *as a whole*, and the views of the international community of states cannot be discounted in ascertaining the juridical status and normative content of a norm. Just as human rights law does not rest in theory on majority will, neither

does it turn on minority will. An unrepresentative cosmopolitan elite is not empowered to declare the law for the rest of the world as keepers of the standard of civilization as *they* define it. Soft-law claims should not be carelessly treated as international legal obligations. National courts and authorities have the liberty to receive or reject soft law claims since these only provide guidelines, not obligations.

It undermines the universality of human rights law to claim that a controversial putative right is a human right. All such claims must be assessed and have a basis in treaty, CIL, or possibly general principles of law that would require said right to be present in *all* major legal systems, common and civil law, Islamic, Buddhist, communitarian, and liberal democracies. This is important, to avoid "human rightism,"[166] which confuses and conflates the categories of law and human rights ideology.

On rights claims that implicate matters of political and moral controversy, these should be debated before democratic domestic forums in order to respect the principles of national sovereignty and non-interference in internal affairs. This is distinct from the principle that established human rights are matters of international concern.

Legitimate Difference of Views and a Global Margin of Appreciation

Author Susan Marks admits that "gender and sexuality politics may well appear less global when viewed from other vantage points,"[167] in which light, to see sexual orientation discrimination as a settled matter is itself a European or North American perspective. There is a legitimate difference of views in this matter, shaped by national constitutional commitments and varied theories of judicial review in relation to structuring the parameters of rights and public goods and according weight to historical intent, precedent, principles, or moral theory.

Constitutions may specify what constitutes prohibited discrimination that courts are to give effect to or may give courts counter-majoritarian checks to develop these grounds through more open-textured provisions prohibiting discrimination on enumerated and analogous grounds.[168] Courts may demonstrate fidelity to the constitutional text in enforcing an explicit ground of discrimination[169] or in refusing to read in an implied ground on the basis that this should be by way of constitutional amendment where this is a viable possibility. Courts develop tests of legitimate differentiation based on criteria of necessity, reasonableness, or proportionality, which are shaped by contextual factors like culture and political philosophy. Courts may take sides on contested issues, such as whether homosexuality is immutable and warrants protection by prohibiting sexual orientation discrimination, or decline to do so, according to specific conceptions of separation of powers.[170] While some courts have found that laws criminalizing sodomy, which distinguish between heterosexual and homosexual conduct, can be justified on grounds of public morality, others take a contrary view. [171]

In *Toonen*, the HRC opined that treating sodomy laws as "moral issues" for "domestic decision" would immunize state interferences with privacy.[172] Former U.S. Supreme Court Justice Anthony Kennedy in *Lawrence v Texas*[173] noted that the court's obligation was to "define the liberty of all, not to mandate our own moral code" drawn from tradition and religious beliefs. This is disingenuous insofar as it suggests such a definition of liberty is "neutral" and does not entail imposing a moral norm.

The reality is that moral decisions are unavoidable, with one public morality norm being replaced by the liberal vision of public morality, which treats heterosexual and homosexual sexual expression and partnership as morally equivalent. The latter assumes the state is being "neutral"[174] when allowing individuals to decide on their personal vision of the good, based on the meta-liberal norm of individual autonomy. The liberal theory of the good, based on consent and desire, is not neutral in espousing hedonism.[175] Indeed, the enactment of "hate speech" laws to penalize speech that ostensibly promotes or incites sexual orientation discrimination brings about the re-moralized state that centralizes and deploys power to bring about a certain way of thinking about public sexual morality. This could violate other human rights like freedom of thought and religious belief, as well as stifle legitimate public debate and free speech. One man's hate speech is another man's political critique. Comparative analysis reveals no uniform approach.

Other courts consider public morality a legitimate legislative purpose since the state is not wholly

without authority to regulate matters concerning sexual morality such as bestiality, incest, and child sex grooming; indeed, some courts appreciate that social values shape what equality requires,[176] and that legislation is needed to protect the "moral ethos of society as a whole."[177] However such laws that affect privacy by criminalizing private sexual conduct are subject to tests of proportionality, necessity, and reasonable classification.[178]

To merely invoke "equality" to argue against differing ages of consent for homosexual and heterosexual sex, for example, is to cynically deploy equality as "a mask for a substantive conception of the good which informs the distinctions and values at play."[179] Equality claims disguise hidden assumptions. There is a certain dishonesty, or at least inconsistency, between assertions that "decriminalization does not imply disapproval"[180] (in relation to sodomy law and privacy under the ECHR) and the argument that laws criminalizing homosexual conduct have a negative health impact (in that many homosexuals will not seek medical treatment for fear of the stigma). Implicitly, the assumption is that decriminalizing sodomy will remove the stigma associated with homosexuality and encourage more homosexuals to seek medical care when society approves of or morally equates homosexuality and heterosexuality.[181] Decriminalization, the removal of legal sanction, *does* signify or signal moral approval, which is a precursor for securing the advance of the far-reaching LGBT agenda.[182]

Arguably, when a proposed human right benefits a favored class of society while diminishing the human rights of others, it should be subject to rigorous democratic debate to ascertain the implications of such a claim. A human right not to be discriminated against on the basis of sexual orientation, which implicates a contested vision of equality, should not be prematurely declared a human right in order to quarantine it from further interrogation as to whether it adheres and coheres with the existing human rights corpus.

In this respect, the ECHR in *Frette v France,*[183] held that adoption laws that drew a distinction between would-be homosexual and heterosexual adopters were justifiable, given the diversity of national approaches to gay adoption within contracting states. This same margin of appreciation was recognized in *Schalk and Kopf v Austria*[184] in relation to same-sex marriage. While certain jurisdictions, as in North America, may recognize a constitutional right to same-sex marriage, this does not make it a universal human right. Even U.N. bureaucrats and human rights officials recognize there is no international human right to same-sex marriage[185] drawing from equality or privacy, although they call for the legal recognition of same-sex couples and conferring upon them the same benefits traditionally married partners enjoy.[186] This, however, skips over the unsettled issue of whether unisex couples should receive this legal recognition or whether homosexual partnerships are morally equivalent to traditional marriage between a man and a woman. Such matters, which impinge on cultural traditions and religious sensitivities, are matters warranting robust public discussion, which is preferable to invoking equality to sneak in a privileged ethic, while pretending to be agnostic about the good.

Within a global setting in which fundamental value divergences are more acute, it is important to recognise a global margin of appreciation in interpreting contested rights claims and protecting a range of acceptable practices to vindicate the values of pluralism, subsidiarity, and democratic will. No global body is authorised to impose a *diktat* over a morally charged controversy with a far-reaching social agenda such as sexual orientation as a prohibited basis of discrimination, disregarding the agreement of states and national democratic processes.[187]

Clash of Rights: Sexual-Orientation Discrimination and the Assault on the Human Rights and Fundamental Freedoms

Human rights co-exist in the same political space and may sometimes qualify each other. Any new human rights claim must be assessed for how it impacts other human rights and public goods. To exalt one putative human right to trump all others would be one-sided. To be fair, any emphasis on one human right over another must flow from its status as a peremptory norm and, even then, this does not preclude the need to optimize the enjoyment of all human rights.

Principles of SOGI discrimination in particular, have far-reaching[188] and negative effects on public discourse—and threaten to diminish other human

rights.[189] This is evident in the far-reaching, intrusive demands of the SOGI discrimination agenda, set forth in documents like the YP and the reports and statements of some U.N. human rights officials that do not carry the broad support of states and the international community as a whole. These "new rights" run roughshod over established human rights with no attempt to achieve a reasonable accommodation or to give due consideration to competing human rights and public goods.[190] To advance these new rights involves promoting soft-law principle in the guise of universally binding norms.

Right to Education. Demands that governments should promote tolerance and respect for diverse sexual orientations through public education programs aimed against "homophobia" and "transphobia"[191] through "comprehensive sexuality education"[192] violate the human right of parents to instill values in their children. The failure to allow parents to opt their children out of public education on sexual morality contrary to their convictions would violate the prior right of parents "to choose the kind of education that shall be given to their children" as proclaimed in article 26(3) of the UDHR.

There are problems, too, insofar as the contents of "sexual orientation" are vague, and not every sexual orientation warrants protection, for example, bestiality, incest, necrophilia, pedophilia, polyamory, etc., are legally prohibited or socially frowned upon.[193] Where is the line to be drawn between acceptable and unacceptable sexual orientation, and who has the authority to do this?

Freedom of Religion and Expression. Expansive readings of non-discrimination on grounds like sexual orientation promotes liberty and equality for some at the expense of equality and liberty for others—particularly in relation to freedom of religion, conscience and expression, as protected under articles 18 and 19 of the UDHR.

Statement 19(d) of the YP advocates that notions of public order and public morality should not be used "in a discriminatory manner" to restrict free expression "that affirms diverse sexual orientation or gender identities." In the same breath, statement 19(e) advocates that states ensure freedom of expression "does not violate the rights and freedoms of persons of diverse sexual orientations and gender identities."[194] This gives one sector of a community superior rights to other sectors, which is inegalitarian. Further, 19(e) of the YP is broad enough to be weaponized to shut down debate on reparative therapy[195] or views questioning the assumptions of the LGBT agenda in relation to "heteronormativity," by proclaiming views that question LGBT assumptions be hate speech or a form of psychological harm that violates "human rights." If all that homosexualism activists demonize as heretical is hate speech subject to legal or social sanction, the pillars of a free society that human rights are supposed to support are imperiled as moral dissent is then silenced by law or bullying tactics.

Principle 21 of YP would downgrade freedom of thought, conscience and religion by declaring they cannot be invoked to justify laws denying equal protection on the basis of SOGI and requiring that religious convictions about SOGI and their expression "is not undertaken in a manner incompatible with human rights."[196] This is vague and could conceivably apply to a religious publication that states that homosexuality is a moral wrong, curbing religious speech.[197]

In the face of increasing calls to SOGI diversity, intolerance is demonstrated toward viewpoint diversity and other liberties like religious freedom, as where religious believers are expected to bear the burden and costs of their own lack of conformity in relation to views of sexual morality contrary to the non-negotiable tenets of their faith.[198] In various sexual orientation discrimination cases, individuals and organizations suffer detriment for adhering to their convictions supporting a more traditional sexual ethic, such as hoteliers who refused to let out rooms to homosexual couples or Roman Catholic adoption agencies who refuse to consider homosexual couples as prospective adoptive parents. If the primary principle is the best interests of the child, can it be argued that same-sex households are not in the child's best interests or must the contrary be assumed? Although co-equal rights may qualify each other, sexual orientation discrimination may operate as a trump card, such that when no reasonable attempt is made to accommodate the conscientious objection of a registrar who refused to conduct a homosexual civil partnership ceremony, as all employees were expected to conform to the council's conception of equality. This coerces

individuals to assent to what they do not agree with, which is oppressive.[199]

U.N. bureaucrats have approved the launching of national public education campaigns to "counter homophobia and transphobia,"[200] where a re-moralized state would impose a publicly endorsed ethic towards sexuality. This trivializes freedom of conscience, religious freedom, and the rights of faith communities and their members to free speech and the right to engage in legitimate public debate, as a facet of the right to political participation.[201]

No Trumping Human Rights. When rights compete, different weighting of the public values a right embodies takes place. When U.N. officials and bodies are one-sided in privileging only the "human rights" of one sector of the community rather than the human rights of all, this suggests a lack of objectivity. When the prohibition against discrimination on sexual-orientation grounds operates to violate or unduly truncate other human rights, this goes against the principle of treating all human rights "on the same footing and with the same emphasis."[202] This discredits the entire human rights movement.

The bias of U.N. officials is also evident in their ideological, non-scientific use of terms like "homophobia" and "transphobia,"[203] which are not mental diseases (as the term phobia suggests), but are rather pejorative slurs used against those who *morally* dissent from the tenets of the homosexual rights agenda. To presume to intrude into freedom of thought and conscience is to endorse a brand of cultural totalitarianism, enforced by the state or private actors in the name of human rights through political correctness codes or abusing hate speech legislation to silence dissenting views. Free society is imperiled when the human right to free speech and moral dissent is given insufficient weight, threatening the values of liberty and equality that human rights law is supposed to protect.

Resistance and Divisiveness. It is not surprising that the expansive use of non-discrimination on controversial grounds of sexual orientation discrimination has caused polarization and divisiveness among members of the international community who have begun to push back: "Where there is power, there is resistance."[204]

Religious groups in particular[205] who view the LGBT agenda as a threat to religious and other freedoms have begun to warn against the mainstreaming and presentation of homosexuality as a normal expression of human sexuality (as opposed to morally wrongful conduct or a gender identity disorder). This points to the clash of incommensurate values. An OIC report cautioned against efforts to use the banner of non-discrimination to promote "radical, sexual and gender agendas related to sensitive issues regarding family, family life, or sexuality."[206] It called out agencies who seek to establish "controversial and unagreed[-]upon so[-]called human rights that may compromise or undermine our religious or cultural norms."[207] In the long run, this practice in may do harm to the progressive development of international human rights law, including areas where there is hard-earned, established consensus.

Given the arguments that SOGI discrimination is an attempt to impose radical ideologies that gain little traction within national legal systems through the back door of human rights and that the equation of "sex" and "sexual orientation" is controversial, advocates should draft their own declaration or convention on LGBT rights and put it up for free and full debate and for a vote within the U.N. General Assembly and before states for them to consider ratifying such a treaty. This is preferable to piggybacking on other human rights treaties like the CEDAW or the CRC, which were designed to address other pressing matters. A sexual-orientation-specific instrument would provide the forum for LGBT activists and their state allies to put forth their concerns and demands on their own terms, so that these could be clearly understood, assessed as claims for equal or special treatment, fully and honestly debated, and accepted, rejected, or accommodated.

Recommendations

To maintain the progress in the acceptance and application of human rights globally, it is important that the human rights project not be hijacked by politicized agendas. To be credible, there must be integrity in maintaining the distinction between *lex lata* (law) and *lex ferenda* (soft law, or an emerging norm which has yet to attain legal status). Policymakers can then with confidence work to ensure the observance and protection of 'core' recognized human rights norms, while making

arguments about emerging claims in a transparent, reason-based manner to promote their acceptance as legal obligations.

- **Policymakers should guard against the politicization of human rights** by distinguishing between core human rights and contested human rights claims that are not grounded in international sources of law like treaty and CIL. The opinions of U.N. experts and bodies, while influential, are not binding.

- **Policymakers should adopt a holistic view of rights, duties and goods** as reflected in article 29 of the UDHR, rather than a one-sided balancing process that privileges a certain ideology. The right of "equality and non-discrimination" is not an absolute one and should not be treated as a special trump card against competing human rights and goods. Since moral judgements are impossible to evade, the moral dimension underlying law should be part of the balancing exercise, rather than arbitrarily shutting out other visions of public morality (usually the traditional ones). Ignoring religious views in particularly will cause disquiet and damage the good the entire human rights project can do. Politicizing human rights has already elicited pushback, as human rights standards and obligations cannot be developed by ignoring an important sector of the international community.

- **Policymakers should be vocal about how it is counterproductive to attempt to create controversial new "rights" or standards** by misinterpreting the International Bill of Rights and other international treaties that U.N. member states never articulated or agreed to. Such attempts devalue the currency of internationally recognized human rights.[208] Aggressive lobbying by LGBT rights activists has been polarizing and divisive. Some states do not consider that action that discriminates on the basis of sexual orientation constitutes a legitimate area of human rights concerns[209] and are critical of over-reaching U.N. bureaucrats[210] and their illegitimate project of moral neo-colonialism in sexuality matters.

Varied conceptions of equality, different interpretive methods, and sexual orientation discrimination in national law have been invoked in ways that violate human rights. Therefore, **policymakers should recognize a global margin of appreciation** to respect principles of pluralism, subsidiary and the democratic will of national societies. While some jurisdictions may, for example, recognize same-sex marriage as part of privacy or equality rights, whether based on the democratic views of that society or their courts, policymakers should respect the political independence of other states by letting their societies decide what they wish their social fabric and sense of social morality to be—without external coercion, pressure, or intervention.

Conclusion

Human rights law is not made by the pronouncements of human rights experts or monitoring bodies. Though they wield considerable influence in shaping human rights discourse, they have no authority to impose a moral *diktat* by declaring a controversial political claim to be a legal human right.

Attempting to normalize radical interpretations of existing and established human rights norms like equality and non-discrimination through continually reiterating non-binding opinions as authoritative, complemented by aggressive lobbying, thwarts full and free debate on what should and should not be recognized as a universal human right. To shortcut the process by anointing a claim as a human right is an attempt to place the claim beyond questioning. This abuses "human rights" by using it as an illiberal trump card,[211] embodying a form of moral neo-colonialism in which assertions are to be believed, not argued for and justified by appeal to the "reason and conscience" all human beings have.[212]

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CHAPTER 7

Human Dignity and the Foundations of Human Rights

PAOLO G. CAROZZA

Specifying the content of human dignity is a difficult challenge that needs the rich soil of practical experience, of seeing in practice what does and does not lead to free and flourishing human lives and communities. To till that ground, we should work constantly for a broader common understanding of basic human rights principles forged in the practical agreement among nations and peoples and respectful of legitimate pluralism among them. Our understanding and commitment to universal human rights will grow from a culture that is open to the ultimate questions of value and meaning in human life.

The place of human dignity as the cornerstone of the foundations of the modern human rights project is both self-evident and also highly ambiguous and contested. The Universal Declaration of Human Rights (UDHR) and subsequent international human rights instruments repeatedly invoke human dignity generically as the only consensually identifiable basis from which human rights are derived. And yet, nowhere in human rights law is there any more deeply fleshed-out understanding of what human dignity means, whence it comes, and in what it consists. At best, one could say that the development of the legal norms themselves constitutes a specification of the requirements of human dignity in practice, but even this is subject to significant divergences of understanding and judgment.

This role for human dignity—both essential and problematic at the same time—mirrors the virtues and vulnerabilities of the universal human rights project more generally. Deliberately grounded in a diverse practical consensus rather than in a unified and cohesive intellectual, historical, or cultural vision, human rights intentionally sideline any explicit engagement with natural law or any other philosophical framework.

Nevertheless, the overall legitimacy and long-term sustainability of the human rights project does depend strongly on its claim to correspond to widely universal truths about human flourishing, freedom, the individual, and the community, and the fundamental demands of justice. The claim that I aim to present and defend in this *Special Report* is that the thin intellectual foundations of human rights law require us to turn to more elemental aspects of human experience in order to test and evaluate the persuasiveness of human rights' claim to correspond to universal human needs and desires.

This appeal to the raw experience and practice of human dignity arises out of my perspective as

a legal scholar and as a lawyer formed primarily in the common law tradition of practical reasoning—that is, someone whose central preoccupation is with facts and cases, with the raw material of human experience, and with drawing out of those concrete circumstances certain practical implications regarding the most reasonable way to order our relationships toward justice and the common good.

That methodological starting point is, in fact, an important one for my claim that in critical ways the foundation of law's preoccupation with the protection and promotion of human dignity needs to be forged in the crucible of human experience. It is an argument against treating human dignity as an abstraction, at least insofar as the concept has implications for the legal recognition of human rights. I will conclude by suggesting that relying methodologically on human experience as the touchstone for legal claims of human dignity has certain important implications for how we might structure the law of universal human rights and how we can give content to it.

The Multiplicity of Dignity Claims in Human Rights Law

The very concrete claims of human dignity that are the daily fare of international human rights bodies are as varied as can be imagined. In my own direct experience as a member of one such institution,[1] many dignity claims were powerful and moving: a Peruvian mother whose son had been "disappeared"; Jamaican men kept indefinitely in overcrowded, small, dark, and unventilated police holding cells amid garbage and urine; the leader of a Paraguayan indigenous community whose children were dying from diarrhea because they had no access to clean water. Some claims were far less compelling, such as the man who claimed that he had been subject to degrading treatment because his employer fired him for refusing to cut the long hair that was very important to his personal aesthetic preferences.[2] Still other cases were neither easy nor clear: How does one assess the claims of dignity of an infertile woman who deeply desires to be a mother but was prohibited by law from using the *in vitro* fertilization technology that would have made it possible for her to bear children?

In each of these cases, and in many others very similar to them, the petitioners and their advocates not only made claims that their rights under the American Convention on Human Rights were infringed, but also that their human dignity was threatened or violated. When we examine how legal actors and institutions, using the language and artifacts of law, have responded to this array of different circumstances, we do not find a theoretical discourse on human dignity (at least, not one that is explicit or extended), but rather decisions that have tangible consequences stemming from the choice to recognize and protect certain kinds of claims, or to deny them.

As an extensive existing literature on human dignity and human rights has made abundantly clear, the pervasive invocation of the concept of human dignity today is accompanied by a wealth of different ideas about the meaning and scope of dignity within the plurality of moral and legal traditions of the human family. Those differences can be profound and can have dramatically different implications for how we understand and protect dignity in law, as even a very compressed comparative survey of contemporary law reveals.[3]

Interrelated Ideas. At a very high level of generality, one can find human dignity invoked across legal systems of widely divergent traditions to denote two interrelated ideas: (a) an ontological claim that all human beings have an equal and intrinsic moral worth; and (b) a normative principle that all human beings are entitled to have this status of equal worth respected by others and also have a duty to respect it in all others.

The normative principle includes within it the obligations of the state to respect human dignity in its law and policy as well. Based on this core common meaning of human dignity, there is broad consensus across legal systems that certain ways of treating other human beings ought always to be prohibited by law. Prohibitions on genocide, slavery, torture, forced disappearance, and systematic racial discrimination, for instance, represent some important examples of universal acceptance of the implications of the status and basic principle of human dignity. It is not surprising that in international human rights law, many of the clearest instantiations of the requirements of human dignity also coincide with the strongest and

exceptionless norms of international law, found, for example, in the definitions of crimes against humanity or *jus cogens*.[4]

In the same way, the most widespread and evident use of dignity in human rights adjudication can be found in cases dealing with the protection of life itself and the integrity (physical or mental) of human persons. Cases are legion in which inhuman and degrading treatment is found to violate the inherent dignity of the victims, and references to the requirements of human dignity pervade the case law of virtually all systems in these areas.[5]

Beyond that core meaning of human dignity, legal experience reveals several areas in which the meaning and use of dignity has less universal resonance, but still fairly broad recognition and acceptance across several different legal traditions and systems. For instance, in many different jurisdictions, courts discuss dignity as a value central to the definition and protection of individuals' social status and social roles.

The German and South African Constitutional Courts have fined authors and publishers or even banned books because, although presented as works of fiction, they shared too many details about a particular individual's private life, in violation of his or her dignity.[6] French courts frequently require newspapers to pay damages after they publish stories or photographs about individuals without respect for their dignity.[7] This conception of dignity is not quite universal, however, and seems to be primarily employed within European courts and associated with the distinctively European conceptions of privacy (which are often quite different from those prevalent in the U.S., for instance).

Another group of cases shows that certain courts employ dignity to address the sweeping conditions that shape the lives of entire communities living in poverty and extreme vulnerability. One sees this developed very clearly in the Inter-American human rights system's cases on the "right to a dignified life" of indigenous peoples[8] or in the Constitutional Court of South Africa's decision requiring the government to devote substantial resources to developing and carrying out a plan to progressively realize the right to adequate housing.[9]

Such situations involving the dignity of excluded groups are also related to the use of human dignity in cases invoking equality as necessary to the respect for human dignity in general. Based on the proposition that all people are inherently and equally entitled to human dignity, this view, especially developed in Canadian jurisprudence, has become common in South Africa and can be found in some other jurisdictions as well.[10]

Human Dignity and Individual Autonomy. The partial overlap of understandings of dignity in these several areas gives way to even greater disagreement as we approach those questions that touch on fundamentally contested visions of the meaning and destiny of human life—especially the meaning and nature of individual freedom. At some level, almost all jurisdictions wrestle in complicated ways with the right relationship of dignity to autonomy, but there is no clear consensus in legal practice—even within single legal systems, let alone across different traditions. From one perspective, human dignity clearly demands protection of individual autonomy. For instance, many jurisdictions ground the autonomy of patients to make free and informed choices about their medical care in human dignity,[11] and a government that does not respect people's liberty and agency to direct their own lives in fundamental ways can thereby violate their dignity.[12]

Yet, in contrast to that use of dignity, which empowers people to make free choices, dignity also plays a role in empowering government to *limit* the personal choices of their citizens. The French prohibition on dwarf-throwing is the most famous example of this,[13] but others abound. In Germany, a prohibition on peep shows has been found to be a valid protection of the human dignity of the (consenting) women being exhibited,[14] while the South African Constitutional Court upheld a ban on prostitution because the commodification of one's body necessarily diminished the human dignity of the prostitutes.[15] At times, this internal contradiction in the relationship between dignity and autonomy manifests itself dramatically. Even when safeguarding the dignity of having free choices, law frequently tempers autonomy by placing some restrictions on those choices that may be necessary to safeguard the dignity of others.[16]

At, or even beyond, the furthest margins of consensus over dignity, we find cases in which different courts (and, indeed, different judges within

the same court) rely on human dignity to come to two entirely different conclusions even when dealing with strongly similar situations. Some of the most obvious examples include cases surrounding the beginning and end of human life—abortion, euthanasia, or assisted suicide.

