

HUMAN RIGHTS: FROM LEGAL TRANSPLANTS TO FAIR TRANSLATION

JAMES M. DONOVAN*

ABSTRACT

The current regime of international human rights suffers from three shortcomings: First, it has failed to adequately address the reality of cultural diversity. Second, the formalized human rights treaties have been ineffective in their ability to compel states to reform their behaviors, and third, the uncontrolled growth in the number of human rights weakens the impact of appeals to that standard.

Although treated as independent problems, this paper finds that these three limitations are sufficiently linked such that a remedy to the first will simultaneously resolve the others. Parts I and II of the paper describe how the imposition of human rights values onto some societies may inflict unintended harms to the extent that those actions undermine the justification and support for human rights altogether. Against that background is the challenge to find ways to realize the goods of the human rights project without injuring those it intends to benefit.

Drawing extensively upon multiple disciplines—most notably the philosophical exchange between Joseph Raz and Jeremy Waldron, and the methodological suggestions of Alison Dundes Renteln and Abdullahi Ahmed An-Na'im—the article focuses on linking human rights laws with local values. The result should be human rights expressed in a manner in which all peoples can see themselves. If they are no longer viewed as hegemonic intrusions, human rights will be openly recognized and consequently more successfully observed. Finally, the structural limitations of the suggested procedure will necessarily support only a small number of human rights.

Abstract.....	475
Introduction.....	476

* Director and James and Mary Lassiter Associate Professor of Law, University of Kentucky College of Law. Ph.D., Tulane University; J.D. Loyola New Orleans School of Law; M.A. Louisiana State University. The author thanks the readers at the 2016 Summer Research Projects Workshop for comments on an early outline.

I. Contemporary Human Rights Practice	479
A. Top-Down Origins of HR Regim	482
B. Hypertrophy of Ineffective Human Rights	485
C. Ethnographic Illustrations.....	489
II. Framing the Problem	494
A. Jurisprudential Background.....	495
B. Anthropology and the Value of Diversity	502
III. Finding “Human” Human Rights.....	509
A. Least Common Denominator.....	510
C. Managing Cross-Cultural Dissensus.....	514
D. Practical Implementation	519
IV. Fairness: A Shared Intuition	522
A. A Natural History of Fairness.....	523
B. The Fairness Standard in Practice.....	527
V. Conclusion	532

INTRODUCTION

Human rights present two related problems. First, from an initial declaration in 1948, the number of formally identified as well as informally claimed rights increases every year.¹ Framing all conflicts through the vocabulary of human rights diminishes the vitality of other forms of normative social regulation. When everything becomes a question of law, the utility of custom, religion, and even etiquette, as well as the ties of family and community, cease to play a meaningful role in the organization of human societies. That price might be acceptable if invocations of human rights achieved their goal of creating a better world, with fewer abuses by states of their citizens than would otherwise be the case. This result, however, has been questioned.

Although writers have remarked on the overuse of rights in general and human rights in particular, their concerns have been primarily normative, and thus fail to offer principled direction on how this condition should be improved. Realizing that the overabundance of human rights can lead to their reduced effectiveness is one thing, but it is quite another to identify a reasoned manner by which to restrict their number. Instead, ad hoc arguments defend why a particular proposal

¹ See *infra* Section I.B.

should be rejected, without providing a generalized limitation on the members of the class of human rights.

Only part of the ambivalence toward human rights endeavors flows from their increasing mundanity. Claimed violations fail to trigger the desired responses also because the recognized human rights do not respect the diversity of values within the world's cultures.² Rather than being the rights of humans *qua* humans, in practice the human rights can be perceived as the ideals of Westerners projected outward as hegemonic demands upon subordinate Others,³ "an updated version of the civilizing mission of Western imperialists."⁴

Any revisions to the human rights legal regime are certain to meet strong resistance. The language of contemporary human rights pervades modern societies to the extent that it has been called a "secular religion."⁵ The label has become a ubiquitous shorthand for an ideal of personal security and actualization that is not likely to immediately disappear.