In short, there is a practical consensus around a core meaning of human dignity; lesser but discernible convergences of understanding around a cluster of key questions, values, and circumstances that are related to dignity; and some sharp disagreements (and even contradictions) that reflect not only the variety of intellectual and moral traditions in which the concept has its roots but also differences in the specific political, social, and cultural contexts in which the very broad principle becomes instantiated. Probably the most persistent tensions have to do with those cases that inescapably deal with the relationship between dignity and competing notions of individual freedom, as well as with arguments about who counts as a human being with equal and inherent moral worth (e.g., the unborn or the terminally ill).

The Essence of Dignity. A problem then arises from the fact that the label "dignity" gets used so broadly that it elides the differences between the core areas of practical agreement and the (sometimes intensely) disputed uses of dignity at or beyond the margins of practical consensus. That ambiguity is what allows use of the normative principle of human dignity to be so vulnerable to charges of inconsistency and incoherence—and even to ideological manipulation.

While for many people the term "dignity" might immediately evoke a classical natural law understanding of the nature and destiny of human life, in fact, in its many usages it does not necessarily carry that natural law context with it at all. Instead, it can tacitly reflect any one of a wide variety of particular views of human nature and human fulfilment that may even be incompatible with one another; say, the difference between a neo-Kantian emphasis on radical individual autonomy, a Judeo-Christian vision of human freedom as intrinsically oriented toward relationship with others, or a concept of dignity in which the individual is entirely subsumed into the value of the collective.

Thus, arguments based on an unelaborated assertion of "dignity" simply mask those underlying differences. In this way, whether intentionally or only passively, the language of dignity can become a vehicle for the surreptitious imposition of one profoundly contested vision of human nature and human destiny over another—and cannot automatically be assumed to be consonant with classical natural law concepts.

Practical Consensus and the Unfinished Business of Foundations. That dynamic, well-documented and extensively discussed for decades now, brings us to an impasse. How can we arrive at a more widely understood and shared conception of dignity, such that we can broaden the ways in which the law becomes a tool for protecting and realizing it, without running aground on the rocks of incommensurable moral and intellectual premises? We seem to be lacking the capacity to move forward.

We might be tempted to conclude that dignity as a legal concept is either trivial (in the sense of being so self-evident and undisputed that it adds nothing to the discussion—say, in the case of torture or slavery) or else so irreconcilably contested as to be useful only within very circumscribed and homogenous communities of discourse, if at all. If so, it might be better simply to reject it as vacuous, quite dangerous, or both.[17]

Human Dignity: Indispensable to Human Rights

If we take that road, though, in reality we are also rejecting the good and important functions of the status and principle of human dignity noted earlier. The ontological claim of human dignity helps sustain the very possibility of human rights as global principles that can and should help us condition sovereignty and hold accountable those who abuse power, especially the power of the state.

Human dignity represents the ideal that there is a certain existential unity to each human being, as a subject of rights, in which conflicting claims of rights need to be balanced and reconciled. The recognition of the equal and inherent worth of all human beings is, today, the only widely shared supra-positive value by which positive law and legal systems worldwide are reasonably judged and critiqued. In short, without a commitment to the idea of human dignity, human rights law as it has been painstakingly constructed over the past 70 years would not exist.

This reminder of the connection of human dignity to the foundations of human rights law in general might also begin to suggest a way to step beyond the impasse. We find there a strong parallel between the problem of human dignity and a structural problem at the origin of international human rights law itself. To draw this out, we can first recapitulate very briefly two well-established premises about contemporary international human rights.

Premises of International Human Rights. First, at a conceptual level, universal human rights, in a way that is not dissimilar to what we see with human dignity, is not a single coherent idea, but represents the intersection of a variety of different traditions of thought, which in various degrees have overlapping commitments and in other ways have mutually incompatible premises—especially premises about the nature and destiny of the human person.[18] This deep divergence of foundational premises was, of course, recognized from the beginning of the attempt to forge an international agreement on human rights in the mid-twentieth century, but (and here is the second of the background features of human rights that needs to be highlighted) the whole international human rights project was constructed on the basis of a deliberate abstention from strong agreement about foundational principles.

The generation of jurists, scholars, and politicians who drafted and secured approval for the UDHR knew very well that they all came to the discussion with profoundly divergent first principles.[19] The basis for their consensus on a declaration of basic human rights was not a substantive agreement about their intellectual foundations nor the discovery of a new transcendent and transcultural global ethic that unified them. Rather, their project was based on a more modest and limited aim: to reach a practical consensus on the articulation of human rights while setting aside the goal of attaining any thicker consensus about where those rights come from and why we should regard them as pertaining to human persons. The human rights enterprise is built on practical agreement, *tout court*.

When asked how it was possible that adherents of such radically opposed philosophies could reach agreement on a declaration of fundamental rights, Jacques Maritain—a Catholic, Thomist philosopher, and diplomat who was heavily involved in the adoption of the Universal Declaration of Human Rights—liked to say, "Yes, we agree about the rights, but on condition that no one asks us why. It is with the 'why' that all the disagreements begin."[20] Maritain and his colleagues did not regard this lack of consensus on foundations as fatal to the project. The fact that an agreement could be achieved across cultures on several practical principles was "enough," Maritain wrote, "to enable a great task to be undertaken."[21]

And, in fact, in the subsequent history of the human rights movement, that practical consensus has allowed for the construction of an impressive human rights edifice. Because we have broad agreement on a basic list of rights, the human rights movement has largely been able to focus on the practical work of "translating" those moral principles into positive legal norms, formal international and constitutional instruments, and an institutional system—and then to focus on the practical work of securing universal agreement to all of that among the community of nations.

Measures of Success. This approach has had enormous success by many important measures. The crisis of humanity represented by the totalitarian movements of the 20th century and their violation of the most fundamental principles of justice and dignity on a massive scale made clear the need to articulate certain universal basic principles of accountability. The genesis of the international human rights movement thus did respond to a genuine and profound human need and desire, and the strategy of practical agreement allowed a response to that need to emerge.

Today, in consequence, there exists a certain core of rights that are basically recognized and accepted across a broad array of different political, economic, religious, and cultural realities, regardless of concurrent differences in any theoretical justification of them. There are national, regional, and global institutions whose work is sincerely, sometimes influentially, directed toward promoting and protecting those fundamental rights, regardless of the divergent traditions to which they are being applied.

A Practical Consensus? What does all this imply for the possibility of moving forward in building a common understanding of human dignity? One

immediately evident conclusion is that the arguments and difficulties about dignity are nothing other than the replication at a more general level of the foundational questions that are at the heart of the human rights project.[22] Human rights instruments bracket foundational questions, but universally invoke human dignity as a generic placeholder for the something that gives human rights a deeper justificatory source.[23] But that only ensures that the underlying disagreement is semantically shifted from the foundation and meaning of human rights to the foundation and meaning of human dignity.

If it is true that we are facing the same structural problem, should we adopt a structurally analogous strategy to address it? Should there be (for purposes of law) a limited focus on whatever practical agreement can be identified around the principle of human dignity, abstaining from engaging and deploying more fully theorized accounts about the status of dignity, where it comes from, and in what it consists?

There is some merit in that proposal, and it begins to get at what I am trying to suggest in saying that we need to turn to concrete human experience in order to gain a fuller understanding of the meaning and implications of human dignity. One could even imagine that it might generate a great deal of constructive convergences in those areas in which there are already the conditions present for a fairly large overlap among various understandings of dignity—the relationship of the principle of dignity to the need to protect persons from all forms of cruel, inhuman, and degrading treatment, for example.

But it is not yet enough. The strategy of practical consensus of Maritain and his contemporaries, for all its outward success, also suffers from some serious weaknesses and limitations. In fact, we can point to a number of persistent problems with the international human rights project that are all traceable in some degree to the thinness of the practical agreement on which it rests.[24]

It contributes to the wide and enduring gap between the formal international legal norms and instruments of human rights law, on the one hand, and the local social, political, and cultural realities in which they are supposed to be operative in practice on the other. It also ignores the fact that positive law (that is, the laws made by human actions, including statutes, treaties, and judicial acts, all of which may or may not reflect and embody higher principles of justice and natural law) alone, without deeper ethical and cultural sources within a society, is insufficient to sustain the relationships of justice and solidarity[25] and commitments to the common good to which we aspire. Both of these reasons contribute in some important degree to the very high degrees of noncompliance that we find in virtually all systems of international human rights law.

Third, the absence of greater substantive agreement about the sources and meaning of human rights has left a vacuum that has often been filled by bureaucracy and proceduralism.

Finally, and most importantly, in the end it is impossible to avoid, at least passively, making judgments and decisions on the basis of the deeper and more contested premises about the nature of the human person and the meaning of human life. Acknowledging practical agreement alone only obscures the deeper differences that, in fact, persist. Whenever we are faced with difficult judgments about the existence or recognition of a human right, its extension into new spheres, its relationship to other rights, its permissible limitations, etc., we are implicitly relying on any number of prior assumptions about the person, society, the state, freedom, law, and so on. Bracketing the underlying assumptions does not make them disappear; it only makes them less transparent, and therefore less subject to reasoned discussion and debate.

Maritain and his contemporaries knew this, and, in fact, acknowledged clearly that consensus around a limited set of practical principles did not obviate the more difficult task of seeking greater common understanding of the underlying reasons and foundations of human rights. The strategy of practical agreement, the philosopher Richard McKeon stressed, would merely provide a "framework within which divergent philosophical, religious, and even economic, social and political theories might be entertained and developed."[26]

In other words, for the drafters and intellectual supporters of the Universal Declaration, the focus on practical agreement on principles and institutions was merely a method for moving beyond the

roadblock of incommensurable premises. It was not presumed to be a sufficient permanent basis for the recognition and protection of universal human rights. Instead, it was to be a provisional and partial overlap of commitments on the basis of which we would need to work (hard!) toward a deeper understanding of the basis of that practice. At best, the effort to reach practical agreement was a method to provoke, to force open a more vital debate about the foundations too.

Turning back to the present predicament of human dignity, then, what can we conclude on the basis of seven decades of experience pursuing a strategy of limited practical consensus on universal human rights? Focusing on our concrete human experiences of human dignity and the convergences that we can find there might be a very fruitful way forward; not, however, merely as a way of seeking practical agreement while setting aside the deeper and more difficult task of seeking a common substantive understanding of the meaning and requirements of human dignity. Focusing on our human experience of dignity cannot be the end point of our efforts but must rather be the *beginning* of a sustained and critical method of reasoning together, about which understanding of dignity, among the many deeply divergent approaches, corresponds best—which is to say most completely, most universally, most reasonably—to the reality of human life in all its complexity.

Appealing to Elementary Human Experience. What is needed, then, is not only a focus on our shared concrete human experience of dignity but a focus that opens up the possibility of critical reasoning about how that experience of dignity deepens our understanding of what it is to be human, to have value, or, most to the point, to have a common, irreducible, and universal value as human persons. Taking up the suggestion of Luigi Giussani, founder of the international Catholic movement Communion and Liberation, this sort of shared and critical experience could be called "elementary experience."[27]

As Giussani explains:

> What constitutes this original, elementary experience? It can be described as a complex of needs and "evidences" which accompany us as we come face to face with all that exists. Nature thrusts man into a universal comparison with himself, with others, with things, and furnishes him with a complex of original needs and "evidences" which are tools for that encounter. So original are these needs or these "evidences" that everything man does or says depends on them....
>
> The need for goodness, justice, truth, and happiness constitutes man's ultimate identity, the profound energy with which men in all ages and of all races approach everything, enabling them to an exchange, of not only things, but also ideas, and transmit riches to each other over the distance of centuries. We are stirred as we read passages written thousands of years ago by ancient poets, and we sense that their works apply to the present in a way that our day-to-day relations do not. If there is an experience of human maturity, it is precisely this possibility of placing ourselves in the past, of approaching the past as if it were near, a part of ourselves. Why is this possible? Because this elementary experience, as we stated, is substantially the same in everyone, even if it will then be determined, translated, and realized in very different ways—so different, in fact, that they may seem opposed.[28]

This "complex of needs and evidences" characterizes what is irreducibly human in all of us, what moves us to act, and what propels us into a dynamic relationship with all of reality. It is something more basic, more fundamentally constitutive of our humanity than any of the multitude of specific cultural artifacts (including law) could be. It is part of what we presuppose, even unconsciously, whenever we say "I" in a serious, self-aware way.[29]

Elementary Experience. There is much more to be said to develop and unpack that concept than I could do justice to here, but let me be quick to say what the appeal to elementary experience is *not*. It is not a new anthropological theory or a new theory of law or natural law; it is not a set of moral precepts to order human affairs; it is not a generic idea

of humanity. It is something distinct from (even if inevitably related to) both theory and culture, and it inheres in the human being as a fact. It is a form of experience of what is human in which the evidence that we run up against thrusts us into a comparison with our own needs and desires, our own nature, our "I."[30]

This is not to suggest, of course, that elementary experience is not translated inevitably into judgments, theories, and values—and together with other persons translated also into cultural projects, including law. But the connection to law must not be "short-circuited," as Carmine Di Martino, professor of Philosophy at the University of Milan, has written: "We have to avoid the short circuit between the list of fundamental rights and the universal structure of experience. The irreducibility of the latter, continuously sought after by reason in an indomitable attentiveness to experience, necessarily demands a critical vigilance, even in the face of so-called universal rights."[31]

Or to put this point in another way, despite the way that we talk about the universality of human rights, it is not really the *rights* that are universal so much as the *human* that is, and the universality of rights follows from the prior universality of the human.[32] But the meaning of human here is not based on the abstract definition or some *a priori* anthropological or metaphysical claim. It is not, therefore, derived from a prior theory of natural law (although the observation of the universality of elementary human experience might very well be the basis on which to begin to construct and to verify the existence of natural law). Our awareness of what is human emerges in experience, an experience capable of a critical judgment of what corresponds to what is irreducibly human—that is, in elementary experience.

And so it is with dignity, then: The meaning of dignity, if not consigned to the fragmented and incoherent babel of approaches that we see about us, if not reduced to whatever the conventional mentalities of the day impress upon us, if not blocked by the schematic opposition of conflicting theories and ideological prescriptions, has to emerge first from an encounter with what is most elementary to our humanity, an encounter that educates us to see in ourselves and in the other what is the worth, the value, the dignity of the human.

To bring this back to concrete cases, let me illustrate the method of elementary experience for a few moments by reference to some of the same real-life examples of dignity claims mentioned in passing at the outset of this chapter, and by reference to the way that I, as a human subject, related to them. All of those cases—the mother of the disappeared, the indigenous leader, the infertile woman seeking help—presented me with the challenge of trying to grasp and enter into not just the technical questions of how the treaty norms might or might not apply to the case in question. More than that, they posed the challenge of how to enter into the human dimensions of the problem. What was I supposed to say to a woman whose son had disappeared, whose heart was crying out for justice, or to the woman who came to us out of the anguish of not being able to satisfy her desire to bear a child?

Clearly, I could not pretend to be able to satisfy their needs in any real or comprehensive sense. How could I even begin to understand the dimensions of the problem of the indigenous people of the Chaco, deprived of the basis of their cultural integrity and reduced to raising their children in a narrow strip of dry earth between the highway and the barbed wire that kept them out of their ancestral lands? Before being legal problems, these were all problems that demanded a deep sympathy, not in a trite, sentimental sense, but in the sense of recognizing in the suffering of these people the authenticity of their desires and seeing in it the evidence of a universal need in which one becomes aware of the constitutive factors of one's own self as well as of the humanity of the other.

In other words, the recognition of their human dignity emerged as elementary experience. Even more illustrative of this dynamic was the stark contrast elicited by a visit to the Jamaican police holding cell (to which I referred earlier) that was immediately followed by a visit to a residential community run by the Missionaries of the Poor, a religious order. In this residential community, the brothers care for some of the most despised and outcast members of Jamaican society: people suffering from AIDS (typically in advanced stages of the syndrome's development) and acutely disabled children.

The first group are rejected by society not only for the virus they carry but also because they are

automatically presumed to be gay in a society rife with hatred and violence against homosexuals. In fact, we documented instances in which the police stood by and watched as gays were beaten and their homes destroyed. The second group consisted of children whose physical deformities and mental handicaps were so severe that it was difficult not to avert one's eyes. What made a simple gaze on the lives of all these residents possible for me was seeing the exceptional love, care, attentiveness, and even joy that the brothers, the volunteer doctors, the AIDS patients, and the children so evidently shared with one another.

The contrast with the environment in the jail, which we had visited just an hour earlier, was staggering: There, men were herded together, standing in garbage and urine. Here, everything was treated with care, with attentiveness to beauty, with tranquility. Both, in vividly contrasting ways, constituted the awareness of the meaning of human dignity for me: the first, in which I could not fail to be struck by the blatant denial of the most elemental humanity of these ordinary men; the second, in which I could not help but be moved by the human love that affirmed the inestimable value of each and every single one of the lives in the brothers' care, even those widely despised and rejected by the larger society around them.

Lessons of Elementary Experience. What lessons can be drawn from all that? First of all, human dignity, as the fruit of the method of elementary experience, is primarily something that is discovered, not something deduced from a theory or from an intellectual or ontological premise. It is something concretely encountered in an Other, a You, and recognized in oneself. And it emerges in particular in relationships of solidarity, of compassion (in the etymological sense), of gratuitousness. It is subjective, in the sense of inhering always in an embodied "I" rather than in a disembodied discourse, yet it is in no way a relativistic thing: It is a hard fact. It is given, not made.

Can that elementary experience of the dignity of another (and of myself), with its inherently intimate relation to the particular human subject, also form the basis of a broader approach to dignity in law? In a way, focusing on the roots of our experience of dignity has moved us back toward the origins of law rather than removing us from relevance to law. Law, as a cultural practice that addresses and helps to realize certain basic human goods, draws on and responds to something that comes before it. Thus, the method of elementary experience, as a way to comprehend and verify the meaning and implications of human dignity, certainly has relevance to the way that law ought to be structured to reflect and protect human dignity and gives us a possible way to evaluate the law's effectiveness in securing that dignity. But, remembering Di Martino's cautionary observation cited earlier, we must not short-circuit the path from human experience to law, still less to specific rights and responsibilities.

Even in the cases cited, the clear recognition of the ways in which the *status* of human dignity is indeed at stake, which allows us to enter into an important reflection on the right way to instantiate the *moral principle* of respect for human dignity, does not take us so far as to determine in any clear and unambiguous way how those cases ought to be decided as a matter of positive law. What kind of reparations should be due to the mother of the disappeared? Should the state be held directly responsible for the material conditions of the indigenous communities of the Chaco and the deaths of the children there? Does a recognition of the authentic expression of human dignity in the desire for biological motherhood necessarily mean that access to new reproductive technologies is the right response, even when other human lives in embryonic form may be put at grave risk of instrumentalization and destruction?

There are obviously several steps of reasoning and many prudential judgments that must be undertaken before getting from the experience of an authentic claim of human dignity to the formal way in which human rights law should recognize and protect it. For this reason, I emphasized earlier that the method of elementary experience does not itself propose, or even lead directly to, any specific theory of law, old or new.

Recommendations

At a macro level, the method of drawing from human experience could have at least a few fairly direct implications for how we treat human dignity in law.

- **The international law of universal human rights ought to seek, foster, and build on the existence of a practical consensus around the status and principle of human dignity.** This should be undertaken just as Maritain and the generation of 1948 did in the forging of the Universal Declaration of Human Rights. That consensus would look to the concrete experience of human dignity shared across broadly diverse expressions of human culture—political, historical, linguistic, religious, etc. Policymakers should seek to anchor international norms on the solid basis of those good aspects of human communities that are widely held in common. In this way, international human rights would tend overall toward advancing a real and universal human good, rather than an abstract and particular ideological agenda. This would also tend to generate a stronger and more effective law due to greater social legitimacy across a range of different social contexts. Human rights would be, and would be perceived to be, less tied to one culturally specific language and practice of dignity and rights.

  That is not to downplay the role that dignity should play in grounding human rights. It is worth reiterating a point made earlier in this essay: The core universally recognized meaning of human dignity is still a powerful and important instrument, even if that core is relatively small. It is enough to enable us to justify and pursue the protection of an essential range of fundamental human rights, including those rights whose violation afflicts the great majority of the billions of individuals currently living under conditions of oppression and violence.

- **Policymakers should be very cautious and restrained in the use of the concept of dignity in the law in ways that generate new rights or aggressively new understandings of rights.** The risk is high that these are not reflections of shared experience, but instead assertions of contested, culturally contingent, and often ideologically charged theories of dignity. I do not mean that our collective understandings of human dignity and its requirements are static and will not or should not change. On the contrary, an openness to the universality of human experience will be likely, over time, to continue to generate new ways of thinking about and addressing human rights violations, especially as new threats to human dignity arise—just as humanity's experience of grave violations of human dignity in the past (the international slave trade, the Holocaust, the gulags) has led to important new developments in the recognition and protection of human rights. But the dynamic expansion of rights is a delicate matter and ought not outstrip our reflective capacity to ensure that there is indeed a broadly and deeply shared understanding of the underlying dignity claims at stake. We need to develop clear and broadly consensual criteria for when new claims of human rights make sense, and when they stretch beyond the boundaries of our best collective reflections on the meaning and scope of human dignity.

- **When there are significant and passionately held disagreements over the meaning and implications of dignity among the peoples of the world, that is good reason to pause, assess, reflect, and debate.** Rather than ignoring and closing off further discussion of the disagreement, policymakers should instead use disagreement as a provocation to break open the discussion about the meaning and consequences of dignity. In other words, it is entirely good and right that public discourse, national and global, should engage in serious and sustained debate about dignity, seeking always to ground it in fact and experience, and asking what most genuinely corresponds to the most original needs and evidence of our common human nature. This, however, is activity more proper to the realms of education and of democratic politics—where debate and persuasion are key—than to the law's binding obligations and coercion.[33]

- **As a matter of *law* in such circumstances, when there is not a strong practical agreement on the requirements of human dignity grounded in concrete experience, policymakers should adopt a generous pluralism of understandings across cultures and legal systems.** In judicial contexts, this could include a healthy "margin of appreciation"

given to states in many contexts. But pluralism has to extend beyond courts and judges to the structure of the international order as a whole. Otherwise, the danger of a hegemonic imposition through global institutions of one idea of dignity (invariably that of the richer and more powerful actors and elites in the international space) is great. We should protect the conditions for a rich and pluralistic discourse on questions of human dignity, thus protecting the integrity of diverse ways of life and forms of human culture and community.

A variety of practices of contemporary international human rights institutions could be called into question on those grounds of legitimate pluralism among states. Consider, just to provide one among many examples, some of the work of the United Nations Human Rights Committee, the supervisory organ created by the International Covenant on Civil and Political Rights. According to the committee's (non-binding, but influential) interpretations of the covenant, international human rights law requires Poland to provide more sexual education to schoolchildren, requires the United States to abolish the political tradition of many states that require judges to be elected rather than appointed, requires Chile to end the state's special relationship with the Roman Catholic and Orthodox Christian churches, and requires many states worldwide to loosen their restrictions on abortion.

Any of these neuralgic issues certainly merits serious democratic debate and decision-making within the countries in question. But that does *not* mean that international law should override the freedom and integrity of local communities to make certain fundamental choices about the way they understand proper relationships of political morality.

- **Policymakers should advocate for a proper regard for the relationship between national sovereignty and human rights.** This respects pluralism in the practical realization of the idea of dignity at the broadest level. Rightly understood, sovereignty is not inconsistent with the idea of universal human rights. On the contrary, as emphasized in the recent report of the U.S. State Department's Commission on Unalienable Rights:

> [N]ational sovereignty serves as the condition for human rights because it is typically at the level of the national political community that a people can best protect human rights. Human rights…require nation-state actors with the independence, capacity, and authority that allows them to take responsibility for defending human rights. Through their laws and political decisions, nation-states are the main guarantors of human rights. State sovereignty is not an alibi for neglecting or abusing human rights. Rather, sovereignty underlines the dependence of human rights on political order. When a state asserts sovereignty as an excuse for committing or failing to address rights violations, the problem is not with the idea of sovereignty but with flawed exercises of it.[34]

- **Similarly, respect for legitimate pluralism in the realization of universal human rights entails a strong normative preference for democracy.** Policymakers should pursue policies and reforms that favour the emergence and stability of democratic polities. And when decisions about the scope and details of rights—especially in those circumstances involving the complex harmonization and reconciliation of a variety of competing rights claims in a constitutional system overall—are made through institutions that have high degrees of democratic legitimacy, that is an important factor to take into account in considering where to defer to local authority and local decisions.