Taking the human rights regime with its acknowledged faults as a persistent reality, this paper considers how it can be amended to better achieve its promise to effectively guarantee core rights to all persons without requiring they surrender what they believe makes them human. The discussion asserts that the shortcomings of the current human rights approach—too many, too parochial, too ineffective—are linked. A method that better identifies norms that truly warrant the label *human* is likely to yield a well-defined and limited roster of human rights. Less frequent invocation may make the rights more powerful for being rare

² This discussion treats "human rights," which refers to a generalized idea of a species of civilian protections, as distinct from "the human rights," which refers to the pragmatic list of legally recognized rights. That the two labels reference different concepts can be seen in the diverging answers they receive in question form. "What are human rights?" invokes broad foundations of human dignity and personal value, while "What are the human rights?" produces a list of specific entitlements enumerated in ratified documents.

³ References to "the Other" tie into an extended tradition in sociology, philosophy, and political geography wherein notions of the Self are defined and justified by contrast to an inferior Other. *See, e.g.,* SIMONE DE BEAUVOIR, *THE SECOND SEX* 6 (Vintage, 2011) ("The category of *Other* is as original as consciousness itself."). *See also* DEREK GREGORY, *THE COLONIAL PRESENT: AFGHANISTAN, PALESTINE, IRAQ* 48 (2004) ("During the 2000 presidential election campaign, Bush had recalled growing up in a world where there was no doubt about the identity of America's 'Other.'").

⁴ ERIC POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* 68 (2014).

⁵ CHRISTOPHER N.J. ROBERTS, *THE CONTENTIOUS HISTORY OF THE INTERNATIONAL BILL OF HUMAN RIGHTS* 9 (2015).

and uncontroversial, and perhaps thereby more effective. The following sections propose such a method.

This paper begins with a review of the problem that must be solved (Part I), as well as a critique of the current legal regime's shortcomings regarding the value of human diversity (Part II). The central premise is that if the idea of the human right is to do the work we require, there needs to be a better procedure to recognize them. If they are what they claim to be, *human* rights, their identification should spark consensual recognition at some level by the widest range of human societies. Otherwise, human rights will be *human* only in the hyperbolic marketing sense that the "World Series" selects the planet's best baseball teams or that "Miss Universe" chooses the most attractive woman in all creation.

Part III draws upon the literature of legal anthropology and other disciplines to describe methodologies designed to respect human diversity. These techniques pinpoint the substantive content of human rights by building upon the empirically identified moral tenets of a wide range of societies. Such an approach views human rights as a conclusion from observed cultural ideals rather than an abstracted aspiration that selectively punishes some groups who fail to achieve those imposed goals.

The goal is that, in order to be relevant at the ground level, human rights should be broadly convergent with the underlying values of any successful group. There need not be one-to-one isomorphism, and the indigenously recognized principle may need restatement into modern legal statements. The end result, however, should be sensible to any population. The alternative is that, instead of a translation of local principles into a consistent language of international law, we witness a power-based transplant of foreign obligations upon subordinate peoples.

Today, this grounded approach to human rights finds little support among relevant policy brokers. One reason for the lack of uptake may be that a critical piece of the description has been missing. Negotiations that would smooth conflicts between disparate factions within each society and between societies that have reached different conclusions concerning appropriate norms cannot progress without an independent standard to evaluate competing claims. Without a mutually acceptable benchmark, no side can reasonably argue its position is better than another. With little incentive for either side to yield in an argument over fundamental principles, impasses are inevitable. To fill this gap, Part IV proposes that panhuman intuitions about basic fairness can

function as a shared prior ethical commitment, assisting in the resolution of disagreements concerning the substantive content of human rights.

The rights identified by the criterion of cross-cultural recognition will be few in number and phrased to protect against abuses rather than aspire towards ideals. While these restrictions have independent merit to prevent diluting overuse from the invocation of new and controversial rights, the applied technique generates the desired result through a nonarbitrary means.

I. CONTEMPORARY HUMAN RIGHTS PRACTICE

Experts may prefer an ostensive definition that defines “human rights” by pointing to clear exemplars, a method that limits the category to the rights in relevant legal documents. Frankly, human rights are whatever the United Nations determines. Most ordinary speakers, however, employ a more natural approach that builds upon the meanings of the words themselves. Typical in this regard is the definition offered by philosopher Richard Wasserstrom:

If any right is a *human* right, it must, I believe, have at least four very general characteristics. First, it must be possessed by all human beings, as well as only by human beings. Second, because it is the same right that all human beings possess, it must be possessed equally by all human beings. Third, because human rights are possessed by all human beings, we can rule out as possible candidates any of those rights which one might have in virtue of occupying any particular status or relationship, such as that of parent, president, or promisee. And fourth, if there are any human rights, they have the additional characteristic of being assertable, in a manner of speaking, ‘against the whole world.’ That is to say, because they are rights that are not possessed in virtue of any contingent status or relationship, they are rights that can be claimed equally against any and every other human being.⁶

By any definition, human rights shoulder an unenviable burden. This new legal creation emerged from the aftermath of the horrors of

⁶ Symposium, Richard Wasserstrom, *Rights, Human Rights, and Racial Discrimination*, 61 J. PHIL. 628, 631–32 (1964). Wasserstrom’s definition varies only slightly from that given by the United Nations. See *What Are Human Rights?*, U.N. OFF. OF THE HIGH COMM’R, <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> (last visited Jan. 20, 2017) (“Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.”).

World War II. At the time they were committed, the Nazi atrocities were not technically illegal due to the norms of state sovereignty under the Westphalian international order. A state was generally permitted to treat its own citizens however it wished.⁷ Human rights aspire to pierce this veil of state immunity from outside interventions by providing an unquestioned and unquestionable floor of protections for every citizen from certain state actions.

To be effective, human rights must be unchallenged in the broad strokes, with disagreement limited only to whether a contested action falls within the forbidden category. To create this impact, “universal human rights in their dominant register (i.e., the one expressed through instruments like the *Universal Declaration of Human Rights* [UDHR]), are above politics, before culture, and, quite literally, outside of history.”⁸ Against mandates of such authority a state could not, for example, assert a right to torture political prisoners by arguing that these individuals were criminals, not political prisoners, and that in any event they were being subjected only to “enhanced interrogation,” and not torture.⁹

Invocation of human rights serves as a shield against aggression by state actors, as trump in arguments against which no higher principle can be invoked, and as a burden-shifter that puts it upon the other party to defend its actions. Although legalistic line-drawing frays the protective cloak this jurisprudential creation throws around vulnerable persons, the outcome presumably results in a more tempered self-restraint by governments than had previously been the case.

One need not question whatever good has flowed from the international regime of human rights to notice that its benefits and burdens have not been evenly distributed. While marketed as a high standard for all, the contents appear to repackage values already held by some and then employed as a critical lash against others, rather than

⁷ JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 28–29 (1993) (“International relations is structured around the legal fiction that states have exclusive jurisdiction over their territory, its occupants and resources, and the events that take place there.”).

⁸ Mark Goodale, *The Power of Right(s): Tracking Empires of Law and New Modes of Social Resistance in Bolivia (and Elsewhere)*, in THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL 130, 144 (Mark Goodale & Sally Engle Merry eds., 2007).

⁹ E.g., Talal Asad, *On Torture, or Cruel, Inhuman and Degrading Punishment*, in HUMAN RIGHTS, CULTURE & CONTEXT: ANTHROPOLOGICAL PERSPECTIVES 111, 120 (Richard A. Wilson ed., 1997) (“[T]he many liberal-democratic governments that have employed torture have attempted to do so in secret. And sometimes they have been concerned to redefine legally the category of pain-producing treatment in an attempt to avoid the label ‘torture.’”).

applied to more local demands. As noted by one legal historian, under American exceptionalism human rights are openly looked upon as “export commodities—goods shipped off to others in faraway places, but rarely considered fit for domestic consumption.”¹⁰

In the meantime, those in “faraway places” may not share the view that the demands being made are good or right, and may even think the opposite. While we may be conditioned to reflexively regard such pushback as ill-considered, its existence should cause us to pause and inquire how these norms came to have the content they do, and why they are labeled as “human” rights rather than civil or political rights.¹¹ When humans fail to recognize the relevance of human rights we tend to criticize the humans as barbarians or inhumane, when perhaps we should reconsider the latent messages of those proclaimed human rights.