- **Policymakers should respect the principle of subsidiarity.**[35] Subsidiarity structurally recognizes and protects legitimate forms of pluralism by making international human rights law strictly subsidiary to the primary responsibility of each state to realize and protect the human rights of all those subject to its authority. That is, the aim of international human rights systems is to assist the realization of the common good in national and other *smaller, primary*

communities by addressing those problems that cannot reasonably be fulfilled by the several states acting on their own. Subsidiarity should guide the allocation of responsibility or guaranteeing of human rights among national law and international law.[36]

- **Policymakers should have a special regard for the role that religious freedom, religious pluralism, and interreligious dialogue play in generating the necessary conditions for the emergence of common understanding.** This will contribute to the building up of a thicker and more genuinely shared experience of human dignity among all parts of the human family.

Conclusion

All human beings share in common a fundamental, inherent, and equal value as human beings, solely by virtue of being human and not because of any contingent positive laws or consensual agreements or political commitments and compromises. That core human dignity is the foundation without which the idea universal human rights is just an illusion, subject to every change of political winds.

But specifying the content of human dignity is a difficult challenge that cannot be achieved just on the basis of theoretical speculation. It needs also the rich soil of practical experience, of seeing in practice what does and does not lead to free and flourishing human lives and communities. To till that ground, we should work constantly for a broader common understanding of basic human rights principles forged in the practical agreement among nations and peoples and respectful of legitimate pluralism among them. Our understanding and commitment to universal human rights will grow from a culture that is open to the ultimate questions of value and meaning in human life.

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ENDNOTES

Returning to First Principles on Human Rights

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1. Lebanese diplomat Charles Malik, who succeeded Eleanor Roosevelt as the Human Rights Commission's chair, said that "the doctrine of natural law is woven at least into the intent of the Declaration. Thus it is not an accident that the very first substantive word in the text is the word 'recognition': 'Whereas recognition of the inherent dignity and of the equal and inalienable rights, etc.' Now you can 'recognize' only what must have been already there, and what is already there cannot, in the present context, be anything but what nature has placed there. Furthermore, dignity is qualified as being 'inherent' to man, and his rights as being 'inalienable,' and it is difficult to find in the English language better qualifications to exhibit the doctrine of the law of nature than these two." Habib Malik, ed., *The Challenge of Human Rights: Charles Malik and the Universal Declaration* (Oxford: Charles Malik Foundation, 2000), pp. 161–162.
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How "Collective Human Rights" Undermine Individual Human Rights

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56. United Nations General Assembly, "United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas," December 17, 2018, https://undocs.org/en/A/RES/73/165 (accessed March 28, 2020), and United Nations General Assembly, "Official Records," A/73/PV.55, December 17, 2018, pp. 24 and 25, https://undocs.org/en/A/73/PV.55 (accessed March 28, 2020).
57. United Nations Office of the High Commissioner for Human Rights, "Country Mandates," https://spinternet.ohchr.org/_layouts/15/SpecialProceduresInternet/ViewAllCountryMandates.aspx (accessed April 3, 2020).
58. Thematic mandates address specific human rights issues wherever they may occur, as opposed to country mandates, which focus on human rights within a specific country.
59. United Nations Office of the High Commissioner for Human Rights, "Special Procedures of the Human Rights Council," https://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx (accessed April 2, 2020).
60. Ibid.
61. See Jack Donnelly, *International Human Rights in Theory and Practice* (Cornell, NY: Cornell University Press, 2003), pp. 23–27; James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), pp. 256–276; James Nickel, *Making Sense of Human Rights* (New York: Wiley, 2007), pp. 163–167; and Wiktor Osiatyński, *Human Rights and their Limits* (Cambridge: Cambridge University Press, 2009).
62. "The stranger who resides with you shall be to you as one of your citizens; you shall love him as yourself, for you were strangers in the land of Egypt." (Lev. 19:34), The Torah (Philadelphia, PA: Jewish Publication Society of America, 1962).
63. Sir Roger Scruton, "Nonsense on Stilts," prepared for a conference on human rights in London, 2011, http://www.morec.com/scruton/nonsense.html (accessed March 28, 2020).
64. Emma Buxton–Namisnyk, "Does an Intersectional Understanding of International Human Rights Law Represent the Way Forward in the Prevention and Redress of Domestic Violence Against Indigenous Women in Australia?" *Australian Indigenous Law Review*, Vol. 18, No. 1 (2014–2015), pp. 119–137.
65. Peter Berkowitz, "Liberal Education as an Antidote to Identity Politics," Real Clear Politics, November 25, 2018, https://www.realclearpolitics.com/articles/2018/11/25/liberal_education_as_an_antidote_to_identity_politics.html (accessed March 28, 2020).
66. Addison Del Mastro, "How Today's Concept of 'Human Rights' Breeds Identity Politics," *The Federalist*, July 5, 2018, https://thefederalist.com/2018/07/05/todays-concept-human-rights-breeds-identity-politics/ (accessed March 28, 2020).
67. Rhodes, *The Debasement of Human Rights*, p. 114.
68. Clifford Bob, "Introduction: Fighting for New Rights," in Clifford Bob, ed., *The International Struggle for New Human Rights* (Philadelphia, PA: University of Pennsylvania Press, 2009), p. 1.
69. Ibid., p. 8.
70. European Parliament, Directorate-General for External Policies, "Expansion of the Concept of Human Rights: Impact on Human Rights Promotion and Protection," March 2018, http://publications.europa.eu/resource/cellar/e00aec1e-3c81-11e8-b5fe-01aa75ed71a1.0001.02/DOC_1 (accessed March 28, 2020).
71. Ibid.
72. U.N. Office of the Secretary General, "In Larger Freedom: Towards Development, Security and Human Rights for All," May 26, 2005, https://www.un.org/en/events/pastevents/in_larger_freedom.shtml (accessed March 28, 2020).
73. Olivia Enos, "Codifying Religious Freedom as a U.S. Foreign Policy Priority," Heritage Foundation *Backgrounder* No. 3458, December 13, 2019, https://www.heritage.org/global-politics/report/codifying-religious-freedom-us-foreign-policy-priority.
74. U.S. Department of State, "Ministerial to Advance Religious Freedom: Potomac Plan of Action," July 24–26, 2018, https://www.state.gov/wp-content/uploads/2018/12/Ministerial-to-Advance-Religious-Freedom-Potomac-Plan-of-Action.pdf (accessed March 28, 2020).

Human Rights: In Our Own Hands

JEREMY A. RABKIN, PHD

1. John Quincy Adams, "Speech on Independence Day," July 4, 1837, https://teachingamericanhistory.org/library/document/speech-on-independence-day-2/ (accessed March 13, 2020). The statesmen of the Founding era generally spoke of "natural rights," which might imply that these rights are fixed in their reach by nature (or the authority described in the Declaration as "Nature's God"), but Adams uses "human rights" interchangeably with "natural rights."
2. Alexander Hamilton, *The Federalist* No. 15, https://avalon.law.yale.edu/18th_century/fed15.asp (accessed March 13, 2020).
3. Alexander Hamilton and James Madison, *The Federalist* No. 19, https://avalon.law.yale.edu/18th_century/fed19.asp (accessed March 13, 2020).
4. George Washington, "Farewell Address," September 19, 1796, in *Washington: Writings* (New York: Library of America, 1997), p. 974.
5. John Jay, *The Federalist* No. 64, https://avalon.law.yale.edu/18th_century/fed64.asp (accessed March 13, 2020).
6. James Madison, *The Federalist* No. 43, https://avalon.law.yale.edu/18th_century/fed43.asp (accessed March 13, 2020).
7. *Belgium v. Spain* (Case Concerning Barcelona Traction, Light and Power Co.), 1970 ICJ 3, paras. 33 and 34.
8. Most of the time, of course, the Security Council is stymied by the exercise of (or threat to exercise) a veto, which the five permanent members (the United States, the United Kingdom, France, Russia, and China) all possess. The council has authorized military response to aggression only against North Korea in 1950, Saddam Hussein's Iraq in 1990, and Al-Qaeda in Afghanistan in 2001. It did authorize a humanitarian intervention against the threat of mass murder in Libya in 2011 but has not done so since then. The U.N. Charter authorizes the Security Council to act against "aggression" and "threats to the peace" but not against violations of human rights.

9. Hamilton, *The Federalist*, No. 15.
10. Universal Declaration of Human Rights, proclaimed in Paris, France, by the U.N. General Assembly as General Assembly Resolution 217 A, December 10, 1948, https://www.un.org/en/universal-declaration-human-rights/ (accessed March 13, 2020).
11. Ibid. The language invites comparison with its biblical precursor, *Deuteronomy* 6:6: "thou shalt teach [these words] diligently unto thy children, and shalt talk of them when thou sittest in thine house, and when thou walkest by the way...."
12. The quasi-religious awe promoted by many human rights activists was criticized by Michael Ignatieff, a human rights advocate himself (and Liberal Party leader in Canada before Justin Trudeau), in *Human Rights as Politics and Idolatry* (Princeton, NJ: Princeton University Press, 2001).
13. Constitution of the United States, Art. VI, cl. 3.
14. Universal Declaration of Human Rights, Art. 24.
15. International Covenant on Civil and Political Rights, adopted by General Assembly Resolution 2200A (XXI), December 16, 1966, https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (accessed March 13, 2010), and International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly Resolution 2200A (XXI), December 16, 1966, https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx (accessed March 13, 2020).
16. Eric A. Posner, *The Twilight of Human Rights Law* (New York: Oxford University Press, 2014), p. 92. But Posner sensibly acknowledges that it is hard to determine a precise count because many treaty provisions are duplicative or overlapping or might be seen as covering multiple claims (as they are elsewhere defined). Ibid., p. 151.
17. Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the U.N. General Assembly on December 18, 1979, Art. 2, paras. (e) and (f), https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx (accessed March 13, 2020).
18. Ibid., Art 11, para. 1(d).
19. Universal Declaration of Human Rights, Art 18; International Covenant on Civil and Political Rights, Art 18.
20. Universal Declaration of Human Rights, Art. 17, para. 2.
21. For incisive commentary on this remarkable omission (compared to historic Western bills of rights), see Jacob Mchangama, "The Right to Property in Global Human Rights Law," Cato Institute *Policy Report*, May/June 2011, https://www.cato.org/policy-report/mayjune-2011/right-property-global-human-rights-law (accessed March 13, 2020).
22. International Covenant on Economic, Social and Cultural Rights, Art. 6, para. 1.
23. Ibid., Art. 11, para. 1; Art. 12, para. 1.
24. Samuel Moyn, in *The Last Utopia: Human Rights in History* (Cambridge, MA: Belknap Press of Harvard University Press, 2012), emphasizes that the project began to gain wide support among Western commentators and even activists only after the collapse of the Soviet Union (and the previous "utopia" envisioned by socialism) during the period in which serious authors wrote books with titles like *The End of History*.
25. "Some evidence suggests that certain authoritarian regimes actually engaged in more violations after ratifying human rights treaties; other evidence suggests that certain subcategories of state—such as democratic states with strong NGOs—improved their performance after ratifying human rights treaties.... The overall picture at the aggregate level is that human rights treaties do not systematically improve human rights outcomes." Posner, *The Twilight of Human Rights Law*, pp. 76–77.
26. Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna, June 25, 1993, Part I, paras. 5 and 10, https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx (accessed March 18, 2020).
27. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), opened for signature in Rome November 4, 1950, entered into force 1953, https://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed March 22, 2020).
28. Ibid., Art. 41 ("the Court shall, if necessary, afford just satisfaction to the injured party").
29. See, for example, Human Rights Watch, *World Report 2020: Events of 2019*, p. 472 ("The human rights situation in Russia continued to deteriorate in 2019") and p. 573 ("Turkey has been experiencing a deepening human rights crisis over the past four years with a dramatic erosion of its rule of law and democracy framework"), https://www.hrw.org/sites/default/files/world_report_download/hrw_world_report_2020_0.pdf (accessed March 14, 2020).
30. George Stafford, "The Implementation of Judgments of the European Court of Human Rights: Worse Than You Think–Part 2: The Hole in the Roof," *EJIL: Talk!*, October 8, 2019 (nearly half of the ECHR's "leading judgments" remain "pending" five years after having been decided), https://www.ejiltalk.org/the-implementation-of-judgments-of-the-european-court-of-human-rights-worse-than-you-think-part-2-the-hole-in-the-roof/ (accessed March 14, 2020); "Russia Leads by Number of Unfulfilled Decisions of European Court of Human Rights," UAWire, April 6, 2019. The pattern was not different in the past. See Helen Keller and Alec Stone Sweet, eds., *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (New York: Oxford University Press, 2008), p. 522 ("the climate in Turkey is not conducive to independent human rights bodies") and p. 667 ("the non-execution of [human rights legal] judgments or the disregard of final judgments [in Russia] is very wide-spread").
31. Posner, *The Twilight of Human Rights Law*, p. 140.
32. Constitution of the United States, Art VI, cl. 2.
33. *Foster v. Neilson*, 27 U.S. 253 (1829) (treaty provisions on land grants from the king of Spain require congressional implementing legislation to support ownership claims).
34. International Covenant on Civil and Political Rights, Arts. 19 and 20.
35. Samuel Moyn, "U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01," last updated August 1, 2016, https://h2o.law.harvard.edu/text_blocks/28885 (accessed March 16, 2020).
36. Thomas Jefferson, Letter to Wilson Cary Nicholas, September 7, 1803, in *Thomas Jefferson: Writings* (New York: Library of America, 1984), p. 1140; *The Papers of Thomas Jefferson*, Vol. 41, ed. Barbara B. Oberg (Princeton, NJ: Princeton University Press, 2014), p. 346.
37. *Reid v. Covert*, 354 U.S. 1, 17 (1956).
38. *Internationale Handelsgesellschaft mbH* v. *Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, Case 11-70 (1970) (European Court of Justice holding that European Commission regulations on agricultural policy must take priority over constitutional objections to the regulations voiced by the German Constitutional Court), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61970CJ0011&from=EN (accessed March 16, 2020). For context and background, see Karen J. Alter, *Establishing the Supremacy of EU Law: The Making of an International Rule of Law in Europe* (New York: Oxford University Press, 2001). European governments have accepted this arrangement for fear of losing the economic benefits of membership and perhaps also because the EU has attained prestige with national elites, neither of which is likely to influence most countries to accept comparable authority for international human rights bodies.
39. Jonathan Elliott, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 2d. ed., Vol. 3 (New York: Burt Franklin, reprinted 1974), p. 514, http://oll-resources.s3.amazonaws.com/titles/1907/1314.03_Bk.pdf (accessed March 16, 2020).
40. Jay, *The Federalist* No. 64.

41. Thomas Jefferson's *Manual of Parliamentary Practice* stipulated that treaties must "concern the foreign nation, party to the contract" and address "only those objects which are usually regulated by treaty." For examples from Founding era and 19th century treatises, see Curtis A. Bradley, "The Treaty Power and American Federalism," *Michigan Law Review*, Vol. 97, No. 2 (November 1998), pp. 390–461, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=3725&context=mlr (accessed March 16, 2020).
42. Joseph Story, *Commentaries on the Constitution of the United States*, 3rd ed. (Boston: Little, Brown, 1858, reprinted by Lawbook Exchange 2001), §1508, Vol. II, p. 376. The first edition appeared in 1833, when John Marshall was still Chief Justice.
43. *Geofroy v Riggs*, 133 U.S. 258 (1890).
44. *Bond v. United States*, 572 U.S. 844 (2014); 134 S.Ct. 2077 (2014).
45. *Bond*, 134 S.Ct. at 2088, 2090 (Sec. III and Sec. IIIA in Roberts opinion for the Court).
46. Thomas opinion, 134 S.Ct. at 2108 (Sec. III in Thomas opinion); initial quotation ("those subjects in ordinary intercourse of nations") from *Holmes v Jennison*, 39 U.S. 540, 569 (1840).
47. Thomas opinion, 134 S.Ct. 2109 (Sec. III in Thomas opinion).
48. U.N. Human Rights Committee, "CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant," CCPR/C/21/Rev. 1/Add.6, November 4, 1994, https://www.refworld.org/docid/453883fc11.html (accessed March 16, 2020).
49. According to the Office of the U.N. High Commissioner for Human Rights, for example: "A general comment now reads as a general statement of law that expresses the Committee's conceptual understanding of the content of a particular provision.... This function enables the Committee to permit the Covenant to speak to modern circumstances, in which understandings and perceptions of language and practice may have evolved substantially since the Covenant was adopted. In this sense, the Covenant is a living instrument that remains as relevant to the contemporary challenges of today as it was when it was adopted. These comments thus continue to guide States parties in applying the provisions of the Covenant, as well as in preparing their reports." Office of the United Nations High Commissioner for Human Rights, "Civil and Political Rights: The Human Rights Committee," *Fact Sheet* No. 15 (Rev. 1), May 2005, p. 24, https://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf (accessed March 16, 2020).
50. In *NRDC v. EPA*, 464 F.3d 1 (2006), the U.S. Court of Appeals for the D.C. Circuit held that a provision in the Clean Air Act Amendments referring to the Montreal Protocol (an international treaty) could not—without "rais[ing] serious constitutional questions"—be interpreted to mean that the statute changed its meaning, or that U.S. commitments under the Montreal Protocol changed their meaning, due to international conference resolutions aimed at changing the terms of the treaty but without subsequent action by the U.S. Senate.
51. See *Human Rights Law Journal*, Vol. 16 (1995), p. 422, arguing, among other things, that since the Senate had only ratified the treaty as a package with accompanying reservations, if "any one or more of the US reservations were ineffective, the consequence would be that the ratification as a whole could thereby be nullified and the United States would not be a party to the Covenant."
52. "The Committee...shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties," and States Parties "may submit to the Committee observations on any comments that may be made...." International Covenant on Civil and Political Rights, Art. 40, paras. 4 and 5. This is not language describing a judicial process or any kind of formal proceeding or even implying greater authority in the committee than the "States Parties" as to correct interpretations of the convention.
53. Notably, Louis Henkin, "U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker," *American Journal of International Law*, Vol. 89, No. 2 (April 1995), pp. 341–350.
54. According to one account, only Denmark and Norway protested that Saudi Arabia's reservation to its CEDAW accession, which exempted anything contrary to Sharia law as interpreted by Saudi Arabia, effectively nullified its ratification and violated the provision in the Vienna Convention on the Law of Treaties prohibiting reservations that are "incompatible with the object and purpose of the treaty." See Belinda Clark, "The Vienna Convention Reservations Regime and the Convention on Sex Discrimination," *American Journal of International Law*, Vol. 85, No. 2 (April 1991), pp. 281–321, and Vienna Convention on the Law of Treaties, May 23, 1969, Art. 19(c), https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf (accessed March 16, 2020).
55. The Atlantic Charter, August 14, 1941, https://www.nato.int/cps/en/natohq/official_texts_16912.htm (accessed March 23, 2020).
56. Specifically, the Atlantic Charter was "technically no more than a press release, of which there was no official copy, signed or sealed." William L. Langer and S. Everett Gleason, *The Undeclared War, 1940–41: The World Crisis and American Foreign Policy* (New York: Harper and Brothers, 1953), p. 688.
57. William Blackstone, *Commentaries on the Laws of England*, Book IV (1769), Ch. 5, "Offences Against the Law of Nations" (discussing interference with foreign ambassadors, interference with foreign visitors protected by "safe conducts or passports," piracy on the high seas).
58. Anthony J. Belia Jr. and Bradford J. Clark, *The Law of Nations and the United States Constitution* (New York: Oxford University Press, 2017).
59. *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir., 1980).
60. 28 U.S.C. §1350.
61. The court invoked a "declaration" against torture, endorsed by a vote of the U.N. General Assembly. If a vote of the U.N. General Assembly can create "international law," the body can be viewed as a world legislature, and if there had been a word in the text of the U.N. Charter indicating that status for the General Assembly, it is highly doubtful that the Charter would have been approved by a two-thirds majority of the Senate in 1945.
62. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (Scalia concurrence, end of Sec. III). Emphasis in original.
63. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (no application abroad); *Jesner v. Arab Bank*, 584 U.S. ____ (2018) (no application to corporations).
64. For a review of competing claims and a defense of the primacy of presidential determinations in this area, see "Presidents and Customary International Law," Ch. 5 in Julian Ku and John Yoo, *Taming Globalization: International Law, the U.S. Constitution, and the New World Order* (New York: Oxford University Press, 2012), pp. 113–150.
65. U.S. Department of Defense, Office of General Counsel, *Department of Defense Law of War Manual*, June 2015, Ch. 1, Sec. 8, §1, p. 31, https://archive.defense.gov/pubs/law-of-war-manual-june-2015.pdf (accessed March 16, 2020).
66. "[T]he convention also contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice...." Ronald Reagan, "Statement on United States Oceans Policy," March 10, 1983, https://www.jag.navy.mil/organization/documents/Reagan%20Ocean%20Policy%20Statement.pdf (accessed March 16, 2020).
67. See the chapter on *Filartiga* in John E. Noyes, Laura A. Dickinson, and Mark W. Janis, *International Law Stories* (New York: Foundation Press, 2007).
68. Vienna Convention on Consular Relations, done at Vienna April 24, 1963, entered into force March 19, 1967, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3 (accessed March 25, 2020).
69. *Medellin v. Texas*, 552 U.S. 491 (2008).
70. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).
71. The Paris Agreement, adopted December 12, 2015, https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf (accessed March 25, 2020).

72. *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804) (status of ship owned by presumptive foreign national).
73. *Ma v Reno*, 208 F. 3d 815 (9th Cir., 2000) (regarding detention of Chinese national following conviction for murder).
74. Martin S. Flaherty, *Restoring the Global Judiciary: Why the Supreme Court Should Rule in U.S. Foreign Affairs* (Princeton, NJ: Princeton University Press, 2019), p. 245 (arguing for "application of a Charming Betsy rule to the Constitution" at least "when global practice reflected the type of international consensus that raises a norm to international custom.").
75. *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005).
76. *Atkins*, 536 U.S. at 316–17, fn. 21; *Roper*, 543 U.S. at 578.
77. *Roper*, 543 U.S. at 608 (Scalia, J., dissenting) ("I do not believe that the meaning of our Eighth Amendment…should be determined by the subjective views of five Members of this Court and like-minded foreigners.").
78. *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) ("The court's discussion of these foreign views…is therefore meaningless [and dangerous] dicta.").
79. *Legal Tender Cases*, 79 U.S. 457 (1870).
80. Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004), p. 102.
81. Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (New York: Alfred A. Knopf, 2015), p. 245.
82. Ibid., p. 232 (commenting on *NRDC v. EPA*, discussed in note 50, *supra*).
83. *Printz v. United States*, 521 U.S. 898, 976 (1997).
84. Adams, "Address Celebrating the Declaration of Independence," July 4, 1821.
85. James Monroe, "Seventh Annual Message," December 2, 1823, https://www.presidency.ucsb.edu/documents/seventh-annual-message-1 (accessed March 26, 2020).
86. James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (Edinburgh and London: William Blackwood and Sons, 1883), p. 159, https://ia802607.us.archive.org/22/items/instituteslawna03lorigoog/instituteslawna03lorigoog.pdf (accessed March 13, 2020). Lorimer argued on such grounds that Britain would be justified in withdrawing diplomatic recognition from the Czarist government of Russia in response to anti-Jewish pogroms and against any state "ruled as an absolute autarchy or absolute exclusive class system." See ibid., p. 160 and Chapter XIV).
87. Alexander Hamilton or James Madison, *The Federalist* No. 62, https://avalon.law.yale.edu/18th_century/fed62.asp (accessed March 13, 2020).
88. On Amnesty's reluctance to associate itself with "conservative opinions" warning of genocide in Cambodia as late as 1977, see Samantha Power, *"A Problem from Hell": America and the Age of Genocide* (New York: Basic Books, 2002), pp. 114–115 On AI's "striking" failure to criticize Soviet repression, see William Korey, *NGOs and the Universal Declaration of Human Rights: "A Curious Grapevine"* (New York: Palgrave Macmillan, 1998), p. 169.
89. National Security Decision Directive No. 75, "U.S. Relations with the U.S.S.R.," January 17, 1983, https://fas.org/irp/offdocs/nsdd/nsdd-75.pdf (accessed March 16, 2020). See also Christopher Hemmer, *American Pendulum: Recurring Debates in U.S. Grand Strategy* (Ithaca, NY: Cornell University Press, 2015), p. 100.
90. Douglas A. Sylva and Susan Yoshihara, "Rights by Stealth: The Role of the UN Human Rights Treaty Bodies in the Campaign for an International Right to Abortion," International Organizations Research Group *White Paper* No. 8, July 1, 2007, https://c-fam.org/wp-content/uploads/IORG-W-Paper-Number8.pdf (accessed March 16, 2020). This "campaign" culminated in a finding by the Human Rights Committee that there is a right to abortion within the ICCPR. See U.N. Human Rights Committee, "General Comment No. 36: Article 6: Right to Life," CCPR/C/GC/35, September 3, 2019, https://www.refworld.org/docid/5e5e75e04.html (accessed March 16, 2020). The "Committee" speaks for "experts" who serve on it, so its comments do not have to be approved by governments. For recent resistance, see Grace Melton, "Pro-Life Nations Reject UN's Cultural Colonialism on Abortion, Population Control," Heritage Foundation *Commentary*, November 20, 2019, https://www.heritage.org/life/commentary/pro-life-nations-reject-uns-cultural-colonialism-abortion-population-control.
91. Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, July 29, 1899, http://www.opbw.org/int_inst/sec_docs/1899HC-TEXT.pdf (accessed March 27, 2020).
92. *Al Skeini and Others v. United Kingdom*, Grand Chamber, European Court of Human Rights, July 7, 2011 (App. 55721/07).
93. Nadeem Badshah, "Former UK Army Chief Supports Veterans' Protection from Prosecution," *The Guardian*, October 12, 2019, https://www.theguardian.com/uk-news/2019/oct/12/former-uk-army-chief-supports-veterans-protection-from-prosecution (accessed March 17, 2020) (reporting on criticism by former General Richard Dannatt that veterans continue to be subject to human rights investigations for past incidents and urging that the U.K. consider withdrawal from the European Convention on Human Rights to end such practices).
94. See, for example, Agnes Callamard, "The Targeted Killing of General Soleimani: Its Lawfulness and Why It Matters," *Just Security*, January 8, 2020, https://www.justsecurity.org/67949/the-targeted-killing-of-general-soleimani-its-lawfulness-and-why-it-matters/ (accessed March 17, 2020).
95. By the terms of the Rome Statute, which created the ICC, the court can claim jurisdiction because the perpetrators belong to a state that has ratified or because it takes place on the territory of a state that has ratified or because the U.N. Security Council has conferred jurisdiction for a situation of special concern. See Rome Statute of the International Criminal Court, adopted in Rome July 17, 1998, in force July 1, 2002, Arts. 12 and 13, https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf (accessed March 17, 2020). Merely internal abuses by nonparty states like Russia or China will escape jurisdiction, while U.S. forces operating in Afghanistan could be prosecuted (without requiring subsequent agreement from these states, as the ICC seems disposed to disregard side agreements between such states and the U.S.). The prosecutor has recently held that the ICC may have jurisdiction over nonparty state Israel because Palestine, though not recognized as an independent state by much of the world or admitted to membership in the U.N., is a "state" with territory that is sufficiently defined (even though no international instrument defines its borders) for the court to derive territorial jurisdiction. International Criminal Court, "Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Palestine, and Seeking a Rule on the Scope of the Court's Territorial Jurisdiction," December 20, 2019, https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine (accessed March 30, 2020).
96. Rome Statute of the International Criminal Court, Art. 5, para. 1.
97. International Criminal Court, Appeals Chamber, "Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia," dismissal of prosecutor's appeal, November 6, 2015, https://www.icc-cpi.int/CourtRecords/CR2015_20965.PDF (accessed March 18, 2020); Jeremy Rabkin, "Meanwhile, at the Hague," *The Weekly Standard*, Vol. 20, No. 44 (August 3, 2015), pp. 9–12, https://www.washingtonexaminer.com/weekly-standard/meanwhile-at-the-hague (accessed March 17, 2020).
98. International Criminal Court, Pre-Trial Chamber II, "Situation in the Islamic Republic of Afghanistan," April 12, 2019, https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF (accessed March 18, 2020); Marlise Simons, Rick Gladstone, and Carol Rosenberg, "Hague Court Abandons Afghanistan War Crimes Inquiry," *The New York Times*, April 12, 2019, https://www.nytimes.com/2019/04/12/world/asia/icc-afghanistan-.html (accessed March 18, 2020); Elian Peltier and Fatima Faizi, "I.C.C. Allows Afghanistan War Crimes Inquiry to Proceed, Angering U.S.," *The New York Times*, March 5, 2020, https://www.nytimes.com/2020/03/05/world/europe/afghanistan-war-crimes-icc.html (accessed March 30, 2020).
99. International Criminal Court, "Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Palestine," December 20, 2019.

100. For a contemporary account, see George Finch, "The Need to Restrain the Treaty-Making Power of the United States Within Constitutional Limits," *American Journal of International Law*, Vol. 48, No. 1 (January 1954), pp. 57–82. See also Frank Holman, *The Year of Victory* (Argus Press, 1955), p. 4, warning against proposals to use "the treaty process as a lawmaking process to change the domestic law and even Government of the United States...along socialistic lines."
101. The only relevant statute dates from 1972 (now codified at 1 U.S.C. §112b) and requires the President to notify the Senate within 60 days after concluding an executive agreement—but not to satisfy any preconditions or steer clear of any prescribed limitations.
102. *Youngstown Sheet and Tube v. Sawyer*, 343 U.S. 579, 637 (1952).
103. See, for example, Ed Whelan, "Sonia Sotomayor's Foreign Deceptions," *National Review*, Bench Memos Blog, July 30, 2009, https://www.nationalreview.com/bench-memos/sonia-sotomayors-foreign-deceptions-ed-whelan/ (accessed March 17, 2020).
104. U.S. Department of State, "Department of State Commission on Unalienable Rights," *Federal Register*, Vol. 84, No. 104 (May 30, 2019), p. 25109, https://www.govinfo.gov/content/pkg/FR-2019-05-30/pdf/2019-11300.pdf (accessed March 27, 2020).
105. *Washington: Writings*, p. 964.
106. Ibid., pp. 970, 973–974.

The Right to Life in International Human Rights Law

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1. United Nations, "Universal Declaration on Human Rights," December 10, 1948, https://www.un.org/en/universal-declaration-human-rights/index.html (accessed January 16, 2020).
2. A derivative sense of dignity is alluded to by Article 22.
3. Articles 10, 16, 21, 23, and 26 spell out some of the implications of equality before the law.
4. John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998), pp. 132–138.
5. Brian Tierney has shown that it is inaccurate to hold that the subjective concept of right began as late as Gerson (against Richard Tuck) or Ockham (against Michel Villey). Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150–1625* (Atlanta, GA: Scholars Press, 1997), pp. 54–77.
6. These others include Socrates, Plato, Aristotle, and Ulpian, as Hersch Lauterpacht—a giant in the field of post-war international law—shows in his 1945 work on the nascent International Bill of the Rights of Man. Lauterpacht insists that the theory of natural law has "always been the main inspiration, if not the conscious instrument, of the doctrine of the rights of man," and there never was any substantive shift from natural law to natural rights but that that process "is coeval with political and philosophical thought dating back to antiquity and the Middle Ages." Hersch Lauterpacht, *An International Bill of the Rights of Man* (Oxford: Oxford University Press, 2013), pp. 4 and 23.
7. "By natural law all were born free." Alan Watson ed., *The Digest of Justinian*, Vol. 1 (Philadelphia: University of Pennsylvania Press, 1985), p. 2.
8. See Finnis, *Aquinas*, pp. 136–137.
9. From the outset the canon law conception of natural rights was not based specifically on Christian revelation but on "an understanding of human nature itself as rational, self-aware, and morally responsible." Tierney, *The Idea of Natural Rights*, p. 76.
10. On Vitoria, and especially Suarez, as contributing to Grotius' understanding of natural rights and international law, see Antonio García y García, "The Spanish School of the Sixteenth and Seventeenth Centuries: A Precursor of the Theory of Human Rights," *Ratio Juris*, Vol. 10, No.1 (1997), pp. 25–35.
11. Locke was significantly indebted to the Anglican theologian Richard Hooker. For a synopsis of the philosophical influences on 18th-century American revolutionary and natural rights talk, see James H. Hutson, "The Emergence of the Modern Concept of a Right in America: The Contribution of Michel Villey," *American Journal of Jurisprudence*, Vol. 39, No. 1 (1994), pp. 185–224 and 213–220.
12. National Assembly of France, "Declaration of the Rights of Man and of the Citizen," August 26, 1789, https://constitution.org/fr/fr_drm.htm (accessed January 16, 2020).
13. Lynn Hunt, *The French Revolution and Human Rights: A Brief Documentary History* (Boston: Bedford Books of St. Martin's Press, 1996), pp. 13–15 and 71–73.
14. French revolutionary politics, which merged into the First Republic, were anything but respectful of freedom of religion and freedom of association, however.
15. Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001), pp. 66–67.
16. Ibid., p. 57.
17. Johannes Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (Philadelphia: University of Pennsylvania Press, 2009), pp. 18–19.
18. For the draft texts of the UDHR, see Glendon, *A World Made New*, pp. 271–314.
19. More than any other figure, Malik insisted upon raising matters of philosophical importance during the drafting process, as is evident in his (ultimately successful) insistence on including the clause "endowed with reason and conscience" (referring to "human beings") in the foundational Article 1. See United Nations, "Commission On Human Rights: Third Session; Summary Record of the Fifteenth Meeting," Doc. E/CN.4/SR.50, May 27, 1948, pp. 12–13, https://undocs.org/E/CN.4/SR.50 (accessed January 15, 2020), and Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999), pp. 296–299. For a brief summary of scholarly views on the significance of Malik for the drafting of the UDHR, see Glenn Mitoma, "Charles H. Malik and Human Rights: Notes on a Biography," *Biography*, Vol. 33, No. 1 (2010), p. 222.
20. The Cassin draft of the preamble did not contain the terms "inherent" and "inalienable," whereas the next version, authored by Malik, did. Glendon, *A World Made New*, pp. 117–118.
21. Habib Malik, ed., *The Challenge of Human Rights: Charles Malik and the Universal Declaration* (Oxford: Charles Malik Foundation, 2000), pp. 161–162.
22. Glendon, *A World Made New*, p. 146.
23. See United Nations Office of the High Commissioner, "International Covenant on Civil and Political Rights," March 23, 1976, https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx (accessed January 17, 2020), and United Nations Office of the High Commissioner, "International Covenant on Economic, Social, and Cultural Rights," January 3, 1976, https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx (accessed January 17, 2020).
24. Thomas Hobbes, *Leviathan: with Selected Variants from the Latin Edition of 1668*, Edwin Curley, ed., (Indianapolis/Cambridge: Hackett Publishing, 1994), pp. 50–57.
25. David Hume, "Of the Dignity or Meanness of Human Nature," in Stephen Copley and Andrew Edgar, eds., *David Hume: Selected Essays* (Oxford: Oxford University Press, 1998), pp. 43–49.
26. Friedrich Nietzsche, *On the Genealogy of Morality*, Keith Ansell-Pearson, ed. (Cambridge: Cambridge University Press, 2006), pp. 172–173.
27. On this address, Moyn writes, "The appeal to reaffirm faith in the dignity of the human person, and in the rights that follow from that dignity, reached unprecedented heights of public visibility.... Undoubtedly, the pope's first peace point was the supreme, influential, and most publicly prominent invocation of human dignity during World War II proper and likely in the whole history of political discourse to that date." Samuel Moyn, *Christian Human Rights* (Philadelphia: University of Pennsylvania Press, 2015), pp. 2–3.

28. It is often supposed that the articulation of human dignity originated with Immanuel Kant, but it can, in fact, be traced back to Cicero's *De Officiis* (44) and is also found in Boethius' *De Consolatione Philosophiae* (524). See, generally, Mette Lebech, *On the Problem of Human Dignity: A Hermeneutical and Phenomenological Investigation* (Würzburg: Königshausen & Neumann, 2009), chs. 1 and 2.
29. Johannes Morsink, "Women's Rights in the Universal Declaration," *Human Rights Quarterly*, Vol. 13, No. 2 (1991), p. 230.
30. Anna Grear, "Challenging Corporate 'Humanity': Legal Disembodiment, Embodiment and Human Rights," *Human Rights Law Review*, Vol. 7, No. 3 (2007), p. 517.
31. Morsink, *The Universal Declaration of Human Rights*, p. 44. John Humphrey was responsible for originally making reference to juridical personality in the UDHR. John P. Humphrey, *Human Rights and the United Nations: A Great Adventure* (New York: Transnational Publishers, 1984), p. 40.
32. In *Contra Eutychen et Nestorium* (*Against Eutyches and Nestorius*, c. 512) Boethius responds to the eponymous thinkers who completely conflated personhood with nature by offering a definition of a person as a *naturae rationabilis individua substantia*—an individual substance of a rational nature. Hugh Fraser Stewart, Edward Kennard Rand, and Stanley Jim Tester, eds., *Boethius* (Cambridge: Harvard University Press, 1962), p. 85. Alongside endorsing this Boethian definition of personhood, Aquinas refers to a person as a subject (*hypostasis*) "distinct by reason of dignity." Thomas Aquinas, *Summa Theologiae* I, q. 29, a. 3, ad. 2.
33. Contemporary versions of an exclusivist account of personhood are all, in one way or another, indebted to John Locke's view of the person as outlined in his *Essay Concerning Human Understanding*: "a thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing, in different times and places; which it does only by that consciousness which is inseparable from thinking, and, as it seems to me, essential to it." John Locke, *An Essay Concerning Human Understanding*, Peter H. Nidditch, ed. (Oxford: Oxford University Press, 1979), p. 79. It is noteworthy that Locke had no use for his own epistemology-oriented view of personhood when it came to treating of natural rights. For him, natural rights arose from and protected human nature.
34. See Klaus Dicke, "The Founding Function of Human Dignity in the Universal Declaration of Human Rights," in David Kretzmer and Eckart Klein, eds., *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002), p. 113.
35. "'Human dignity' probably became part of current usage at the same time and for the same reasons as the expression 'human person,' i.e., to designate the fundamental value or importance of the human individual as such. The 1948 *Universal Declaration of Human Rights* testifies to the currency of both terms, and within the human rights tradition flowing from the *Universal Declaration*, the term is constantly used to express the basic intuition from which human rights proceed." Lebech, *On the Problem of Human Dignity*, 27 (emphasis in original).
36. Patrick Lee and Robert P. George, "The Nature and Basis of Human Dignity," *Ratio Juris*, Vol. 21, No. 2 (2008), p. 174 (emphasis in original).
37. See note 16, *supra*.
38. Much hinges on the meaning of what it is to intend an effect as either a means or an end. (Killing consequent upon a choice to use proportionate force to defend oneself need not involve an intent to end life; such killing may in fact be a side-effect.) The foundational work in this regard is Elizabeth Anscombe, *Intention* (Cambridge: Harvard University Press, 1957). Anscombe wrote her monograph in part as a response to defenders of President Truman's choice to kill—as a means to an end—innocent Japanese civilians during World War II. An excellent exposition of intention (and foresight) is Michael Bratman, *Intention, Plans, and Practical Reason* (Cambridge: Harvard University Press, 1987).
39. John Finnis, *Natural Law and Natural Rights*, 2nd ed. (Oxford: Oxford University Press, 2011), pp. 223–226.
40. So it can be misleading to speak of "equal" dignity. Better to speak in terms of, for example, every human being possessing an incomparable, inherent dignity. For a very helpful analysis of this and related issues, see Sherif Girgis, "Equality and Moral Worth in Natural-Law Ethics and Beyond," *American Journal of Jurisprudence*, Vol. 59, No. 2 (2014), pp. 143–162.
41. See, generally, Germain Grisez, "Against Consequentialism," *American Journal of Jurisprudence*, Vol. 23, No. 1 (1978), pp. 21–72. Some versions of "rule utilitarianism" (as distinct from "act utilitarianism") attempt to make compatible adherence to utilitarianism with respect for human rights. But rule utilitarianism relies in the first instance on act-utilitarian calculations and so it is as incompatible with a sound understanding of human dignity as act utilitarianism. A consistent rule utilitarian must always be prepared to suspend respect for human rights if foreseen consequences dictate—a conditional intention which is antithetical to genuine respect for human rights.
42. Christina Zampas and Jaime M. Gher, "Abortion as a Human Right: International and Regional Standards," *Human Rights Law Review*, Vol. 8, No. 2. (2008), p. 263.
43. Rhonda Copelon, Christina Zampas, Elizabeth Brusie, and Jacqueline deVore, "Human Rights Begin at Birth: International Law and the Claim of Fetal Rights," *Reproductive Health Matters*, Vol. 13, No. 26 (2005), pp. 121–122. For the actual statement from the French delegate see United Nations, "Ninety-Ninth Meeting: Draft International Declaration of Human Rights," Doc. A/C.3/SR.99, p.116, https://undocs.org/A/C.3/SR.99 (accessed January 17, 2020).
44. Morsink, *The Universal Declaration of Human Rights*, pp. 290–293. See also Morsink, *Inherent Human Rights*, p. 29.
45. United Nations, "Ninety-Eighth Meeting: Draft International Declaration of Human Rights," Doc. A/C.3/SR.98, p. 110, https://undocs.org/A/C.3/SR.98 (accessed January 17, 2020).
46. Morsink, *The Universal Declaration of Human Rights*, p. 291.
47. Jean-Jacques Rousseau, *The Social Contract*, in *Rousseau: The Social Contract and Other Later Political Writings*, Victor Gourevitch, ed. (Cambridge: Cambridge University Press, 1997), p. 41 ("Man is born free, and everywhere he is in chains.").
48. Watson, ed., *The Digest of Justinian*, p. 2.
49. In the *Discourse on the Origin and Foundations of Inequality Among Men*, Rousseau displays a heavily negative view of abortion. Jean-Jacques Rousseau, "Discourse on The Origin and Basis of Inequality Among Men," in *Jean-Jacques Rousseau: The Basic Political Writings*, Donald A. Cress, ed. (Indianapolis: Hackett Publishing Company, 2011), p. 66. He then goes on to write:

    > How many are the shameful ways to prevent the birth of men or to fool nature: either by those brutal and depraved tastes that insult its most charming work, tastes that neither savages nor animals ever knew, and that have arisen in civilized countries only as a result of a corrupt imagination; or by those secret abortions, worthy fruits of debauchery and vicious honor; or by the exposure or the murder of a multitude of infants, victims of the misery of their parents or of the barbarous shame of their mothers; or, finally, by mutilation of those unfortunates. What would happen if I were to undertake to show the human species attacked in its very source, and even in the most holy of all bonds, where one no longer dares to listen to nature until one has taken into account one's financial interests, and where, with civil disorder confounding virtues and vices, continence becomes a criminal precaution, and the refusal to give life to one's fellow man an act of humanity? But without tearing away the veil that covers so many horrors, let us content ourselves with pointing out the evil, for which others must supply the remedy.

    Ibid., pp. 102–103.
50. For example, Watson, ed., *The Digest of Justinian*, pp. 15–17, 57, 137, 175, and 198.
51. United Nations, "Summary Record of the 9th Meeting," Doc. E/CN.4/AC.2/SR.9, pp. 21–22, https://digitallibrary.un.org/record/629485?ln=en (accessed January 20, 2020).
52. United Nations, "Ninety-Ninth Meeting: Draft International Declaration of Human Rights," p. 120.

53. See United Nations, "Summary Record of the 35th Meeting on Human Rights, Drafting Committee on an International Bill of Rights, 2nd Session," Doc. E/CN.4/AC.1/SR.35, May 17, 1948, http://hr-travaux.law.virginia.edu/document/iccpr/ecn4ac1sr35/nid-1686 (accessed January 17, 2020) p. 4, and United Nations, "Summary Record of the 2nd Meeting, Commission on Human Rights, Drafting Committee, 1st Session," Doc. E/CN.4/AC.1/SR.2, June 11, 1947, p. 10, https://hr-travaux.law.virginia.edu/document/iccpr/ecn4ac1sr2/nid-181 (accessed January 17, 2020).
54. United Nations, "Ninety-Eighth Meeting: Draft International Declaration of Human Rights," p. 111, and United Nations, "Ninety-Ninth Meeting: Draft International Declaration of Human Rights," p. 121.
55. Malik, ed., *The Challenge of Human Rights*, p. 162.
56. United Nations, "Summary Record of the 35th Meeting on Human Rights, Drafting Committee on an International Bill of Rights, 2nd Session," p. 3. The remainder of the proposal read, "Everyone has the right to enjoy conditions of life compatible with human dignity and the normal development of his or her personality. Persons incapable of satisfying their own needs have the right to maintenance and support."
57. Ibid., p. 4.
58. Ibid. (Eleanor Roosevelt on behalf of the United States).
59. Ibid., p. 5 (Alexei Pavlov on behalf of the USSR). During an earlier, briefer discussion of the topic, Bodil Begtrup of the Commission on the Status of Women argued that the explicit inclusion of the unborn under the right to life could not be reconciled with extant domestic legislation providing for the right to abortion in "certain cases." U.N. Doc. E/CN.4/AC.2/SR.3, p. 8, https://digitallibrary.un.org/record/629389?ln=en (accessed January 20, 2020). A few days later, during drafting of what was to become the International Covenant on Civil and Political Rights, Begtrup indicated that the primary case she had in mind was provision for abortion in order to save the mother's life. United Nations, "Summary Record of the 35th Meeting on Human Rights, Drafting Committee on an International Bill of Rights, 2nd Session," p. 13.
60. Ibid., p. 4.
61. Ibid., p. 5.
62. Ibid.
63. Ibid.
64. Ibid., p. 6.
65. Ibid.
66. Both those who supported *and opposed* the inclusion of the Bill of Rights appealed to natural rights to justify their stance. See Benjamin Fletcher Wright, *American Interpretations of Natural Law: A Study in the History of Political Thought* (Harvard: Harvard University Press, 1931), pp. 139–140.
67. "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."
68. *Dred Scott v Sandford*, 60 U.S. 393 (1857) at 404–405.
69. Ibid., at 405.
70. Ibid., at 550 (McLean, J.).
71. Ibid., at 624 (Curtis, J.).
72. For example, "I am in favour of the adoption of this amendment because it will secure to the oppressed slave his natural and God-given rights. I believe that the black man has certain inalienable rights, which are as sacred in the sight of heaven as those of any other race. I believe he has a right to live, and to live in a state of freedom." *Congressional Globe*, June 15, 1864, p. 2990 (statement of Rep. Ingersoll): "It is not within the limits of human laws to legislate away the soul of man; we cannot deprive him, by any process of legislation, constitutional or otherwise, of his free agency, we cannot legislate away his liberty…[in relation to 'the four hundred specimens of humanity' owned by an anti-Amendment member] who, by the laws of nature and of God, have the same right to own him that he has to own them." *Congressional Globe*, January 11, 1865, p. 221 (statement of Rep. Broomall).
73. *Plessy v Ferguson*, 163 U.S. 537 (1896).
74. William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd ed. (Cambridge: Cambridge University Press, 2002), p. 134.
75. For a more comprehensive treatment of this and other drafting debates pertaining to the status of the unborn in international human rights treaty law, see Thomas Finegan, "International Human Rights Law and the 'Unborn': Texts and *Travaux Préparatoires*," *Tulane Journal of International and Comparative Law*, Vol. 25, No. 2 (2016), pp. 89–126.
76. United Nations, Office of the High Commissioner for Human Rights, *Legislative History of the Convention on The Rights of The Child*, Vol. I (2007), p. 296, https://www.ohchr.org/Documents/Publications/LegislativeHistorycrc1en.pdf (accessed January 17, 2020).
77. For the text of the opinion, see Sharon Detrick, *United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (Dordrecht: Martinus Nijhoff Publishers, 1992), p. 113. The U.N. Legal Counsel who wrote the opinion, Karl August Fleischhauer, served as judge on the International Court of Justice from 1994 to 2003.
78. United Nations, "Vienna Convention on the Law of Treaties," drafted May 23, 1969, entered into force January 27, 1980, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (accessed January 17, 2020).
79. United Nations Human Rights Committee, "Concluding Observations on the Fourth Periodic Report of Ireland," U.N. Doc. CCPR/C/IRL/CO/4, August 19, 2014, http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsieXFSudRZs%2FX1ZaMqUUOS9yIqPEMRvxx26PpQFtwrk%2BhtvbJ1frkLE%2BCPVCm6lW%2BYjfrz7jxiC9GMVvGkvu2UluUfSqikQb9KMVoAoKkgSG (accessed January 17, 2020).
80. Ibid. The HRC's advocacy in favor of a right to abortion began in its 1996 document, "Concluding Observations of the Human Rights Committee, Peru." United Nations Human Rights Committee, "Concluding Observations of the Human Rights Committee, Peru," U.N. Doc. CCPR/C/79/Add.72, November 18, 1996, http://hrlibrary.umn.edu/hrcommittee/peru1996.html (accessed January 17, 2020). There the HRC called for the decriminalization of abortion in the case of rape and posited that clandestine abortions effected by the general criminalization of abortion are the main cause of maternal mortality in the country.
81. "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."
82. "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."
83. "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."
84. United Nations Human Rights Committee, "General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life," CCPR/C/GC/36, October 30, 2018, para. 8, https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf (accessed January 17, 2020).