Before argument can be made that changes are required to our approach to human rights, the case must be made that a genuine problem exists. The following sections argue that even if we grant that the initial vision within the UDHR was sufficiently limited to the most general standards of acceptable restrictions on state actors, latter accretions impose ever more exacting demands that realize decreasing benefits. Conflict between these top-down draftings of organizational committees and the ground level lifeways of peoples has become unavoidable. Continuing on the present course will either result in the delegitimization of the human rights project altogether because it has expanded so far beyond its original purpose that it cannot bear the weight of dictating a broad suite of rules for a planet, or lead to normative homogeneity through the demise of alternative understandings of the goods of human living.

¹⁰ ROBERTS, *supra* note 5, at 121. See also STEPHEN HOPGOOD, *THE ENDTIMES OF HUMAN RIGHTS* 97 (2013) (citing Louis Henkin) (“The American public was, by and large, a paying audience rather than a membership constituency for global rights. They rarely if ever sought international protection for domestic ‘human rights’ abuses, and this deeply nationalist conception of the civil/human rights distinction persists. Human rights were, in effect, *foreign policy* for non-Americans.”).

¹¹ Goodale reminds us of the qualitative difference between civil and human rights. MARK GOODALE, *SURRENDERING TO UTOPIA: AN ANTHROPOLOGY OF HUMAN RIGHTS* 29–30 (2009) (“[C]ivil rights were understood in a quite different way than human rights, within a different system of political and legal legitimacy, and anchored in a different set of assumptions about human nature and the foundation of citizenship.”).

A. TOP-DOWN ORIGINS OF HR REGIM

Human rights are a legal and philosophical chimera. To receive at least a formal show of submission they must appear to be in some sense antecedent to and superior to the sovereignty of nation-states. If that were not the case, any renegade state could with impunity declare itself exempt from whatever norm against which it was currently chafing.

Underneath the popular image of a supranational power lies a much messier reality. While giving the appearance of having been only recognized, human rights are, in fact, created. They are formal enactments of international law, hammered out over years of minute craftsmanship until a consensus document emerges that is in the end only selectively ratified. As is true of most legislative instruments, the final compromise may only vaguely resemble the initial broad aspirational intent. Despite springing from this most artificial and contrived of processes, the outcome will nonetheless be proclaimed bearing the honorific of “human right.”

Little attention has been directed toward the significance of applying the label “human right.” To the extent that the fulfillment of the rule’s objectives requires not only governmental compliance but also uptake by the general population, calling an obligation a “human right”—rather than “the latest demand for conformity issued out of Geneva or New York”—makes all the difference. Even when aware of the rule’s artificial genesis, the lay audience relies upon the myth that the pronouncements embody natural entailments of being “human,” which places them beyond the reach of contrary demands of mere politics or religion. Once loosed, the human right cannot be contained and yields to no superior authority. For this reason, when the UDHR was being drafted, “the British Colonial Office warned its overseas administrators not to circulate the text of the UDHR, lest this brood of subversive ideas propagate in the streets before they could be tamed in the UN Commission.”¹² Actual compliance with human rights obligations may be imperfect, but the branding makes it difficult for any state to deny utterly that it has at least some duties in those matters.

This natural law mystique emboldens well-meaning actors who promulgate the legal mandates onto noncompliant groups. Tellingly, these peoples may have been unrepresented during committee negotiations that formulated the standards. Unlike the earlier torture

¹² ROBERTS, *supra* note 5, at 137.

example, they did not commit to the rules only to attempt to avoid them through legalistic hairsplitting; here they may not concede that the asserted rights are relevant to them, and may recognize the rule as being neither right nor consistent with their understanding of what it means to be “human.” As a result, the fear is that:

Instead of serving as a bulwark against fascism and the oppression of the weak, a declaration of human rights would, eventually, no matter how well intentioned, tend toward the opposite: it would become a doctrine “employed to implement economic exploitation and . . . deny the right to control their own affairs to millions of people over the world, where the expansion of Europe and America has not [already] meant the literal extermination of whole populations.”¹³

This divergence between the ennobling sweep of the popular imagination and the gritty particularities of group life presents the problem this article attempts to resolve.