85. For example, Michael O'Flaherty and John Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles," *Human Rights Law Review*, Vol. 8, No. 2 (2008), p. 215 ("These Concluding Observations have a non-binding and flexible nature."); Manfred Nowak, "The Need for a World Court of Human Rights," *Human Rights Law Review*, Vol. 7, No. 1 (2007), p. 252 (describing as "non-binding" the decisions and concluding observations and recommendations of the treaty-monitoring bodies); and Zampas and Gher, "Abortion as a Human Right: International and Regional Standards," p. 253 ("Committees are not judicial bodies and their Concluding Observations are not legally binding").
86. The CEDAW Committee has analogous powers to the HRC: It issues non-binding "suggestions and general recommendations" (Article 21[1]) based on "the provisions of the present Convention" (Article 18 [1]).
87. See Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of all Forms of Discrimination Against Women* (Dordrecht: Martinus Nijhoff Publishers, 1993), p. 144. In 2005 Amnesty International subscribed to this good faith interpretation of the CEDAW by describing as a "myth" the claim that the CEDAW supports abortion through its invocation of family planning: "CEDAW does not address the matter of abortion…[and] [m]any countries in which abortion is illegal…have ratified the Convention." Amnesty International, "A Fact Sheet on CEDAW: Treaty For The Rights of Women," August 25, 2005, https://www.amnestyusa.org/files/pdfs/cedaw_fact_sheet.pdf (accessed November 18, 2019). There is probably no real need to have recourse to supplementary interpretative materials on this point because the ordinary meaning of "family planning" does not involve abortion, as even the contemporary Oxford, Cambridge, and Merriam-Webster dictionaries indicate (never mind editions in circulation in 1979 when the CEDAW was adopted).
88. See, for example, T. W. Sadler, *Langman's Medical Embryology*, 11th ed. (Philadelphia: Wolters Kluwer, 2010), pp. 3–4, 13, and 39; William J. Larsen and Gary C. Schoenwolf, *Larsen's Human Embryology*, 4th ed. (Philadelphia: Elsevier Health, 2009), pp. 2, 4, 7, and 15; and Keith L. Moore and T. V. N. Persaud, *The Developing Human: Clinically Oriented Embryology*, 8th ed. (Philadelphia: W.B. Saunders Company, 2007), p. 2.
89. Sometimes the standard is described as the (immediately exercisable) capacity for rationality, agency, or some combination of these and similar capacities (for example, the capacity for future planning). These various capacities are inextricably linked and in many respects coterminous with self-consciousness, and so it matters little for present purposes which is referred to.
90. See note 29, *supra*, on John Locke. Elsewhere, I analyze views on the unborn child by the most important philosophical and juristic "founding forefathers" of the American Revolution. Thomas Finegan, "Human Rights Law and Constitutional Biolaw: A Coherentist Investigation into Dignity, Personhood and Rights," doctoral thesis, 2014.
91. Michael Tooley, *Abortion and Infanticide* (Oxford: Clarendon Press, 1983). Important precursors to Tooley's revisionist account are Joseph Fletcher, "Indicators of Humanhood: A Tentative Profile of Man," *The Hastings Center Report*, Vol. 2, No. 5 (1972), pp. 1–4; Joseph F. Fletcher, "Four Indicators of Humanhood: The Enquiry Matures," *The Hastings Center Report*, Vol. 4, No. 6 (1974), pp. 4–7; and Daniel Dennett, "Conditions of Personhood," in Amelie Oksenberg Rorty, ed., *The Identities of Persons* (California: University of California Press, 1976), pp. 175–196.
92. A representative collection of views on the matter is contained in the same volume as the following article which began it: Alberto Giubilini and Francesca Minerva, "After-Birth Abortion: Why Should the Baby Live?" *Journal of Medical Ethics*, Vol. 39, No. 5 (2013), pp. 261–263.
93. In jurisdictions with liberal abortion regimes, children who survive abortions to be born alive legally can be—and sometimes are—deliberately neglected by medical staff in order to bring about their deaths. See, e.g., European Centre for Law and Justice, "Late Term Abortions and Neonatal Infanticide in Europe," Petition to the Parliamentary Assembly of the Council of Europe, June 2015, pp. 6–9, https://www.academia.edu/13078907/Late_Term_Abortion_and_Neonatal_Infanticide_in_Europe (accessed October 30, 2019).
94. An important work as part of this emerging consensus is John Harris, *The Value of Life: An Introduction to Medical Ethics* (London: Routledge and Kegan Paul, 1985).
95. A landmark case is *Airedale National Health Service Trust v. Bland* A.C. 789 (1993). For analysis of the case see John Keown, *Euthanasia, Ethics and Public Policy: An Argument Against Legalisation* (Cambridge: Cambridge University Press, 2002), ch. 19.
96. An example of judicial recognition of the very troubling statistics on non-voluntary euthanasia in these jurisdictions is *Fleming v. Ireland* I.E.H.C. 2, (2013), paras. 94–104.
97. See, for example, Jeff McMahan, "Our Fellow Creatures," *The Journal of Ethics*, Vol. 9, Nos. 3–4 (2005), pp. 353–380, and Peter Singer, "Speciesism and Moral Status," *Metaphilosophy*, Vol. 40, Nos. 3–4 (2009), pp. 567–581.
98. The leading voice in this area is Eva Feder Kittay. See, for example, Eva Feder Kittay, "At the Margins of Moral Personhood," *Ethics*, Vol. 116, No. 1 (2005), pp. 100–131, and Licia Carlson and Eva Feder Kittay, "Introduction: Rethinking Philosophical Presumptions in Light of Cognitive Disability," *Metaphilosophy*, Vol. 40, Nos. 3–4 (2009), pp. 307–330 and 322–335.
99. Another advantage of the position was that it gave ground to consider certain sub-personal humans as more than mere moral "nothings" and yet not so important as to be persons with a right to life burdensome on reproductive autonomy.
100. For example, Philippe Rochat, "Five Levels of Self-Awareness as They Unfold Early in Life," *Consciousness and Cognition*, Vol. 12, No. 4 (2003), pp. 717–731, and Laura J. Bach and Anthony S. David, "Self-Awareness after Aquired and Traumatic Brain Injury," *Neuropsychological Rehabilitation*, Vol. 16, No. 4 (2006), pp. 397–414.
101. Tim Bayne et al., "Are There Levels of Consciousness?" *Trends in Cognitive Sciences*, Vol. 20, No. 6 (2016), pp. 405–413.
102. Jeff McMahan, "Challenges to Human Equality," *The Journal of Ethics*, Vol. 12, No. 1 (2008), pp. 81–104.
103. Richard Arneson, "Basic Equality: Neither Acceptable nor Rejectable," in U. Steinhoff, ed., *Do All Persons Have Equal Moral Worth?* (Oxford: Oxford University Press, 2015), pp. 30–52.
104. Cristopher Knapp, "Equality and Proportionality," *Canadian Journal of Philosophy*, Vol. 37, No. 2 (2007), pp. 179–202.
105. Jeff McMahan comes closest. McMahan, "Challenges to Human Equality," p. 101.
106. For some brief remarks on the incompatibility between rule utilitarianism and human rights, see note 37, *supra*.
107. For more on this point see Thomas Finegan, "Intermediate Moral Respect and Proportionality Reasoning," *Bioethics*, Vol. 30, No. 8 (2016), pp. 579–587.
108. Morsink, *The Universal Declaration of Human Rights*, pp. 39–40.
109. One need only consider *Buck v. Bell*, 274 U.S. 200 (1927), a ruling written by one of the most respected legal scholars of the era, Oliver W. Holmes.
110. International Law Commission, *Draft Conclusion on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, 2018, conc. 13, https://legal.un.org/ilc/texts/instruments/english/commentaries/1_11_2018.pdf (accessed January 17, 2020). See also International Law Association, Berlin Conference, Committee on International Human Rights Law and Practice, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies*, 2004, para. 21.
111. "It seems to be well accepted that the findings of the treaty bodies do not themselves constitute binding interpretations of the treaties…. Governments have tended to stress that, while the views, concluding observations and comments, and general comments and recommendations of the treaty bodies are to be accorded considerable importance as the pronouncement of body [sic] expert in the issues covered by the treaty, they are not in themselves formally binding interpretations of the treaty." International Law Association, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies*, paras. 15–16.
112. See note 85, *supra*.
113. See United National Human Rights Committee, "General Comments No. 36 on Article 6 of the International Covenant on Civil and Political Rights: Right to Life," https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx (accessed January 10, 2020).

114. This is *not* to suggest that states should not formally oppose unjust General Comments. They should, for reasons relating to the development of customary international law and the relevance of "subsequent practice" for treaty interpretation. "[T]he general comments and general recommendations of the treaty bodies are circulated to all States parties following their adoption, generally in the form of the annual report of the committee concerned to the General Assembly or to the Economic and Social Council. States have the opportunity to express their views on the correctness of the interpretations at that stage, as well as in their reports under the treaty and in their discussions with the committees during the consideration of those reports…one could argue that the acquiescence of States parties in those statements could be seen as establishing the agreement of the parties on the interpretation of those provisions." International Law Association, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies*, para. 23.
115. See, for example, United Nations Human Rights Committee, "Monitoring Civil and Political Rights," https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx (accessed October 30, 2019).
116. International Law Commission, *Guide to Practice to Reservations to Treaties: 2011*, para. 2.4.4, https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_8_2011.pdf (accessed January 17, 2020).
117. For example, see declarations entered to the ICCPR post accession, United Nations, "Chapter IV: Human Rights," December 16, 1966, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (accessed January 10, 2020).
118. See Council of Europe, "Reservations and Declarations for Treaty No. 005: Convention for the Protection of Human Rights and Fundamental Freedoms," https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=4ZONITZB (accessed January 10, 2020).
119. Pushing back against treaty-monitoring bodies is compatible with the maintenance of a treaty-monitoring system. There is even a case to be made that it could strengthen that system. Forcing treaty-monitoring bodies to root their findings in the VCLT would, naturally, reduce the competence creep and proliferation of findings of those bodies—but it would also improve their overall legal credibility and *modus operandi*, likely reduce the number of treaty reservations that do not conflict with a treaty's object and purpose, and make it more difficult for states to excuse or dismiss negative findings against them.

Freedom of Speech in International Human Rights Law

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1. The term "hate speech" is used in quotation marks throughout this article—a reminder that its definition or understanding cannot be taken for granted. As a leading academic, Peter Molnar has written, "When used in legal parlance, the colloquial expression 'hate speech' seems to presuppose that the state can define with legal precision the particular forms of content that should be regulated as 'hate speech.' Because I regard this implicit assumption as questionable, I shall use 'hate speech' only in quotation marks." Peter Molnar, "Towards Better Law and Policy Against 'Hate Speech': The 'Clear and Present Danger' Test in Hungary," in Ivan Hare and James Weinstein, eds., *Extreme Speech and Democracy* (Oxford University Press, 2009), p. 237. We follow this practice in all of our writings on the subject.
2. See Paul Coleman, *Censored: How European Hate Speech Laws Are Limiting Freedom of Speech* (Vienna: Kairos Publications, 2016). This essay is largely based on Coleman's book, in particular, section 3, and parts of the book have been reproduced with permission.
3. United Nations, "United Nations Strategy and Plan of Action on Hate Speech," p. 2, https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf (accessed May 11, 2020) (emphasis added).
4. EU Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States, Part II: The Social Situation*, 2009, p. 46, https://fra.europa.eu/sites/default/files/fra_uploads/397-FRA_hdgso_report_part2_en.pdf (accessed May 11, 2020) (emphasis added).
5. Council of Europe, "Factsheet: Hate Speech," November 2008, p. 2 (emphasis added).
6. Iginio Gagliardone et al., "Countering Online Hate Speech," UNESCO *Series on Internet Freedom*, 2015, pp. 7–8, https://www.researchgate.net/publication/284157227_Countering_Online_Hate_Speech_-_UNESCO (accessed May 11, 2020).
7. See Coleman, *Censored: How European Hate Speech Laws Are Limiting Freedom of Speech*.
8. Finland, Criminal Code, Ch. 11, § 10, p. 58, https://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf (accessed June 4, 2020) (emphasis in original).
9. See Alliance Defending Freedom, "Major Finnish Free Speech Case: Two Additional Investigations Against Räsänen, MP," March 10, 2020, https://adfinternational.org/news/major-free-speech-case-in-finland-2newinvestigations/ (accessed May 11, 2020).
10. John Stuart Mill, *On Liberty* (Indianapolis: Hackett, 1978), p. 27 (emphasis added). For a recent discussion of this argument of Mill's and its profound influence on First Amendment law, see Irene M. Ten Cate, "Examination of John Stuart Mill's and Oliver Wendell Holmes's Free Speech Defenses," *Yale Journal of Law and the Humanities*, Vol. 22 (2010), pp. 50–56, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1831766 (accessed May 11, 2020).
11. Mill, *On Liberty*, p. 11. For a recent discussion of Mill's harm principle and its relation to free speech, see Kent Greenwalt, *From the Bottom Up: Selected Essays* (Oxford: Oxford University Press, 2016), pp. 357–362. On the distinction between the harm principle and the offense principle, which is less protective of free speech, see David van Mill, "Freedom of Speech," in Edward N. Zalta, ed., *The Stanford Encyclopedia of Philosophy*, Summer 2018, https://plato.stanford.edu/entries/freedom-speech/ (accessed May 11, 2020).
12. Mill, *On Liberty*, p. 12.
13. Montesquieu, *The Spirit of the Laws*, Thomas Nugent, trans. (New York: Harper, 1949), p. 193.
14. Ibid., pp. 193–194. See the discussion of Montesquieu on this point in William T. Mayton, "Seditious Libel and the Lost Guarantee of a Freedom of Expression," *Columbia Law Review*, Vol. 91 (1984), p. 9, https://www.jstor.org/stable/1122370?seq=1 (accessed May 11, 2020).
15. Jud Campbell, "Natural Rights and the First Amendment," *Yale Law Journal*, Vol. 127, No. 2 (2017–2018), p. 253, https://www.yalelawjournal.org/article/natural-rights-and-the-first-amendment (accessed May 11, 2020).
16. See the discussion of influences on the founding generation in Michael Kahn, "The Origination and Early Development of Free Speech in the United States," *Florida Bar Journal*, Vol. 71 (2002), pp. 1–5. On Locke's influence in particular, Peter Myers is correct in his judgment that "[i]n virtually all the elements of their account of natural rights, the Founders restate the political philosophy of John Locke, whose 'little book on government,' the *Second Treatise of Government* (1689), Jefferson held to be 'perfect as far as it goes.'" Peter C. Myers, "From Natural Rights to Human Rights—and Beyond," Heritage Foundation *Special Report* No. 197, December 20, 2017, p. 7, https://www.heritage.org/sites/default/files/2017-12/SR-197_0.pdf.
17. John Locke, *Two Treatises on Government*, Peter Laslett, ed. (Cambridge: Cambridge University Press, 1988), 2nd treatise, § 27. Defenses of free speech premised on Locke's account of natural rights remain popular today. See, for example, Stephen Heyman, "Hate Speech, Public Discourse, and the First Amendment," in Ivan Hare and James Weinstein, eds., *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009), p. 159.
18. Locke, *Two Treatises on Government*, 2nd treatise, § 7.
19. Ibid., § 23.

20. John Locke, "A Letter Concerning Toleration," in Richard Vernon, ed., *Locke on Toleration* (New York: Cambridge University Press, 2007), p. 31.
21. Ibid., p. 35.
22. Benedict Spinoza, *The Chief Works of Benedict Spinoza*, R. Elwes, trans. (Mineola, NY: Dover, 1951), pp. 258–260.
23. For example, United Nations, *Universal Declaration of Human Rights*, December 10, 1948, Art. 10, https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/217(III) (accessed May 11, 2020); United Nations, *International Covenant on Civil and Political Rights*, December 16, 1966, Art. 19, https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx (accessed May 11, 2020); Council of Europe, *European Convention on Human Rights*, November 4, 1950, Art. 10, https://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed May 11, 2020); Organization of American States, *American Convention on Human Rights*, November 22, 1969, Art. 13, https://www.cartercenter.org/resources/pdfs/peace/democracy/des/amer_conv_human_rights.pdf (accessed May 11, 2020); and Organisation of African Unity, *African Charter on Human and Peoples' Rights*, June 1981, Art. 9, https://www.achpr.org/public/Document/file/English/banjul_charter.pdf (accessed May 11, 2020).
24. Namely, United Nations, *International Covenant on Civil and Political Rights*, Art. 20, and United Nations, *International Convention on the Elimination of All Forms of Racial Discrimination*, December 21, 1965, Art. 4, https://ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx (accessed May 11, 2020).
25. See United Nations, "United Nations Strategy and Plan of Action on Hate Speech," discussed *infra*.
26. United Nations, "Calling of an International Conference on Freedom of Information," A/RES/599, December 14, 1946, https://digitallibrary.un.org/record/669110?ln=en (accessed May 11, 2020) (emphasis added).
27. In 1941, President Franklin Roosevelt called for the protection of four freedoms: "freedom of speech and expression, the freedom of worship, freedom from want, and the freedom from fear." See Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, 1999), p. 61.
28. *Verordnung des Reichspräsidenten zum Schutz von Volk und Staat* (Decree of the President of the Reich for the Protection of the People and State), February 28, 1933, § 1, https://www.1000dokumente.de/index.html?c=dokument_de&dokument=0101_rbv (accessed May 11, 2020).
29. United Nations, *Universal Declaration of Human Rights*, Art. 19.
30. See Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*, p. 67.
31. United Nations, *Report of the Third Session of the Commission on Human Rights*, E/800, June 28, 1948, p. 28, https://undocs.org/E/800 (accessed May 11, 2020).
32. Ibid., p. 42.
33. Belgian representative Fernand Dehouse, in United Nations, "Draft International Declaration of Human Rights, E/800," A/C.3/SR.128, 128th meeting, November 9, 1948, p. 414, https://undocs.org/A/C.3/SR.128 (accessed May 11, 2020).
34. United Nations, "Draft International Declaration of Human Rights, E/800," A/C.3/SR.129, 129th meeting, November 10, 1948, p. 421, https://undocs.org/A/C.3/SR.129 (accessed May 11, 2020).
35. See Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*, p. 68.
36. United Nations, "Continuation of the Discussion on the Draft Universal Declaration of Human Rights: Report of the Third Committee (A/777)," A/PV.182, 182nd meeting, December 10, 1948, p. 57, https://undocs.org/A/PV.182 (accessed May 11, 2020)
37. United Nations, "Draft International Declaration of Human Rights, E/800," A/PV.180, 128th meeting, December 9, 1948, p. 54, https://undocs.org/A/PV.180 (accessed May 11, 2020).
38. Ibid.
39. United Nations, *International Covenant on Civil and Political Rights*, Art. 19 (emphasis added).
40. United Nations, "Draft International Covenants on Human Rights: Report of the Third Committee," A/5000, December 5, 1961, 16th Sess., § 34, http://uvallsc.s3.amazonaws.com/travaux/s3fs-public/A-5000.pdf?null (accessed May 12, 2020).
41. Ibid.
42. See Marc J. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers, 1987), p. 375.
43. United Nations, "Draft International Covenants on Human Rights: Report of the Third Committee," § 34.
44. Michael O'Flaherty, "International Covenant on Civil and Political Rights: Interpreting Freedom of Expression and Information Standards for the Present and the Future," in Tarlach McGonagle and Yvonne Donders, eds., *The United Nations and Freedom of Expression and Information: Critical Perspectives* (Cambridge University Press, 2015), p. 62.
45. United Nations, "Draft International Covenants on Human Rights: Report of the Third Committee §§ 25–26.
46. Italy, Luxembourg, Monaco, and The Netherlands placed reservations on Article 19 in relation to national regulations on broadcasting and licensing. Malta placed a reservation on Article 19 in relation to political activity.
47. For example, Art. 10 of the European Convention on Human Rights.
48. United Nations, "Report of the Commission on Human Rights, Second Session," E/600, December 17, 1947, p. 35, https://undocs.org/E/600(SUPP) (accessed May 12, 2020) (emphasis added).
49. United Nations, "Summary Record of the Twenty-Eighth Meeting, Second Session," E/CN.4/AC.1/SR.28, May 11, 1948, https://uvallsc.s3.amazonaws.com/travaux/s3fs-public/E-CN_4-AC_1-SR_28.pdf?null (accessed May 12, 2020). See Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*, p. 403.
50. United Nations, "Summary Record of the Three Hundred and Seventy-Seventh Meeting, Ninth Session," E/CN.4/SR.377, October 16, 1953, p. 4. See Stephanie Farrior, "Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech," *Berkeley Journal of International Law*, Vol. 14, No. 1 (1996), § 25, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=886171 (accessed May 11, 2020).
51. United Nations, "Sixteenth Session, Third Committee, 1079th Meeting," A/C.3/SR.1079, October 20, 1961, §9, https://undocs.org/A/C.3/SR.1079 (accessed May 12, 2020), and United Nations, "Summary Record of the Three Hundred and Seventy-Seventh Meeting, Ninth Session," § 26.
52. Eleanor Roosevelt in United Nations, "Commission on Human Rights, Sixth Session,"174th Meeting, E/CN.4/SR.174, May 6, 1950, p. 6, https://hr-travaux.law.virginia.edu/document/iccpr/ecn4sr174/nid-1741 (accessed May 12, 2020).
53. United Nations, "Draft International Covenants on Human Rights: Report of the Third Committee," p. 13.
54. Ibid.
55. Ibid., p. 14.
56. Farrior, "Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech," § 25.
57. Jacob Mchangama, "The Sordid Origin of Hate-Speech Laws," Hoover Institution *Policy Review*, December 2011 and January 2012, p. 5, https://www.hoover.org/research/sordid-origin-hate-speech-laws (accessed May 12, 2020).
58. United Nations, *International Convention on the Elimination of All Forms of Racial Discrimination*, Art. 4 (emphasis added).
59. While the article calls for prohibition by law, the monitoring body of the treaty has held this to mean criminal law. See Farrior, "Molding the Matrix: The Historical and Theoretical Foundations of Law Concerning Hate Speech," § 51.