Critiquing the slippage between the marketing of human rights and their applications may appear to some as a false issue. The UDHR is an aspirational charter lacking legal force, serving only as a statement of principles, much like the role of the Declaration of Independence within the jurisprudence of the United States. No one is likely to be formally disciplined for failure to abide by the responsibilities with the UDHR.¹⁴ The burden to comply flows instead from the signed treaties which have at their center the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.¹⁵ Collectively known as the International Bill of Human Rights,¹⁶

¹³ GOODALE, *supra* note 11, at 28.

¹⁴ MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 256 (3d ed. 1999) (“Like other General Assembly resolutions, however, the Universal Declaration does not in and of itself constitute a binding international obligation, though it may be cited as an evidence of a customary international law of human rights, and some feel that by now it is itself part of customary international law.”).

¹⁵ The United Nations lists eighteen instruments as forming the “core” of international human rights. See *The Core International Human Rights Instruments and Their Monitoring Bodies*, U.N. OFF. OF THE HIGH COMM’R, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last visited Jan. 20, 2017). The complete list of all human rights instruments is also available. See also *Universal Human Rights Instruments*, U.N. OFF. OF THE HIGH COMM’R, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx> (last visited Jan. 20, 2017).

¹⁶ UNITED NATIONS, *FACT SHEET NO. 2 (REV. 1), THE INTERNATIONAL BILL OF HUMAN RIGHTS* (June 1996), <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>.

these documents and others operationalize the spirit captured within the UDHR.

Difficulties come not from the general idea of human rights but with the attempt to fill the category with enforceable content. This is a weakness of all natural law systems. Whatever intuitive salience the notion offers that there is a basic order beyond our ability to either ignore or change with impunity, identifying universally agreeable tenets has proven obstinately difficult. The best guidance Thomas Aquinas could offer was “do good, avoid evil.”¹⁷ Lacking any firm or consistent criteria to identify the rules of natural law, a common outcome is for the speaker’s personal preferences to be elevated to universal principle. Similarly, the heady mixture of natural law justification with positive law enactments blurs the specific details about the category of human rights.

Disagreement on the identification of human rights arises even within an international community that shares the same political and philosophical assumptions. The United States, for example, has declined to ratify the treaties that specify the human rights of women¹⁸ and children,¹⁹ and was one of only four nations to vote against the 2007 U.N. Declaration on the Rights of Indigenous Peoples.²⁰ Disputes over legal matters are not uncommon, but in this instance the lack of consensus can be uniquely damaging to the underlying assumptions. Human rights enjoy popular endorsement because they are thought to be obvious, even self-evident consequences of humanness.²¹ Consistent rejection of

¹⁷ THOMAS AQUINAS, *SUMMA THEOLOGIAE* I-II q. 94 a. 2 (“[G]ood ought to be done and pursued and that evil ought to be avoided.”).

¹⁸ See U.N. Office of the High Comm’r, *Status of Ratification Interactive Dashboard, Ratification of 18 International Human Rights Treaties*, <http://indicators.ohchr.org/> (last visited Feb. 15, 2017) for the current status of ratification of human rights instruments.

¹⁹ See *id.* to find the current status of the Convention on the Rights of the Child.

²⁰ *Declaration on the Rights of Indigenous Peoples*, U.N. OFF. OF THE HIGH COMM’R, <http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx> (last visited Feb. 15, 2017). The three other states who voted against the Declaration—Australia, New Zealand, and Canada—like the United States would find it inconvenient if they were compelled to recognize the rights of its colonized indigenes.