60. The final version of Article 4 reads: "States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia: (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law; (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination."
61. Tony Mendel, "Does International Law Provide for Consistent Rules on Hate Speech?" in Michael Herz and Peter Molnar, eds., *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge: Cambridge University Press, 2012), p. 47.
62. Natán Lérner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination* (Sijthoff & Noordoff, 1980), p. 43.
63. Morris Abram in United Nations, "Summary Record of the Four Hundred and Eighteenth Meeting: Sixteenth Session," Economic and Social Council, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/SR.418, January 21, 1964, https://digitallibrary.un.org/record/1651949 (accessed May 12, 2020), and Lérner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination*, p. 51.
64. United Nations, "Draft International Convention on the Elimination of All Forms of Racial Discrimination: Mr. Abram; Revised Suggested Draft for United Nations Convention on the Elimination of All Forms of Racial Discrimination," Economic and Social Council, January 14, 1964, E/CN.4/Sub.2/L.308/Add.1/Rev.1/Corr.1, https://digitallibrary.un.org/record/737698?ln=en (accessed May 12, 2020).
65. United Nations, *Report of the Sixteenth Session of the Sub-Committee on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights*, Economic and Social Council, February 11, 1964, E/CN.4/Sub.2/L.314, Art. 34, pp.16–17, https://undocs.org/pdf?symbol=en/E/CN.4/873 (accessed May 12, 2020).
66. United Nations General Assembly, "Draft International Convention on the Elimination of All Forms of Racial Discrimination: Report of the Third Committee," A/6181, December 18, 1965, Amendment A/C.3/L/1220, Art. 67, https://undocs.org/pdf?symbol=en/A/6181 (accessed May 12, 2020); United Nations General Assembly, "Twentieth Session, Third Committee, 1312th Meeting," October 20, 1965, discussing A/C.3/L/1210, https://uvallsc.s3.amazonaws.com/travaux/s3fs-public/A-C_3-SR_1312.pdf?null (accessed May 12, 2020); and United Nations General Assembly, "Twentieth Session, Third Committee," October 22, 1945, A/C.3/SR/1315, Amendment A/C.3/T/1208. See also Lérner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination*, p. 45.
67. United Nations, "Summary Record: International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 20th Session, 3rd Committee, 1315th Meeting," A/C.3/SR.1315, October 22, 1965, § 1, https://hr-travaux.law.virginia.edu/document/icerd/ac3sr1315/nid-75 (accessed May 12, 2020).
68. Ibid.
69. Ibid.
70. Ibid.
71. Ibid., § 2.
72. Ibid., §§ 4–17, 20.
73. Mrs. Sekaninova, ibid., § 6.
74. Mr. Ospina in United Nations, "General Assembly, 20th Session: 1406th Plenary Meeting," A/PV.1406, December 21, 1965, §§ 70–72, https://digitallibrary.un.org/record/747848?ln=en (accessed May 12, 2020).
75. Mchangama, "The Sordid Origin of Hate-Speech Laws," pp. 6–7.
76. *Ratifica ed Esecuzione della Convenzione Internazionale Sull'Eliminazione di Tutte le Forme di Discriminazione Razziale* (Ratification and Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination), § 3(1), Law No. 654/1975, as amended, https://www.miolegale.it/norme/legge-654-1975-eliminazione-discriminazione-razziale/ (accessed May 13, 2020).
77. *30 Juillet 1981: Loi Tendant à Réprimer Certains Actes Inspirés par le Racisme ou la Xénophobie* (July 30, 1981: Law on the Punishment of Certain Acts Inspired by Racism or Xenophobia), Art. 2, as amended, https://www.unia.be/files/Documenten/Wetgeving/loi_contre_le_racisme_30_juillet_1981.pdf (accessed May 13, 2020).
78. See Venice Commission, *Blasphemy, Insult and Hatred: Finding Answers in a Democratic Society* (Venice Commission, 2010), p. 163.
79. *Ο Περί της Καταπολέμησης Ορισμένων Μορφών και Εκδηλώσεων Ρατσισμού και Ξενοφοβίας μέσω του Ποινικού Δικαίου Νόμος του 2011* (The Law on the Fight against Certain Forms and Manifestations of Racism and Xenophobia Through the Criminal Law of 2011), October 21, 2011, http://www.cylaw.org/nomoi/arith/2011_1_134.pdf (accessed May 14, 2020).
80. Each core human rights treaty has a treaty body comprised of "independent experts." These experts provide their interpretation of the treaty and monitor member states' implementation of the treaty through country reports and, in some instances, by receiving individual communications from citizens who claim their rights have been violated.
81. United Nations, "International Covenant on Civil and Political Rights: General Comment No. 34," CCPR/C/GC/34, Art. 19: Freedoms of Opinion and Expression, para 2, https://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf (accessed May 13, 2020).
82. Ibid., para 22.
83. Ibid., para 34.
84. Ibid., para 35.
85. See United Nations General Assembly, "Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled 'Human Rights Council,'" September 20, 2006, § 47, https://undocs.org/en/A/HRC/2/3 (accessed May 13, 2020).
86. "Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility, or Violence," in United Nations, "Annual Report of the United Nations High Commissioner for Human Rights: Addendum," A/HRC/22/17/Add.4, January 11, 2013, § 18, https://www.ohchr.org/EN/Issues/FreedomReligion/Pages/RabatPlanOfAction.aspx (accessed May 13, 2020).
87. United Nations General Assembly, "Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression," September 7, 2012, A/67/357, paras 45–47, https://www.undocs.org/A/67/357 (accessed May 13, 2020).
88. United Nations General Assembly, "Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt," A/HRC/25/58, December 26, 2013, para 58, https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Documents/A-HRC-25-58_en.doc (accessed May 13, 2020).
89. "Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility, or Violence," § 25.
90. United Nations General Assembly, "Report of the Special Rapporteur on Freedom of Religion or Belief," Human Rights Council, December 23, 2015, A/HRC/31/18, para 84, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/291/11/PDF/G1529111.pdf?OpenElement (accessed May 13, 2020).

91. United Nations General Assembly, "Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression," para 78.
92. United Nations General Assembly, "Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression," A/71/373, September 6, 2016, para 57(a), https://undocs.org/A/71/373 (accessed May 13, 2020).
93. Ibid., para 25.
94. United Nations, "Racism, Racial Discrimination, Xenophobia, and All Forms of Discrimination," Economic and Social Council, Commission on Human Rights, 55th Sess., E/CN.4/1999/L.40, April 20, 1999, draft resolution, https://documents-dds-ny.un.org/doc/UNDOC/LTD/G99/124/98/PDF/G9912498.pdf?OpenElement (accessed May 13, 2020).
95. See United Nations, "Defamation of Religions," Commission on Human Rights Res. 1999/82, E/CN.4/RES/1999/82, April 30, 1999, https://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-1999-82.doc (accessed May 13, 2020).
96. Ibid.
97. Ibid., § 2.
98. Ibid., § 3.
99. Ibid., § 4.
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101. See United Nations, "Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence, and Violence Against Persons Based on Religion or Belief," Human Rights Council, Res. 16/L.38, 16th Sess., A/HRC/RES/16/L.38, March 21, 2011, https://documents-dds-ny.un.org/doc/UNDOC/LTD/G11/121/55/PDF/G1112155.pdf?OpenElement (accessed May 13, 2020).
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26. See Glendon's description of the establishment of this committee in Glendon, *A World Made New*, pp. 50–51.
27. Jacques Maritain, *Man and the State* (Chicago, IL: University of Chicago Press, 1951), pp. 77–78 (emphasis in original).
28. Ibid., p. 80.
29. C. S. Lewis, *The Abolition of Man* (San Francisco, CA: HarperOne, 2015).
30. On rights as entitlements, see Leif Wenar, "Rights," in Edward N. Zalta, ed., *The Stanford Encyclopedia of Philosophy Archive*, Spring 2020, https://plato.stanford.edu/archives/spr2020/entries/rights/ (accessed July 9, 2020).
31. While human rights, or natural rights, entail a corresponding obligation, it is not the case that all natural obligations entail a corresponding right. Some do, but not all. Some natural law obligations—such as charity or beneficence, for instance—are wide obligations, meaning that they are open-ended with respect to their discharge and are not owed in a strict sense to their recipients.
32. Not all natural law scholars endorse human rights or natural rights, although many do. The argument here is that if one endorses human rights, then one also endorses natural rights and natural law because human rights implies both. Some scholars, though, may allow that human rights, were they to exist, implies natural rights and natural law, yet are skeptical that there are human rights in the first place. See for instance, the work of Alasdair MacIntyre, who famously compared natural rights to witches and unicorns in his book. Alasdair MacIntyre, *After Virtue* (Notre Dame, IN: University of Notre Dame Press, 1984), p. 69.
33. For major general statements of the school, see Germain Grisez, *The Way of the Lord Jesus: Volume One: Christian Moral Principles* (Chicago, IL: Franciscan Herald Press, 1983); John Finnis, *Natural Law and Natural Rights* (Oxford, U.K.: Oxford University Press, 1980); John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford, U.K.: Oxford University Press, 1998); and Germain Grisez, Joseph Boyle, and John Finnis, "Practical Principles, Moral Truth, and Ultimate Ends," *The American Journal*

of Jurisprudence, Vol. 2 (1987), pp. 99–151. The moniker "New Natural Law" is arguably problematic and probably derives from the work of one of the school's chief critics. See Russell Hittinger, *A Critique of the New Natural Law Theory* (Notre Dame, IN: University of Notre Dame Press, 1987). Still, given the prevalence of the label, the author uses it here. For a natural law theorist who is not normally identified with the new natural law theory but also endorses basic goods, see Mark C. Murphy, *Natural Law and Practical Rationality* (Cambridge, U.K.: Cambridge University Press, 2001).

34. Aristotle, *Nicomachean Ethics*, Robert C. Bartlett and Susan D. Collins, trans. (Chicago, IL: University of Chicago Press, 2011), Book 1, pp. 1–25.
35. On basic goods, see Finnis, *Natural Law and Natural Rights*, pp. 59–99; Finnis, *Aquinas*, pp. 79–86; and Grisez, *Christian Moral Principles*, pp. 115–140.
36. See, for instance, several of the pieces in, and the general thesis of, Winnifred Fallers Sullivan, Elizabeth Shakman Hurd, Saba Mahmood, and Peter G. Danchin, eds., *Politics of Religious Freedom* (Chicago: University of Chicago Press, 2015).
37. Christopher Hitchens, *God Is Not Great: How Religion Poisons Everything* (New York: McClelland, 2007); Richard Dawkins, *The God Delusion* (New York: Houghton Mifflin, 2006); Daniel C. Dennett, *Breaking the Spell: Religion as a Natural Phenomenon* (New York: Penguin, 2006); and Sam Harris, *The End of Faith: Religion, Terror and the Future of Reason* (New York: W.W. Norton, 2004).
38. In addition to Martin Riesebrodt and Christian Smith, who are discussed *infra*, see Kevin Shilbrack, *Philosophy and the Study of Religions* (Malden, MA: Wiley Blackwell, 2014); Kathleen Brady, *The Distinctiveness of Religion in American Law: Rethinking Religion Clause Jurisprudence* (Cambridge, U.K.: Cambridge University Press, 2015); and William P. Alston, "Religion," *Encyclopedia of Philosophy*, Vol. 7 (New York: Macmillan, 1972).
39. Martin Riesebrodt, *The Promise of Salvation: A Theory of Religion*, Steven Rendall, trans. (Chicago: University of Chicago Press, 2010), p. xi.
40. Christian Smith, *Religion: What It Is, How It Works, and Why It Matters* (Princeton, NJ: Princeton University Press, 2017).
41. Smith, *Religion*, p. 22.
42. Smith compiles a remarkable list of over 100 of these practices on p. 29 of *Religion*.
43. Ibid., pp. 23–25. Smith points out that these same religions contain diverse beliefs about the character of superhuman powers.
44. Ibid., pp. 30, and 44–46.
45. Finnis and Grisez both argue that religion is a basic good. Finnis, *Natural Law and Natural Rights*, pp. 89–90. Others who belong to their school of thought also make this case. See Christopher Tollefsen, "Religious Liberty, Human Dignity, and Human Goods," in Timothy Samuel Shah and Jack Friedman, eds., *Homo Religiosus? Exploring the Roots of Religion and Religious Freedom in Human Experience* (Cambridge, U.K.: Cambridge University Press, 2018), pp. 230–242; and Joseph Boyle, "The Place of Religion in the Practical Reasoning of Individuals and Groups," *American Journal of Jurisprudence*, Vol. 43 (1998), pp. 1–24.
46. Lactantius, *Divine Institutes*, Alexander Roberts, Sir James Donaldson, and Arthur Cleveland Coxe, eds. (Publisher and Date: Not Available), p. 246.
47. Kyai Haji Abdurrahman Wahid, "Foreword: God Needs No Defense," in Paul Marshall and Nina Shea, eds., *Silenced: How Apostasy and Blasphemy Codes Are Choking Freedom Worldwide* (Oxford, U.K.: Oxford University Press, 2011), p. xx.
48. Pope Paul VI, "Dignitatis Humanae," December 7, 1965, http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html (accessed July 27, 2020).
49. Monica Duffy Toft, Daniel Philpott, and Timothy Samuel Shah, *God's Century*: *Resurgent Religion and Global Politics* (New York: W.W. Norton, 2011), pp. 50–74.
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52. Micah Schwartzman, "What If Religion Is Not Special?" *University of Chicago Law Review*, Vol. 79, No. 4, pp. 1351–1427.
53. See also Cécile Laborde, *Liberalism's Religion* (Cambridge, MA: Harvard University Press, 2017); Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton, NJ: Princeton Press, 2005), pp. 155–159; and Brian Leiter, *Why Tolerate Religion?* (Princeton, NJ: Princeton University Press, 2012).
54. See Laborde, *Liberalism's Religion*, pp. 1–12.
55. Elizabeth Shakman Hurd, "Believing in Religious Freedom," in Winnifred Fallers Sullivan et. al., eds., *The Politics of Religious Freedom*, p. 51. This post-modern view is the orienting conception of this volume, though essays by Robert Hefner, Samuel Moyn, and Nandini Chatterjee are exceptions. See also Elizabeth Shakman Hurd, *Beyond Religious Freedom: The New Global Politics of Religious Freedom* (Princeton, NJ: Princeton University Press, 2015); and Saba Mahmood, *Religious Difference in a Secular Age: A Minority Report* (Princeton, NJ: Princeton University Press, 2015).
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58. Riesebrodt, *The Promise of Salvation*, pp. 26–30.
59. United Nations Human Rights Council, *Report of the Special Rapporteur on Freedom of Religion or Belief*, February 27, 2020, https://www.ohchr.org/EN/Issues/FreedomReligion/Pages/Annual.aspx (accessed July 27, 2020).
60. LGBT+ is the term that the report uses and refers to people who identify as lesbian, gay, bisexual, and transgender, as well as persons of additional sexual orientations and gender identities.
61. United Nations Human Rights Council, *Report of the Special Rapporteur on Freedom of Religion or Belief*, §§ 49–50.
62. Ibid., § 64. He cites statements by the U.N. Human Rights Committee, the CEDAW Committee, the CERD Committee, the CAT Committee, Special Procedures mandates, and regional human rights systems.
63. A good survey of these truncations is Paul Marshall, "Western Christians' Responses to Denials of Religious Freedom," in Daniel Philpott and Timothy Samuel Shah, eds., *Under Caesar's Sword: How Christians Respond to Persecution* (Cambridge, U.K.: Cambridge University Press, 2018), pp. 428–455.
64. Steve Jacobs, "I Asked Thousands of Biologists When Life Begins. The Answer Wasn't Popular," *Quillette*, October 16, 2019, https://quillette.com/2019/10/16/i-asked-thousands-of-biologists-when-life-begins-the-answer-wasnt-popular/ (accessed June 15, 2020).
65. United Nations Human Rights Council, *Report of the Special Rapporteur on Freedom of Religion or Belief*, §§ 44–45.
66. Sonia Elks and Rachel Savage, "Factbox: Same-Sex Marriage Rights Around the World," Reuters, May 27, 2020, https://www.reuters.com/article/us-global-lgbt-marriage-factbox-trfn/factbox-same-sex-marriage-rights-around-the-world-idUSKBN2331KM#:~:text=%2D%20Same%2Dsex%20marriage%20is%20legal,South%20Africa%2C%20Spain%2C%20Sweden%2C (accessed July 27, 2020). An exceptional place where abortion appears in international law is the United Nations, "The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa," (the Maputo Protocol) https://www.un.org/en/africa/osaa/pdf/au/protocol_rights_women_africa_2003.pdf (accessed August 17, 2020). It was signed in 2003, and Article 14 calls state parties to "protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus."

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Equality and Non-Discrimination in International Human Rights Law

LI-ANN THIOA

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2. Johannes Morsink, "World War Two and the Universal Declaration," 15(2) *Human Rights Quarterly*, Vol. 15, No. 2 (1993), pp. 357–405.
3. Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, 2000), p. 45.
4. Ibid., p. 45.
5. See articles 4 (slavery, servitude); 10 (fair and public healing); 16 (equal rights to marriage and its dissolution); 21 (participation in government and equal access to public services); 23(2) ("right to equal pay for equal work"); and 26 (right to education).
6. Fernando Teson, "The Kantian Theory of International Law," *Columbia Law Review*, Vol. 92 (1992) pp. 53, 54.
7. Nicholas D. Smith, "Aristotle's Theory of Natural Slavery," *Phoenix*, Vol. 37, No. 2 (1983) pp. 109–122.
8. Morsink, "World War Two and the Universal Declaration," p. 366.
9. See, for example, Institut de Droit "International's Declaration of the International Rights of Man (1929)," reproduced in *American Journal of International Law*, Vol. 43, No. 2 (1941) pp. 662–665.
10. Morsink, *The Universal Declaration of Human Rights*, pp. 116–120.
11. Ibid., pp. 139–152.
12. "Letter to M. Paderewski by the President of the Conference Transmitting to Him and Treaty to be Signed by Poland under Article 93 of the Treaty of Peace with Germany," American Journal of International Law, Vol. 13, No. 4, (1919), https://www.jstor.org/stable/i312411 (accessed December 9, 2020). In the 1930s, Poland unsuccessfully called for a generalizing of the minorities' regime. See Józef Beck (Poland), *League of Nations Official Journal*, Special Supplement, 130, 38 (1934) 2.
13. Julius Curtius (Germany), *League of Nations Official Journal*, Special Supplement, Vol. 90, 41–42.
14. "Treaty Between the Principal Allied and Associated Powers (The British Empire, France, Italy, Japan, and the United States) and Poland," June 28, 1919, http://www.forost.ungarisches-institut.de/pdf/19190628-3.pdf (accessed December 9, 2020).
15. Trindade Cancado, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, July 22, 2010, https://www.webcitation.org/5rRB9e3bz?url=http://www.icj-cij.org/docket/files/141/15987.pdf (accessed December 9, 2020), p. 83.
16. Dmitry Manuilsky (Ukraine) stated that human rights should extend to non-self-governing territories to eradicate the colonial powers' belief they are superior races governing over the inferior races. Morsink, *The Universal Declaration of Human Rights*, p. 1010.
17. United Nations, "Declaration on the Granting of Independence to Colonial Territories and Peoples," General Assembly Resolution 1514 (XV), December 14, 1960, https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/152/88/IMG/NR015288.pdf?OpenElement (accessed December 9, 2020).
18. Baron Makino (Japan) proposed inserting a clause on "equal and just treatment in every respect, making no distinction either in law or in fact, on account of race or nationality" into the League Covenant. Paul Gordon Lauren, "First Principles of Racial Equality: History and Politics and Diplomacy of the Human Rights Provisions in the United Nations Charter," *Human Rights Quarterly*, Vol. 5, No. 1 (1983), p. 14. Later, Wellington Koo (China) suggested inserting, "The principle of all states and all races shall be upheld" into the United Nations Charter. Susan Waltz, "Reclaiming and Rebuilding the History of the UDHR" *Third World Quarterly*, Vol. 23, No. 3 (2002), p. 440.
19. Oscar Janowsky, *The Jews and Minority Rights (1898–1919)* (New York: Columbia University Press, 1933), p. 323.
20. Eleanor Roosevelt noted the UDHR was an aspirational standard, not a treaty, and did not purport to "be a statement of law or of legal obligations." Quoted in M.M. Whiteman, *Digest of International Law*, U.S. Department of State, Publication 7873, 1965, p. 243.
21. See, for example, Hurst Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law," *Georgia Journal International & Comparative Law*, Vol. 25 (1996), p. 287.
22. The 1965 Convention against Racial Discrimination (CERD), the 1979 Convention for the Elimination of All Forms of Discrimination against Women (CEDAW), the 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, and the 2006 Convention on the Rights of Persons with Disabilities.
23. Equality and non-discrimination also feature in regional human rights instruments, such as article 14 of the European Convention on Human Rights (ECHR) and article 2 of the African Charter on Human and Peoples Rights (ACHPR), which is similar to article 2(1) of the ICCPR (International Covenant on Civil and Political Rights) in being an accessory prohibition of discrimination. A right to equality before and equal protection of the law similar to that of article 26 of the ICCPR and article 7 of the UDHR can be found in article 24 of the American Convention on Human Rights and article 3 of the ACHPR. Protocol 12 of the ECHR was introduced to create a broader, free-standing right to non-discrimination in respect of the enjoyment of any right set forth in law.
24. Inter-American Court of Human Rights, "Juridical Condition and Rights of the Undocumented Migrants Advisory Opinion," OC-18/03, September 17, 2003, No. 34, Paragraph 101, https://www.brennancenter.org/sites/default/files/legacy/Justice/IACHR%20Opinion%20Final.pdf (accessed December 9, 2020).
25. Jarlath Clifford, "Equality," in Dinah Shelton, ed., *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013), pp. 427–430.
26. Peter Westen, "The Empty Idea of Equality,"' *Harvard Law Review*, Vol. 59 (1995), p. 537.
27. Catharine Barnard and Bob Hepple, "Substantive Equality," *Cambridge Law Journal*, Vol. 59, No. 3 (1995), pp. 562–585.
28. Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977) pp. 180–183. Dworkin's idea was appropriated by Jack Donnelly, who argues that human rights law applies to "equal and autonomous agents living in states that treat each citizen with equal concern and respect," the foundational basis for the UDHR. Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed., (Cornell University Press, 2003) p. 46.
29. Egypt (on behalf of the African Group) in United Nations, "Discussion of SOGI Issues," Human Rights Council, 8th Session, and ARC International, "Recognizing Human Rights Violations Based on Sexual Orientation and Gender Identity at the Human Rights Council," Session 8, June 2–18, 2008, http://arc-international.net/wp-content/uploads/2011/09/SOGI-report-HRC8.pdf (accessed December 7, 2020).
30. For example, for differential treatment to be justified, there must be a "reasonable relationship of proportionality" between substantial factual differences between individuals and the legislative object. Inter-American Court of Human Rights, "Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica," January 19, 1984, Advisory Opinion, http://www.worldcourts.com/iacthr/eng/decisions/1984.01.19_Proposed_Amendments.pdf (accessed December 9,

2020). See *In the Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium*, ECHR Application No. 1474/62, para. 10, July 23, 1968. See also S. M. Huang-Thio, "Equal Protection and Rational Classification," 1963, Public Law 412.

31. Joseph Raz, "Human Rights in the Emerging World Order," *Transnational Legal Theory*, Vol. 1 (2010), pp. 31–47.
32. Article 1(3), Charter of the United Nations, T.S. 993, EIF Oct. 24, 1945, https://www.un.org/en/charter-united-nations/ (accessed December 29, 2020). Chilean delegate Santa Cruz told his Third Committee colleagues that article 2 expressed a basic charter provision, noting that the United Nations was created "principally to combat discrimination in the world." Morsink, *The Universal Declaration of Human Rights*, p. 92.
33. Ibid.
34. Dinah Shelton, "Prohibited Discrimination in International Human Rights Law," in Aristotle Constantinides and Nikos Zaikos, eds., *The Diversity in International Law: Essays in Honour of Professor Kalliopi K Koufa* (Brill, 2009), pp. 265. See generally Titia Loenen and Peter R. Rodrigues, eds., *Non-Discrimination Law: Comparative Perspectives* (The Hague/Boston: Kluwer Law International, 1999).
35. Mary Ann Glendon, "Knowing the Universal Declaration of Human Rights," *Notre Dame Law Review*, Vol. 73 (1998), p. 1153.
36. From inception, the Declaration was considered "as part of an International Bill of Rights" together with a covenant, plus rules of implementation." Nehemiah Robinson, *The Universal Declaration of Human Rights: Its Origin, Significance, Application and Interpretation* (New York: Institute of Jewish Affairs, World Jewish Congress, 1958), p. 29.
37. Sigrun Skogly on Article 2 in Asbjorn Eide, ed., *The Universal Declaration of Human Rights: A Commentary* (Oslo: Scandinavian University Press, 1992), p. 57.
38. Hersch Lauterpacht, *An International Bill of the Rights of Man* (Columbia University Press, New York, 1945), pp. 115–116.
39. Jakob Th. Moller on Article 7, Eide ed., *The Universal Declaration of Human Rights*, pp. 115–141.
40. Morsink, *The Universal Declaration of Human Rights*, pp. 103, 105.
41. Other groups, like women and children, are addressed through the general human rights regime, focusing on individual rights. Li-ann Thio, *Managing Babel: The International Legal Protection of Minorities in the Twentieth Century* (Brill, 2005), p. 9.
42. William A Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires*, Volume 1 (October 1946–November 1947) (Cambridge University Press, 2013).
43. Humphrey's original single article provided, "No one shall suffer any discrimination whatsoever on account of race, sex, language or political creed. There shall be full equality before the law in the enjoyment of the rights enunciated in this Bill of Rights" Cassin reinstated "religion," which was in the charter's original list of four grounds, which Humphrey had replaced with "political creed." Morsink, *The Universal Declaration of Human Rights*, p. 45.
44. United Nations Doc. E/CN.4/57 united the principle of non-discrimination and equality before the law in one article, in separate paragraphs. United Nations, "Report on the Working Group Working Group on the Declaration of Human Rights," Doc. E/CN.4/57, https://documents-dds-ny.un.org/doc/UNDOC/GEN/GL9/001/07/PDF/GL900107.pdf?OpenElement (accessed December 9, 2020).
45. The reason article 7 does not list grounds of non-discrimination is because when the one long non-discrimination clause was finally split into two, the list went with what became article 2. Morsink, *The Universal Declaration of Human Rights*, p. 47.
46. Ibid., p. 92.
47. Ibid., p. 46. French delegate Cassin's new clause read: "All are equal before the law and entitled to the equal protection of the law. Public authorities and judges, as well as individuals are subject to the rule of law."
48. "No one shall suffer any discrimination whatsoever on account of race, sex, language or political creed. There shall be full equality before the law in the enjoyment of the rights enunciated in this Bill of Rights." Johannes Morsink, "Colonies, Minorities and Women's Rights," *in* Stephanie Farrior, ed., *Equality and Non-Discrimination Under International Law: Volume II* (The Library of Essays on International Human Rights) (Routledge, 2015), 1st ed., p. 149.
49. Evelyn Ellis, "The Principle of Equality of Opportunity Irrespective of Sex: Some Reflections on the Present State of European Community Law and Its Future Development," in Alan Dashwood and Siofra O'Leary, eds., *The Principle of Equal Treatment in EC Law* (Sweet & Maxwell, 1997), p. 180.
50. Morsink, *The Universal Declaration of Human Rights*, pp. 128–129.
51. Ibid., pp. 129 and 363
52. Ibid., p. 96.
53. Skogly in Eide, ed., *The Universal Declaration of Human Rights*, p. 62.
54. Nehemiah Robinson, *The Universal Declaration of Human Rights: Its Origin, Significance, Application and Interpretation* (New York: Institute of Jewish Affairs, World Jewish Congress, 1958), p. 104.
55. Ibid., p. 105 [emphasis in original].
56. Morsink, *The Universal Declaration of Human Rights*, pp. 113–116.
57. Ibid., p. 113.
58. Ibid., pp 102–103. National origin was thus linked to "race" and "color," strengthening the protection of members of ethnic and cultural groups.
59. Ibid., p. 13.
60. Ibid., p. 114.
61. Ibid., p. 114
62. Ibid., p. 116. In the context of children's rights under article 24(1) of the ICCPR, non-discrimination on the basis of birth (based on the drafting debates) referred to the permissibility of distinctions between legitimate and illegitimate children; the *travaux* indicated that this would not prohibit distinctions made by the law of succession.
63. Ibid., p. 115.
64. Ibid., p. 114.
65. United Nations, "The Policies of Apartheid of the Government of the Republic of South Africa," General Assembly Resolution 2202A (XXI), December 16, 1966, https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/005/05/IMG/NR000505.pdf?OpenElement (accessed Decemer 9, 2020).
66. Ibid.
67. The grounds: "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Discrimination, in contrast to distinction, implies action.
68. United Nations, "General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Article 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights)," Committee on Economic, Social and Cultural Rights, July 2, 2009, E/C.12/GC/20, p. 27, https://www.refworld.org/docid/4a60961f2.html (accessed December 2, 2020).
69. Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl, Germany and Arlington, VA: NP Engel, 1993), p. 27.
70. Ibid., p. 33.
71. The "equal right of men and women" to enjoy Covenant rights (articles 3 of the ICCPR and the ICESCR); equality before the courts (article 14 of the ICCPR); equal rights and responsibilities of spouses during marriage (article 23 of the ICCPR); the right of children to enjoy rights without discrimination (article 24 of the ICCPR); and equal pay for equal work and equal rights to promotion opportunities (article 7 of the ICESCR).

72. United Nations, "CCPR General Comment No. 23: Article 27 (Rights of Minorities)," Human Rights Committee, April 8, 1994, CCPR/C/21/Rev.1/Add.5, para 6.1, https://www.uio.no/studier/emner/jus/humanrights/HUMR5508/v12/undervisningsmateriale/ICCPR%20General%20Comment%2023.pdf (accessed December 29, 2020).
73. Shelton, "Prohibited Discrimination in International Human Rights Law," in Constantinides and Zaikos, p. 270.
74. United Nations, *F. H. Zwaan-de Vries v. The Netherlands*, Human Rights Committee, Communication No. 182/1984, U.N. Doc. CCPR/C/OP/2, April 9, 19987, p. 209, https://www.escr-net.org/caselaw/2006/f-h-zwaan-vries-v-netherlands-communication-no-1821984-9-april-1987-un-doc-supp-no-40 (accessed December 9, 2020). For example, there is no covenant right to sit on a park bench, but if a law forbids an ethnic group from sitting on park benches, this would violate article 26.
75. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, p. 468.
76. The Human Rights Committee in *Nahlik v. Austria*, in relation to a collective agreement, noted that the covenant might require regulation of private sector discrimination in the "quasi-public" sphere, such as employment or access to publicly available goods and services, without requiring regulation with the personal sphere, such as the home and family, where discriminatory attitudes may be better addressed by educative rather than coercive measures. The desire to horizontalize the application of non-discrimination law is also evident in the observation that the lack of official recognition of same-sex relationships and absence of legal prohibition on discrimination can also result in same-sex partners being discriminated against by private actors. United Nations, "Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity," Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/29/23, May 4, 2015 at 68.
77. United Nations General Assembly, "International Covenant on Civil and Political Rights," December 16, 1966, in United Nations, *Treaty Series*, Vol. 999, p. 171, https://treaties.un.org/doc/Publication/UNTS/Volume%20999/v999.pdf (accessed December 29, 2020).
78. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, p. 474.
79. United Nations, "CCPR General Comment No. 18: Non-Discrimination," Human Rights Committee, November 10, 1989, para 13, https://www.refworld.org/pdfid/453883fa8.pdf (accessed December 2, 2020).
80. Manfred Nowak, "Civil and Political Rights," in Janusz Symonides, ed., *Human Rights: Concept and Standards* (Dartmouth: Ashgate & UNESCO Publishing, 2000).
81. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, p. 461.
82. *S. W. M. Broeks v. Netherlands*, Communication No. 172/1984, U.N. Doc CCPR/C/29/D/172/1984, http://www.worldcourts.com/hrc/eng/decisions/1987.04.09_Broeks_v_Netherlands.htm (accessed December 9, 2020). The Human Rights Committee found that article 26 of the ICCPR was violated by a Dutch unemployment benefits law that required married women to prove "breadwinner" status to receive benefits, something married men did not have to prove. The differentiation in question related to sex and the right in question did not relate to any ICCPR right, with the committee underscoring that article 26 did not merely duplicate the article 2 guarantee. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, p. 461.
83. Shelton, "Prohibited Discrimination in International Human Rights Law," in Constantinides and Zaikos, p. 292.
84. United Nations, "Concluding Comments on India," 1998, U.N. Doc CCPR/C/79/Add.91, para 10.
85. United Nations, "General Comment No. 18 of November 10, 1989," Human Rights Committee, HRI/GEN/1/Rev.8, May 8, 2006, p 185. This provides the Committee's view that "discrimination" in the ICCPR implies "any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."
86. Article 1(1) of the CERD states that "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." Article 1(2) provides that CERD does not apply when a state party makes distinctions between citizens and non-citizens. Article 1 of the CEDAW considers that "discrimination against women" means "any distinction, exclusion or restriction" made on the basis of sex that has "the effect or purpose" of depriving women the enjoy of their human rights on a basis of equality of men and women. It covers both direct and indirect discrimination, encompassing both civil–political and socio-economic human rights.
87. See generally Wouter Vandenhole, *Non-discrimination and Equality in the View of the U.N. Human Rights Treaty Bodies* (Antwerp/Oxford: Intersentia, 2005). Individuals may suffer multiple discriminations in belonging to more than one disfavored group. See the Durban Declaration, adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in 2001, para. 2, http://www.un-documents.net/durban-d.htm (accessed December 9, 2020).
88. Committee on the Elimination of Racial Discrimination, General Recommendation 19, "The prevention, prohibition and eradication of racial segregation and apartheid," 1995, U.N. Doc. A/50/18 at 140, reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.6 at 208, 2003.
89. United Nations, "Convention on the Elimination of All Forms of Discrimination Against Women," 1992, General Recommendation No. 19, "Violence Against Women," https://www.un.org/womenwatch/daw/cedaw/cedaw.htm (accessed December 9, 2020).
90. Clifford, "Equality," in Dinah Shelton, ed., *The Oxford Handbook of International Human Rights Law*, p. 443.
91. Shelton, "Prohibited Discrimination in International Human Rights Law," in Aristotle Constantinides and Nikos Zaikos, p. 262.
92. *Ibrahima Gueye et al. v. France*, Communication No. 196/1985, U.N. Doc.CCPR/C/35/D/196/1985 (1989) (the giving of inferior pensions to Senegalese soldiers serving in the French Army before independence, compared to retired soldiers of French nationality, was not considered a distinction based on reasonable and objective criteria).
93. *Sutherland v. United Kingdom* at 50 where different ages of consent for heterosexuals and homosexuals was found to be discriminatory treatment with regard to the article 8 right to private life and was an unjustified "difference based on sexual orientation." See *Sutherland v. United Kingdom*, European Commission of Human Rights, Application no. 25186/94, at 50. See also *L and V v. Austria*, 2003-I 29, European Human Rights Report, Vol. 36 (2003).
94. Clifford, "Equality," in Dinah Shelton, ed., *The Oxford Handbook of International Human Rights Law*, p. 444.
95. *North Sea Continental Shelf* Cases, 1969 International Court of Justice Reports, p. 42, http://www.courses.kvasaheim.com/ps376/briefs/ojf38491brief4.pdf (accessed December 9, 2020).
96. *Lim Meng Suang v. Attorney-General*, [2013] Singapore High Court SGHC 73 at [133].
97. A May 2012 report of the international lesbian and gay alliance indicates that homosexual sexual acts are illegal in some 78 countries. See International Lesbian, Gay, Bisexual, Trans, and Intersex Association, *State Sponsored Homophobia: A World Survey of Laws Criminalising Same-Sex Sexual Acts Between Consenting Adults*, ILGA *Report*, May 2012, https://ilga.org/state-sponsored-homophobia-report-2012-ILGA (accessed December 2, 2020).
98. Dino Kritsiotis, "On the Possibilities of and for Persistent Objection," *Duke Journal of Comparative & International Law,* Vol. 21, No. 1 (2010), p. 121.
99. For example, while CIL norms such as the prohibition against torture, which is also a peremptory norm, may be invoked to invalidate an amnesty law, as it was by the Chilean Supreme Court in *Re: Victor Raul Pinto* (Supreme Court of Chile, Case No 3125-04; ILDC 1093 (CL 2007), it failed to invalidate a law permitting corporal punishment in *Yong Vui Kong v. Public Prosecutor* [2015], 2 SLR 1129. The Singapore Court of Appeal (at 35) found there was no reason "why the elevation of a

particular norm to the highest status under one legal system (international law) should automatically cause it to acquire the same status and take precedence over the laws that exist in another system (domestic law)" within a dualist system. It noted that peremptory norms as understood during the drafting process of what became the Vienna Convention on the Law of Treaties were meant to apply to inter-state (and not intra-state) matters. To accord a peremptory norm constitutional law status would mean "the content of our Constitution could be dictated by the views of other states," regardless of the popular will as expressed through elected representatives [38]. The Supreme Court of Canada in *R. v. Hape* [2007] 2 SCR 292, noted that the legislature may violate international law pursuant to parliamentary sovereignty, but had to do so expressly. This could incur international responsibility.

100. News release, "Intense Debate, Close Voting as Gender Identity, Sexual Orientation, Digital-Age Privacy Take Centre Stage in Third Committee," United Nations, GA/SHC.4191, November 21, 2016, https://www.un.org/press/en/2016/gashc4191.doc.htm (accessed December 9, 2020).
101. A 2008 Joint Statement issued by the European Union and other states for signature by U.N. member states urged that sexual orientation or gender identity should not be the basis for criminal penalties. Sixty-seven member states signed this statement, while a competing statement circulated by Egypt and other member states affirming the right of states to regulate homosexual acts was signed by about 60 member states. Partick Worsnip, "U.N. Divided Over Gay Rights Declaration," Reuters, December 19, 2008, https://www.reuters.com/article/us-un-homosexuality-idUSTRE4BH7EW20081218 (accessed December 9, 2020).
102. For example, Former High Commissioner for Human Rights Louise Arbour identified SOGI issues as "priority concerns" in 2008. ARC International, "Recognizing Human Rights Violations." See also United Nations, "Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity."
103. For example, in 2011, 85 countries issued a Joint Statement entitled "Ending Acts of Violence and Related Human Rights Violations based on Sexual Orientation and Gender Identity", http://2007-2017-blogs.state.gov/stories/2011/03/23/ending-acts-violence-and-human-rights-violations-based-sexual-orientation-and.html (accessed December 9, 2020).
104. See Council of Europe, "Recommendation CM/Rec (2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity," *Explanatory Memorandum* to the Recommendation, CM (2010)4, Add3 Rev2E, March 29, 2010.
105. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018). The Supreme Court of the United States overturned the Commission's finding that cakeshop proprietor Jack Phillips violated Colorado SOGI non-discrimination law for declining to create a cake in celebration of a same-sex wedding. The Court ruled that the state of Colorado violated Phillips' religious freedom by demonstrating animus towards his Christian beliefs that marriage is between a man and a woman. See also *Lee v. Ashers Baking Company Ltd. and Others* [2018] UKSC [Supreme Court of the United Kingdom] 49 (2018), in which bakery owners in Northern Ireland were charged with discrimination under the United Kingdom's SOGI non-discrimination law for declining to create a cake in celebration of same-sex marriage. The Supreme Court of the United Kingdom ruled for the bakers on the grounds that the state could not be compelled to speak a message that violated their consciences.
106. See Organization of Islamic Cooperation and Independent Permanent Human Rights Commission, "OIC–IPHRC Study on SOGI in the Light of Islamic Interpretations and International Human Rights Framework," May 2017, paras. 1–3, https://www.oic-iphrc.org/en/data/docs/studies/46303.pdf (accessed December 15, 2019) (also known as "OIC Study").
107. Ibid., paras. 2–4, 22, 25.
108. The only "minorities" international human rights law recognizes a group with specific legal rights (as opposed to the general human rights available to all) those identified in the title of United Nations, "Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities," General Assembly Resolution 47/135, December 18, 1992.
109. "OIC–IPHRC Study on SOGI," para. 4.
110. Ibid., at 105.
111. Robert L. Spitzer, "Can Some Gay Men and Lesbians Change Their Sexual Orientation? 200 Participants Reporting a Change from Homosexual to Heterosexual Orientation," *Archives of Sexual Behavior*, Vol. 32, No. 5 (2003), pp. 403–417.
112. "OIC–IPHRC Study on SOGI," para. 2.
113. Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford, Clarendon Press, 1995), p. 23.
114. *Lawrence v. Texas*, 539 U.S. 558 (2003), and "German Parliament Votes to Legalise Same-Sex Marriage," *Guardian*, June 30, 2017 (by a vote of 393 to 226 with abstentions).
115. In *Schalk and Kopf v. Austria*, Application No. 30141/04, June 25, 2010 at 54–64, the ECHR observed that the use of the term "men and women" in article 12 of the ECHR rather than "everyone" meant that the article must be regarded as deliberate and seen in the context of marriage in the traditional sense of one between persons of opposite biological sex. In contrast, article 9 of the Charter of Fundamental Rights of the European Union omits any reference to man or woman in stating, "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights."
116. This putative right to assisted suicide failed in *Pretty v. United Kingdom*, Application No. 2346/02, European Court of Human Rights, Judgement of April 29, 2002. The Indian Supreme Court in *Common Cause (A Reg'd Society) v. Union of India* (2018) 5 SCC 1, held that the article 21 clause protecting the right to life included a right to die with dignity in terms of passive euthanasia under strict guidelines.
117. *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (No. 2), No. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, §10, European Court of Human Rights, 1968, A6.
118. *Handyside v. United Kingdom*, European Court of Human Rights, No. 5493/72 (November 4, 1976), para. 48.
119. Mark Bell, "The New Article 13 EC Treaty: A Sound Basis for European Anti-Discrimination Law?" *Maastricht Journal of European and Comparative Law*, Vol. 6, No. 1 (1999), p. 5. See also Ian Bryan, "Equality and Freedom from Discrimination: Article 13 EU Treaty," *Journal of Social Welfare and Family Law*, Vol. 24, No. 2 (2002), pp. 223–238; Constitution of South Africa, § 8(3), 1994, https://justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf (accessed December 2, 2020); and European Union, "Treaty of Amsterdam," Article 13 (Office for the Official Publications of the European Communities, 1997).
120. Gordon Brown, *Global Citizenship Commission, The Universal Declaration of Human Rights in the 21st Century: A Living Daocument in a Changing World* (Open Book Publishers, 2016).
121. Pacta Tertiis rule, rticle 34, Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force January 27, 1980.
122. Even if an international norm such as the prohibition against torture may co-exist as both a treaty and customary international law norm in accordance with the doctrine of parallel obligations articulated in *Nicaragua v. USA* (1986) International Court of Justice 1, it may not have the same content. For example, "torture" under the Convention against Torture (1465 U.N. Treaty Series 85, [1989] U.N. Doc. A/RES/39/46) may cover a discrete instance executed by a public official, while torture as an international crime under customary international law would need to be widespread and systematic. See *R. v. Bow Street Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (Amnesty International and others intervening) (No.3), [1999] 2 All E.R. 97, https://learninglink.oup.com/static/5c0e79ef50eddf00160f35ad/casebook_155.htm (accessed December 9, 2020).
123. *North Sea Continental Shelf* (*Germany v. Denmark and the Netherlands*), Judgement, I.C. Reports 1969, p. 3, paras. 71–73.
124. *Atala v. Chile*, Case No. 12.502, September 17, 2010, paras. 88–95 (judgement of February 24, 2012).

125. Article 46, ECHR (1950), Article 28(2), Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples Rights (2004), and Article 68, American Convention on Human Rights (1969).
126. Former Human Rights Council Member Michael O'Flaherty noted, "These Concluding Observations have a non-binding and flexible nature. As such, they are not always a useful indicator of what a Committee may consider to be a matter of obligation under the Covenant." Michael O'Flaherty and John Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles," *Human Rights Law Review*, Vol. 8, No. 2 (2008), p. 215.
127. Convention of the Elimination of All Forms of Discrimination Against Women, Article 21; Convention on the Rights of the Child, Articles 44 and 45; and Internation Covenent on Civil and Political Rights, Article 40.
128. O'Flaherty and Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles," p. 218.
129. Human Rights Committee Communication, No. 488/1992, CCPR/C/50/D/488/1992, April 4, 1994. See David Lee Mundy, "Hitting Below the Belt: Sex-ploitive Ideology & The Disaggregation of Sex and Gender," *Regent University Law Review*, Vol. 14 (2001–2002), p. 215.
130. *Young v. Australia*, CCPR/C/78/D/941/2000 (August 6, 2003). See also *X. v. Colombia*, CCPR/C/89/D/1361/2005.
131. United Nations Treaty Series, Vol. 1155, p. 331 (EIF January 27, 1980), https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf (accessed December 2, 2020).
132. Ian Johnstone, "Treaty Interpretation: The Authority of Interpretive Communities," *Michigan Journal of International Law*, Vol. 12 (1991), pp. 380–403.
133. Similarly, when article 12 of the UDHR and article 17 of the ICCPR were drafted in the 1940s–1960s, it was unlikely that the state parties thought that the right to privacy, home, and correspondence would extend beyond the typical "search and seizure" intrusion into the home model to include a right to sexual autonomy requiring the invalidation of certain state laws at the time the treaty entered into force. In the American context, the fashioning of a right to privacy from a constitutional penumbra was not to take place until *Griswold v. Connecticut*, 381 U.S. 479 (1965), and extended to encompass a right to abortion in *Roe v. Wade*, 410 U.S. 113 (1973). This instance of heavy-handed judicial intervention ahead of democratic change caused (and continues to cause) disquiet. Even Justice Ruth Bader Ginsburg has criticized *Roe v. Wade* not for its substance but because "it moved too far, too fast" as "the majoritarian institutions" in the 1970s were listening but not acting swiftly enough for advocates of quick change, which "appears to have provoked, not resolved" conflict. See Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*," *North Carolina Law Review,* Vol. 63 (1985), pp. 385–386.
134. United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.
135. Nick Poynder, "When All Else Fails: The Practicalities of Seeking Protection of Human Rights Under International Treaties," Castan Centre for Human Rights Law, April 28, 2003, https://www.safecom.org.au/poynder.htm#bio (accessed December 15, 2019).
136. See Torkel Opsahl, "The Human Rights Committee," in Philip Alston ed., *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 1992) pp. 369, 407–408. Opsahl argues that many HRC members considered their role was to cooperate with state parties rather than to criticize individual states or determine they had failed to fulfill their treaty obligations.
137. For example, U.N. High Commissioner for Human Rights N. Pillay in 2011 cited *Toonen* for the proposition that states were obliged to protect individuals from sexual orientation discrimination. See United Nations, "Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity, Office of the High Commissioner, A/HRC/19/41, https://www.icj.org/wp-content/uploads/2012/06/laws-acts-individuals-annual-report-2011.pdf (accessed December 2, 2020)
138. Various treaty-monitoring bodies have issued general comments stating that implicit grounds like gender identity (transgender, transsexual, intersex) were prohibited grounds of discrimination. United Nations "General Comment No. 20 on Non-Discrimination in Relation to Economic, Social and Cultural Rights," United Nations, Committee on Economic, Social and Cultural Rights, E/C.12/GC/20, July 2009, para. 32; United Nations, "General Comment 4," Committee on the Convention of the Rights of the Child, U.N. Doc. CRC/GC/2003/4, July 1, 2003, para. 6; and United Nations, "General Comment 2," Committee on the Convention Against Torture, U.N. Doc. CAT/C/GC/2, January 24, 2008, para, 2. While the CEDAW Committee has not addressed sexual orientation in a general comment, it has criticized laws criminalizing homosexual acts and praised states who enacted laws prohibiting such discrimination. See United Nations, "Concluding Observations, Kyrgyzstan," U.N. Doc. A/54/38, August 20, 1999, para. 128; United Nations, "Uganda," U.N. Doc. CEDAW/C/UGA/CO/7, October 22, 2010, paras. 43–44; United Nations, "Sweden," U.N. Doc. A/56/38, July 31, 2001, para. 334; and United Nations, "Ecuador," U.N. Doc. CEDAW/C/ECU/CO/7, November 2, 2008, para. 28.
139. *Orozco v. Attorney-General of Belize* (Supreme Court of Belize), Judgement of August 10, 2016). By acceding to the ICCPR in 1996, Chief Justice Benjamin held that the reference to "sex" in section 16(3) of the Belize Constitution should be read to include sexual orientation, following *Toonen,* which was also referenced by the Delhi High Court in *Naz Foundation v. Government of NCT of Delhi* (Delhi High Court), July 2, 2009.
140. G. K. Chesterton, *Heretics,* Ch. 2 (1905), https://www.gutenberg.org/files/470/470-h/470-h.htm (accessed December 7, 2020).
141. Michael J. Klarman, "What's So Great About Constitutionalism?" *Northwestern University Law Review*, Vol. 93 (1998), p. 145.
142. In discussing the separation of powers, the Singapore Court of Appeal noted the "fundamental proposition" that "the courts are *separate and distinct from* the Legislature. More specifically, whilst the courts do "make" law, this is only permissible in the context of the interpretation of statutes and the development of the principles of common law and equity. It is *im*permissible for *the courts* to arrogate to themselves *legislative powers*—to become, in other words, "*mini-legislatures*." This must necessarily be the case because the courts have no mandate whatsoever to create or amend laws in a manner which permits recourse to *extra-legal policy factors as well as considerations.* The jurisdiction as well as the power to do so lie exclusively within the sphere of *the Legislature*....Hence, the duty of a court is to *interpret* statutes enacted by the Legislature; it *cannot amend or modify statutes* based on its own personal preference or fiat as that would be an obvious (and unacceptable) usurpation of the *legislative* function." (emphasis in original) *Lim Meng Suang v. AG* 1 SLR 26 (2015) at 77. See also Chief Justice Sundaresh Menon's Bernstein Lecture in Comparative Law delivered at Duke Law School and published as Sundaresh Menon, "Executive Power: Rethinking the Modalities of Control," [2019] 29 Duke Journal of Comparative & International Law, Vol. 29 (2019), p. 297 (noting that the case of *Griswold v. Connecticut* [381 U.S. at 492] had the effect of moving the U.S. Supreme Court "to the center of the culture wars and therefore to the center of American political life, which may not be a comfortable place for every court.")
143. *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (Ser. A) March 23, 1995, para. 71. The Inter-American Court of Human Rights also favored "an evolutionary interpretation" of human rights instruments. See *Awas Tingi Community v. Nicaragua,* Inter-Am Ct HR (judgement of August 31, 2001) paras. 147–153.
144. See, for example, United Naitons,"Report of the Human Rights Committee," 50th Sess., Supp. No. 40, Annex VI, "Observations of States Parties Under Article 40, Paragraph 5, of the Covenant," at 135, U.N. Doc. A/50/40, Oct. 5, 1995 ("The United Kingdom is of course aware that the General Comments adopted by the [Human Rights] Committee are not legally binding"). See also the United States' statements at 131 that the ICCPR "does not impose on States Parties an obligation to give effect to the [Human Rights] Committee's interpretations or confer on the Committee the power to render definitive or binding interpretations" of the ICCPR. The "Committee lacks the authority to render binding interpretations or judgments," and the "drafters of the Covenant could have given the Committee this role but deliberately chose not to do so."
145. Elizabeth Baisley, "Reaching the Tipping Point? Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity," *Human Rights Quarterly*, Vol. 38, No. 1 (2016), pp. 134–163.