²¹ The alleged self-evidency of the human rights raises several difficulties. “This claim of self-evidence, crucial to human rights even now, gives rise to a paradox: if equality of rights is so self-evident, then why did this assertion have to [be] made and why was it only made in specific times and places?” LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* 19 (2007). More to the point, were the rights truly self-evident, it should not be necessary to expend so many resources on teaching people to recognize them. However, “[t]he principles enunciated in the UN World Conference of Human Rights in June 1993 asserted . . . the need for human rights education in a systematic way and on a massive scale.” Sally Engle Merry, *Legal Pluralism and Transnational Culture: The Ka Ho’okolokolonui Kanaka Maoli Tribunal, Hawaii, 1993*, in *HUMAN RIGHTS*,

enabling treaties by the most ardent advocates of human rights undermines that façade and threatens to lay bare their ultimately arbitrary genesis.

From one perspective, the UDHR and its progeny represent only the latest step in the formal articulation of rights which runs from the English Magna Carta (1215) through the French Declaration of the Rights of Man and of the Citizen (1789) and ending with the American Bill of Rights (1791). What set the UDHR apart, however, was its intention to apply universally to everyone on the planet rather than to the members of a limited political collective. If shared background assumptions greatly eased those earlier efforts, allowing even slaveholders to speak unironically about the endowed rights of all men, the task becomes considerably more challenging when expanded to include viewpoints that radically differ on the understanding of the good of human life. When these discussions include perspectives beyond the modern states, the confusion and disagreement threaten to make the idea of a human right unsustainable.

Fortunately, the ontological ambivalence that created this difficulty also offers an opening to discern a methodology identifying those protections deserving the title of “human rights.”

B. HYPERTROPHY OF INEFFECTIVE HUMAN RIGHTS

Specific human rights are the product of positive law negotiations subsequently packaged as natural law entitlements. As a result of that process, requirements of human rights law can diverge from the norms of folk in two ways. First, the laws themselves may differ substantively from local norms because they each reflect distinctive assumptions about human nature. If human rights are intended to emerge out of what it means to be “human,” then to the extent that those understandings differ, so too must the expectations of the rights that follow upon those premises. As John Evans recently demonstrated, when persons in American society hold dissimilar ideas about what it means to be human, the differences influence attitudes toward human rights.²² We

CULTURE & CONTEXT: ANTHROPOLOGICAL PERSPECTIVES 28, 30–31 (Richard A. Wilson ed., 1997).

²² While Evans’ contrasts between philosophical, theological, and biological anthropologies suffice for present purposes to demonstrate that beliefs about what it means to be “human” yield different postures toward human rights, more specific conclusions are problematic. Among the methodological weaknesses of his project is the measure of attitudes toward human rights. He

can expect to find even more dramatic differences between groups that share significantly less in common.

Even without the complications from divergent assumptions about humanness, conflicts can arise when formally enumerated human rights become more extensive. The illusion that human rights gesture toward universal entitlements might have been sustainable if human rights had been limited to the 1948 roster in the UDHR, a self-contained and presumptively unassailable pronouncement akin to the Decalogue. Unfortunately, later pronouncements both more specific and increasingly numerous have multiplied the opportunities for friction between legal rule and practical living. According to a tally offered by Eric Posner, the “number of human rights increased from 20 in 1975, to 100 in 1980, to

offers five different scenarios— using US troops to stop genocide, buying a kidney, committing suicide to avoid incurable disease and expensive medical costs, taking blood from a condemned prisoner to cure cancer, and torturing terrorists to save lives— and asks respondents to rate the moral acceptability of each. JOHN H. EVANS, *WHAT IS A HUMAN? WHAT THE ANSWERS MEAN FOR HUMAN RIGHTS* 69 (2016).

The survey shows that the general depictions associated with the biological and philosophical anthropologies (that we are not special compared to animals, nonunique, of unequal value, with minds like machines) *are* associated with less support for specific human rights attitudes. Those associated with the theological anthropology are associated with more support for human rights attitudes. In general, those who agree more with the biological and philosophical anthropologies are less in agreement with human rights, and those who agree more with the theological are more in agreement with human rights.