146. For example, Judge Schwebel's individual opinion in *Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice Advisory Opinion of July 8, 1996.
147. International Commission of Jurists, "Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity," March 2007, https://www.refworld.org/docid/48244e602.html, (accessed December 11, 2020).
148. O'Flaherty and Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law," p. 218.
149. Inter-American Commission on Human Rights, the African Commission on Human and Peoples Rights, and United Nations Human Rights Mechanisms, *Joint Thematic Dialogue on Sexual Orientation, Gender Identity and Intersex Related Issues*, Final Report, 2018, https://www.ohchr.org/Documents/Issues/SexualOrientation/ReportSecondTrilateralDialogue_InterAmericanAfricanExperts_EN.pdf (accessed December 15, 2019).
150. Paula L. Ettelbrick and Alia Trabucco Zeran, "Impact of the Yogyakarta Principles on International Human Rights Law Development: A Study of November 2007–June 2010," Final Report, https://www.asiapacificforum.net/resources/impact-yogyakarta-principles-international-human-rights-law-development/ (accessed December 7, 2020).
151. O'Flaherty and Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles," p. 247.
152. Pierro A Tozzi, "Six Problems with the Yogyakarta Principles," C-FAM International Organizations Research Group *Briefing Paper* No. 1 (Febraury 12, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id-1551652 (accessed December 22, 2020).
153. Pierro Tozzi, "French U.N. 'Sexual Orientation' Push Linked to Radical Yogyakarta Principles," January 5, 2009, https://www.lifesitenews.com/news/french-un-sexual-orientation-push-linked-to-radical-yogyakarta-principles (accessed December 7, 2020).
154. Michael O'Flaherty, former HRC member and lead drafter of the Yogyakarta Principles, has explicitly appealed to these principles to define the terms "SOGI" in the French lead Statement of December 2008, supported by 66 U.N. member states. O'Flaherty and Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles," p. 247.
155. Ibid.
156. Ibid., p. 217. Notably the European Court of Justice has criticized reliance on the category of "sex" to address matters of "sexual orientation," as the latter is different from the binary man/woman issues that "sex" is perceived to address. *Grant v. SouthWest Trains Ltd.*, C-249/96 [1998] ECR I-621 (1998), 1 CMLR 993.
157. "Decision of the Supreme Court on the Rights of Lesbian, Gay, Bisexual, Transsexual and Intersex (LGBTI) People," *National Judicial Academy Law Journal*, Vol. 2, No. 1 (2008), pp. 261–286.
158. *Ang Ladlad LGBT Party v. Commission on Election*, Supreme Court of the Republic of the Phillipines, G.R. No. 190582 (2010), https://www.lawphil.net/judjuris/juri2010/apr2010/gr_190582_2010.html (accessed December 9, 2020).
159. Ibid., p. 52.
160. Ibid., p. 53.
161. Joseph Raz, "Human Rights in the Emerging World Order," *Transnational Legal Theory*, Vol. 1 (2010), pp. 31–47.
162. Ibid.
163. Jerome Shestack, "The Jurisprudence of Human Rights," in Meron, ed., *Human Rights in International Law: Legal and Policy Issues, Vol. 2* (Clarendon, Oxford, 1984), p. 101.
164. Raz, "Human Rights in the Emerging World Order," p. 154.
165. John Witte and M. Christian Green, *Religion and Human Rights: An Introduction* (Oxford University Press, 2012), pp.18–19
166. Alain Pellet, "'Human Rightism' and International Law," Gilberto Amado Memorial Lecture, July 18, 2000, http://pellet.actu.com/wp-content/uploads/2016/02/PELLET-2000-Human-rightism-and-international-law-G.-Amado.pdf (accessed on December 23, 2020).
167. Susan Marks and Andrew Clapham, *International Bill of Rights Lexicon* (Oxford University Press, 2005), p.340.
168. This has been the approach of Canadian courts. *Egan v Canada*, 2 SCR 513 (1995), paras. 111, 176, 177, and *Vriend v. Alberta*, SCR 493 (1998), paras. 102–103
169. The South African Constitution explicitly prohibits sexual orientation discrimination and, understandably, the court found a law that discriminates against homosexual men on the basis of sexual orientation to be unfair and invalid as an aspect of constitutional morality. *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, 1999 (1) SA 6 (Constitutional Court of South Africa).
170. *Lim Meng Suang v. AG* [2014] SGCA 53 at [26], [176], [186] (Singapore Court of Appeal) (noting there was no definitive evidence whether sexual orientation was biologically determined or otherwise and that the legislature should address such scientific and extra-legal arguments), and *Corbiere v. Canada* 2 SCR 203 (1999), para. 3.
171. *Lawrence v. Texas*, 539 U.S. 558 (2003) overturned *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which the U.S. Supreme Court held that the fact the governing majority in a state considered homosexuality immoral was not sufficient to uphold a prohibitive law without more; the law furthered no legitimate state interests that could justify intruding on privacy rights. The U.S. Supreme Court majority effectively conflated "status" with "conduct" in finding that laws criminalizing acts that define a person as homosexual or transgender effectively target homosexual or transgender people as a class, i.e., the law did not target merely sexual conduct but also sexual identity. The European Court of Human Rights took a similar position in *Norris v. Ireland* (judgement of October 26, 1988, Series A, No. 142, pp. 20–21) in relation to applying penal sanctions against consenting homosexual adults. The Zimbabwean court in *Banana v. State* ([2004] 4 LRC 621), drawing inspiration from *Bowers,* found that that the term "gender" under section 23(2) of the Constitution of Zimbabwe did not include sexual orientation. As such, the crime of sodomy was not unconstitutional. As foreign cases are not precedents, but merely persuasive, the fact that *Bowers* was later overruled in *Lawrence v. Texas* does not mean that its reasoning could not continue to find favor in other jurisdictions.
172. *Toonen* v. *Australia*, No. 488/1992 (March 30, 1994), para. 8.7.
173. *Lawrence v. Texas*, 539 U.S. 558 (2003) at 571.
174. This assumption of neutrality is also evident in human rights discourse, as where former U.N. Secretary General Ban Ki Moon called for the worldwide decriminalization of homosexual acts, arguing that "cultural practice cannot justify any violation of human rights," as if human rights themselves, or the human rights model being espoused, is somehow *above* culture when human rights culture is itself a cultural project. News release, "Secretary-General Urges Human Rights Council to Avoid Narrow Considerations, Selectivity; Supports Independence while Condemning 'Inflammatory Rhetoric,'" January 25, 2011, SG/SM/13366-HRC/12, https://www.un.org/press/en/2011/sgsm13366.doc.htm (accessed December 9, 2020).
175. James Kalb, "Tyranny of Liberalism," *Modern Age* (2000), p. 247.
176. *Lim Meng Suang v. Attorney-General*, 1 SLR 26 (2015) at 92, 176, and 185.
177. *Nadan & McCoskar v. State*, FJHC 500 (2005) (High Court, Fiji).
178. Ibid.
179. Julian Rivers, "Promoting Religious Equality," *Oxford Journal of Law and Religion*, (2012), p. 12.
180. *Dudgeon v. U.K.,* No. 7525/76 (October 22, 1981), Series A, No. 45 at 49.

181. United Nations "Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity," at 51, and Amnesty International, "Crimes of Hate, Conspiracy of Silence: Torture and Ill-Treatment Based on Sexual Identity," Amnesty International *Index*, ACT 40/016/2001, August 2001, p. 21, https://www.amnesty.org/en/documents/ACT40/016/2001/en/ (accessed December 29, 2020).
182. See also Kees Waaldijk, "Standard Sequence in the Legal Recognition of Homosexuality: Europe's Past, Present and Future," *Australasian Gay and Lesbian Law Journal*, Vol. 4 (1994) 50 (observing in 1994 at 51–52 a sequence that has empirically been borne out: "The law in most countries seems to be moving on a line starting at (0) total ban on homo-sex, then going through the process of (1) the decriminalisation of sex between adults, followed by (2) the equalisation of ages of consent, (3) the introduction of anti-discrimination legislation, and (4) the introduction of legal partnership. A fifth point on the line might be the legal recognition of homosexual parenthood. From the perspective of the 21st century, one could include in the sequencing calls for same-sex marriage and hate speech laws to punish 'homophobia' and 'transphobia', which effectively is oppressive in silencing moral dissent. This displays a remarkable display of certainty with respect to the question of morality, in an age of postmodernism and pluralism, reflecting the use and abuse of human rights as a sort of 'secular religion.'"
183. *Frette v. France*, 2002-I 345 (2004), 38 EHRR 21.
184. *Schalk*, Application No. 30141/04, June 25, 2010, https://servat.unibe.ch/dfr/em301410.html (accessed December 29, 2020).
185. The Human Rights Committee has rejected arguments that restricting marriage to heterosexual couples violates article 26 of the ICCPR as the article 23 ICCPR right to marry explicitly refers to "men and women." See *Joslin v. New Zealand*, CCPR/C/75/D/902/1999 (2002), Human Rights Committee, July 30, 2002. Nonetheless, given the legalization of same-sex marriage in various jurisdictions since 2002, advocates argue that the Human Rights Commission should reexamine this opinion. Paula Gerber and Adiva Sifris, "Marriage: A Human Right for All?" *Sydney Law Review*, Vol. 36, No. 4 (2014), p. 643.
186. United Nations, "Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity," at 79h.
187. For example, in *Botswana-Kanane v. State 2003* (2) BLR 67 (CA), the Botswana court held that the decriminalization of sodomy law was treated as a matter to be decided by public opinion, and since there was no evidence of a change in public opinion, the sodomy law was upheld.
188. While some have tried to argue that decriminalization of sodomy does not necessarily lead to same-sex marriage, conceptually and logically, as sodomy laws are based on a distinction between heterosexual and homosexual conduct (as are laws on traditional marriage), if this is considered discrimination in one case, it paves the way for marriage between a man and a woman to be considered discriminatory as well.
189. Douglas W. Kmiec, "Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion," in Douglas Laycock et al., eds., *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* (Rowan and Littlefield Publishers, 2008).
190. Marta Cartabria, "The Challenge of 'New Rights' and Militant Secularism," in Mary Ann Gledon and Hans F. Zacher, eds., *Universal Rights in a World of Diversity: The Case of Religious Freedom* (Vatican City: Pontifical Academy of Social Sciences Acta 17, 2012), pp. 428–455, http://www.pass.va/content/dam/scienzesociali/pdf/actapass17.pdf (accessed December 15, 2019).
191. International Commission of Jurists, "Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity," and United Nations, "Report of the Office of the United Nations High Commissioner for Human Rights, Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity," at 7.
192. United Nations, "Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity," at 51.
193. The view that privacy was a form of "blanket libertarian permission for people to do anything they like provided that what they do is sexual and in private" was rejected by J. Sachs in N*ational Coalition for Gay and Lesbians v. Minister of Justice* (1999) (1) SA 6 (South Africa, Constitutional Court). He noted that most states criminalize incest, bestiality, and sexual conduct involving violence and deception, though it is unclear on what principle this rests. If private and consensual homosexual activity is protected as a human right to privacy, why should consensual incest between two adults not also be protected as part of the sexual autonomy component of privacy rights and non-discrimination, since the criminalization of such activities also rest on grounds of public morality. A law prohibiting adult consensual incest was upheld in *Williams v. Morgan* (478 F 3d. 1316, 1318). If public morality is not a justification for limiting the scope "sexual rights," why are laws against prostitution, bigamy, polygamy, bestiality, incest, and statutory rape not struck down? This foregrounds the point that moral decisions have to be made, and will be enforced by law, so who has the legitimacy to do this within the international legal order, and on the basis of what criteria?
194. International Commission of Jurists, "Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity."
195. This is supported by principle 18, which claims that a person's sexual orientation and gender identity are not medical conditions and do not need to be "treated, cure[d] or suppressed." Science has been politicized by ideology such that no view—including a scientific view—that disrupts the dominant narrative of the LGBT agenda is allowed.
196. International Commission of Jurists, "Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity."
197. M. H. Ogivile, "After the Charter: Religious Free Expression and Other Legal Fictions in Canada," *Oxford University Commonwealth Law Journal*, Vol. 2 (2002), p. 219, and Hans C Clausen, "The Privilege of Speech in a Pleasantly Authoritarian Country: How Canada's Judiciary Allowed Laws Proscribing Discourse Critical of Homosexuality to Trump Free Speech and Religious Liberty," *Vanderbilt Journal of Transnational Law*, Vol. 38 (2005), pp. 443–500.
198. See Council of Europe, "Recommendation CM/Rec (2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity." The marginalization of religious freedom is evident in the following statement: "[T]he principle that neither cultural, traditional nor religious values, nor the rules of a 'dominant culture' can be invoked to justify hate speech or any other form of discrimination, including on grounds of sexual orientation or gender identity."
199. *Ladele v. Islington LBC,* [2010] 1 WLR 995.
200. United Nations, "Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity," at 75.
201. See United Nations, "Universal Declaration of Human Rights" at 21, https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf (accessed December 29, 2020)
202. United Nations, "Vienna Declaration and Programme of Action," A/CONF.157/23, June 25, 1993, para. 5.
203. United Nations, "Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity," at 78.
204. Michel Foucault, *The History of Sexuality, Vol. 1: An Introduction* (New York: Pantheon, 1978), p. 125.
205. Ilias Tirspiotis, "Discrimination and Civil Partnership: Taking 'Legal' Out of Legal Recognition," *Human Rights Law Review*, Vol. 14, No. 2 (2014), pp. 343–358. The Greek Orthodox Church warned members of parliament they would be excommunicated if they voted for the legal recognition of homosexual civil partnerships.
206. "OIC–IPHRC Study on SOGI," paras. 1–3.
207. Ibid., p. 10.
208. Ibid., para. 31.

209. On behalf of the OIC, Pakistan distributed a letter to all Geneva missions stating that "sexual orientation is not a human rights issue." See "Letter from the Ambassador and Permanent Representative of the Permanent Mission of Pakistan, Geneva," February 26, 2004.
210. Nigeria argued that the death penalty by stoning for homosexual acts as lawful punishment under Shariah law should not feature in a report by the Special Rapporteur for extrajudicial killings. ARC International, "Recognizing Human Rights Violations."
211. Stephen Hall, "The Persistent Spectre: Natural Law, International Law and the Limits of Legal Positivism," (2001) 12(2) European Journal of International Law, Vol. 12, No. 2 (2001), pp. 301–305.
212. United Nations, "Universal Declaration of Human Rights," Article 1.

Human Dignity and the Foundations of Human Rights

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1. The author served as a member of the Inter-American Commission on Human Rights (the principal organ responsible for the protection and promotion of international human rights obligations in the Americas) from 2006 to 2010, and as its president from 2008 to 2009.
2. Of course, there are many other circumstances in which the cutting of hair can be the basis for a very serious claim that human dignity is threatened—as in the shaving of a detainee's head for purposes of humiliation, or a requirement that a Sikh cut his hair in violation of his religious obligations—but no such deeply rooted dignity claims were presented here.
3. The material in the following paragraphs is drawn largely from more extended discussions in Paolo G. Carozza, "Human Dignity in Constitutional Adjudication," in Tom Ginsburg and Rosalind Dixon, eds., *Comparative Constitutional Law* (Cheltenham: Edward Elgar Publishing Limited, 2011), pp. 459–472, and Paolo G. Carozza, "Human Dignity," in Dinah Shelton, ed., *Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013) (forthcoming).
4. *Jus cogens* refers to the small set of overriding, peremptory norms of international law from which no state may exempt itself, such as the prohibitions of genocide, slavery, and human trafficking, as well as crimes against humanity.
5. For just two among innumerable examples, see *Public Committee Against Torture v. Government of Israel*, HC 5100/94, 1999, https://versa.cardozo.yu.edu/opinions/public-committee-against-torture-v-israel (accessed December 16, 2020), and *Napier v. The Scottish Ministers*, 2004, S.L.T. 555 [U.K.] (February 10, 2020), https://www.scotcourts.gov.uk/search-judgments/judgment?id=6b2c87a6-8980-69d2-b500-ff0000d74aa7 (accessed December 16, 2020).
6. *Beschluss vom 13. Juni 2007*, 1 BvR 1783/05 (June 13, 2007) [German Federal Constitutional Court], https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/DE/2007/06/rs20070613_1bvr178305.pdf;jsessionid=F2937AB37CFC1A96BFB3F57D9F6622FB.2_cid377?__blob=publicationFile&v=2 (accessed December 16, 2020), and *NM v. State*, (5) SA 250 (CC) [Constitutional Court of South Africa], 2007, https://medicolegal.org.za/uploads/interesting_cases/ICL_NM_AND_OTHERS_v_SMITH_AND_OTHERS_56deac748da57.pdf (accessed December 16, 2020).
7. For example, *F. c/Sté Hachette Filipacchi Associés*., Cour de Cassation, Première Chambre Civile [French Appellate Court, 1st Civil Chamber], March 7, 2006.
8. See, for example, *Yakye Axa Indigenous Community v. Paraguay*, June 17, 2005, Inter-Am. Ct. H.R. [Inter-American Court of Human Rights] (2005), http://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf (accessed December 16, 2020).
9. *South Africa v. Grootboom*, SA 46 (CC) [Constitutional Court of South Africa] (2001).
10. For example, *Law v. Canada (Minister of Employment and Immigration)*, 1 SCR [Canadian Supreme Court] (1999), 497.
11. *A. C. c/C. et al.,* Cour de Cassation, Première Chambre Civile [French Appellate Court, 1st Civil Chamber] (2001).
12. For example, the Hungarian Constitutional Court held that dignity includes an inalienable right to bear a name reflecting one's self-identity. See Alkotmánybíróság [Hungarian Constitutional Court] 58/2001 (XII. 7), http://public.mkab.hu/dev/dontesek.nsf/0/645f7e824cc1ce49c1257ada0052a748/$FILE/en_0058_2001.pdf (accessed December 16, 2020). And dignity's role in guaranteeing personal autonomy can also extend beyond questions of shaping one's self-identity. For instance, the Indian Supreme Court struck down a law limiting donations of land to charitable organizations on the grounds that treating people with dignity requires allowing them to will their land to whomever they choose. See *John Vallamattom and Anr. v. Union of India*, 2003, https://indiankanoon.org/doc/1983314/ (accessed December 16, 2020).
13. Conseil D'Etat [Supreme Administrative Court, France], October 27, 1995, Commune de Morsang-sur-Orge, http://www.rajf.org/article.php3?id_article=245 (accessed December 16, 2020). See also the opinion of the Human Richts Committee in *Wackenheim v. France*, Comm. 854/1999, U.N. Doc. A/57/40, Vol. II, at 179 (HRC 2002), https://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20-%20Manuel%20Wackenheim%20v.%20Fr.pdf (accessed December 16, 2020).
14. BVerwGE [German Federal Administrative Court] 64, 274-Peep Show (1981).
15. *Jordan v. State*, (6) SA [Constitutional Court of South Africa] 642 (2002), http://www.saflii.org/za/cases/ZACC/2002/22.html (accessed December 16, 2020).
16. In most instances, when the conflict between dignity-as-liberty and dignity-as-constraint appears, the issue is not necessarily two competing definitions of dignity but rather the competing dignities of two different people whose interests may collide. This helps unravel the otherwise puzzling ability of courts to rely on dignity in support of either side of the abortion divide.
17. See, for example, Mirko Bagaric and James Allan, "The Vacuous Concept of Dignity," *Journal of Human Rights*, Vol. 5 (2006),[OKAY?] pp. 257–270, and Justin Bates, "Human Dignity: An Empty Phrase in Search of Meaning?" *Judicial Review*, Vol. 10 (2005), pp. 165–168.
18. See, for example, Patrick Hayden, ed., *The Philosophy of Human Rights: Readings in Context* (St Paul, MN: Paragon House, 2001).
19. Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 2002).
20. Jacques Maritain, "Introduction," in UNESCO, ed., *Human Rights Comments and Interpretations*, (London: Wingate, 1949), p. 9.
21. Ibid.
22. The phrase "unfinished business" is borrowed from Mary Ann Glendon, "Foundations of Human Rights: The Unfinished Business," *American Journal of Jurisprudence*, Vol. 44 (1999), p. 1.
23. For discussion of human dignity as a placeholder, see Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights," *European Journal International Law*, Vol. 19 (2008), p. 655.
24. I have tried to describe these difficulties in more detail in, for example, Paolo G. Carozza, "Human Dignity and Judicial Interpretation of Human Rights: A Reply," *European Journal International Law*, Vol. 19 (2008), pp. 931–944, and Paolo G. Carozza, "Il Traffico dei Diritti Umani nell'età Post-Moderna," in Luca Antonini, ed., *Il Traffico dei Diritti Insaziabili* (Rubbettino, 2007), pp. 81–105.
25. I use the term "solidarity" here in the way that it was defined by Pope John Paul II, as "a firm and persevering determination to commit oneself to the common good; that is to say to the good of all and of each individual, because we are all really responsible for all." See John Paul II, "Sollicitudo Rei Socialis," December 30, 1987, para. 3, http://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_30121987_sollicitudo-rei-socialis.html (accessed December 16, 2020). However, the term can be and has been used in many other different ways as well. See generally, Paolo G. Carozza and Luigi Crema, "On Solidarity in International Law," Caritatis in Veritate Foundation, http://www.fciv.org/downloads/Carozza%20Crema.pdf (2014) (last accessed December 28, 2020).

26. UNESCO, *Human Rights: Comments and Interpretations*, p. 35.
27. Luigi Giussani was a prominent 20th century Italian intellectual and religious leader and founder of the Catholic movement Communion and Liberation. See "Looking for Beauty, He Found Christ," Communion and Liberation, https://english.clonline.org/fr-giussani (accessed December 16, 2020).
28. Luigi Giussani, *The Religious Sense* (Montreal: McGill-Queen's University Press, 1997), pp. 7–10. The idea of elementary experience and its relationship to law has been developed in Andrea Simoncini, Lorenza Violini, Paolo Carozza, and Marta Cartabia, *Esperienza Elementare e Diritto* (Milano: Guerini e Associati, 2011).
29. Andrea Simoncini, "Esperienza Elementare e Diritto: Una Questione 'Persistente,'" in Simoncin et al., *Esperienza Elementare e Diritto*, p. 17.
30. Ibid., p. 19.
31. Carmine Di Martino, "L'incontro e l'emergenza dell'umano," in Javier Prades, ed., *All'origine della Diversità. Le Sfide del Multiculturalismo* (Milano: Guerini e Associati, 2008), p. 95.
32. Simoncini et al., *Esperienza Elementare e Diritto*, p. 22.
33. It is worth reminding ourselves that the success of the Universal Declaration of Human Rights has largely been because of its function as a pedagogical and persuasive tool. Both in the process of its formulation and in its aspiration as a "common standard for humanity," it is has contributed significantly to the transformation of hearts and minds in the service of a universal common good. Not without cause did Pope John Paul II refer to it as "one of the highest expressions of the human conscience of our time." ("World Marks U.N. Human Rights Day," BBC, December 9, 2008.) But in 1948 it was deliberately kept as a non-binding, educative instrument, without formal juridical authority. Had it been presumed to be a fully binding legal instrument, one can only imagine how quickly it would have failed (unless backed by massive coercive force, in which case one can only imagine how surely it would have contributed to imperialism and oppression). While it is helpful to translate the general moral principles of human rights into the positive law of international treaties, that positivization does not resolve the underlying differences, nor does it obviate the need for debate and discussion.
34. U.S. State Department, *Report of the Commission on Unalienable Rights*, August 26, 2020, https://www.state.gov/wp-content/uploads/2020/08/Report-of-the-Commission-on-Unalienable-Rights.pdf (accessed December 21, 2020).
35. Subsidiarity, in general, requires that decisions and actions should presumptively be taken within the "primary" communities closest to the persons most directly affered by them (for example, in the family or at the local level), and larger or more distant social groups (like the state or international bodies) have both a subsidiary responsibility to help those primary communities achieve their ends *and* also a negative obligation not to replace or usurp them. In an international context, a subsidiarity-oriented perspective would favor allowing national and other more local associations the greatest possible freedom to realize their ends for themselves—while international law would only intervene to assist them when they are incapable (because of corrupt or authoritarian regimes, for example)—but would not aim to replace or supplant the primary roles of national and local communities. This relationship of subsidiarity necessarily helps to foster a robust pluralism, as states will inevitably give expression to understandings of human dignity and rights that are reflective of their particular histories and distinctive social realities.
36. See Paolo G. Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law," *American Journal of International Law*, Vol. 97, No. 1 (2003), p. 38.

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