However, one can find something morally distasteful while still recognizing an underlying right, as when the ACLU fought to permit the Nazis to march through the predominantly Jewish community of Skokie, Illinois. *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43 (1977). Such difficulties mean that the conclusion that the Darwinian view of humanness tends toward less tolerance for human rights should be offered with much caution. Even assuming that Evans has adequately operationalized attitudes toward human rights, the relationship he found may be an artefact of the specific issue involved, or the general background assumptions of the discussion. For example, at an earlier time the theological view, in light of the Genesis account of Noah, argued that black races were inferior and thus slavery and later Jim Crow were the appropriate responses. *See, e.g.*, STEPHEN R. HAYNES, *NOAH'S CURSE: THE BIBLICAL JUSTIFICATION OF AMERICAN SLAVERY* 8 (2002) (“By the 1830s . . . the scriptural defense of slavery had evolved into the ‘most elaborate and systematic statement’ of proslavery theory.”). It was the biological/scientific work of others like Franz Boas showing that all races are indistinguishable that dispelled the myth of the separation of races and made possible the equal treatment of persons. *See* FRANZ BOAS, *RACE, LANGUAGE, AND CULTURE* (1940). *See also* Deborah L. Hall, David C. Matz, & Wendy Wood, *Why Don't We Practice What We Preach? A Meta-Analytic Review of Religious Racism*, 14 *PERS. SOC. PSYCHOL. REV.* 126, 134 (2010) (“Although religious people might be expected to express humanitarian acceptance of others, their humanitarianism is expressed primarily toward in-group members. Thus, we found little evidence that religiosity motivated racial tolerance.”).

175 in 1990, to 300” in 2014.²³ Although sizeable enough to trigger the difficulties mentioned, the count does not include the vast catalog of informal human rights claims speakers casually assert.²⁴

Growing from a well-received core, more and more rights have accreted to the category. “Human rights have gone from a general list of what governments should not do to their citizens in the 1940s to a full-blown moral-theological-political vision of the good life.”²⁵ The cumulative impact of this expanding roll of actionable human rights has been to diminish the power of the invocation; the mana of the call to human rights has been profaned through overuse. But the problem of immediate interest is that this vision of the good life is characteristically western, modern, and capitalist, with little to no tolerance for those societies that do not share these attributes.²⁶ Yet it is pushed out as generically “human,” barely hiding the implication that societies which are not western, modern, and capitalist are backward, in some sense not fully human and therefore vulnerable to corrective interventions.

One can tolerate a measure of imperfection in the implementation of a plan provided it nonetheless results in clear benefits. Unfortunately, observers are skeptical that “human rights treaties, on the whole, have improved the well-being of people, or even resulted in respect for the rights in those treaties.”²⁷ When looking at “whether countries that have ratified treaties are more likely than they otherwise would be to conform their actions to the requirements of the treaty,” Oona Hathaway found that:

[N]ot only is treaty ratification not associated with better human rights practices than otherwise expected, but it is often associated with worse practices. Countries that ratify human rights treaties often

²³ POSNER, *supra* note 4, at 92.

²⁴ A conveniently timed example appeared in the program for a recent society meeting, which promised a defense of “The Human ‘Right’ to Psychoanalysis.” See Annual Meeting Program, L. & Soc’y Ass. 19 (June 2-4, 2016), http://www.lawandsociety.org/NewOrleans2016/docs/2016_Program.pdf. I did not attend this presentation, so my comments do not go beyond challenging the implications of the title.

²⁵ Richard Ashby Wilson, *Tyrannosaurus Lex: The Anthropology of Human Rights and Transnational Law*, in *THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL* 342, 349 (Mark Goodale & Sally Engle Merry eds., 2007).

²⁶ Jennifer Hendry & Melissa L. Tatum, *Human Rights, Indigenous Peoples, and the Pursuit of Justice*, 32 *YALE L. & POL’Y REV.* 351, 356 (2016) (“Individual natural rights became synonymous with modernity, which was, in turn, irrevocably and undeniably Western.”); see also Merry, *supra* note 21, at 29 (“Human rights is obviously based on Western liberal-legalist ideas, [even if] in the postcolonial world, it is no longer exclusively owned by the West.”).

²⁷ POSNER, *supra* note 4, at 7.

appear less likely, rather than more likely, to conform to the requirements of the treaties than countries that do not ratify these treaties.²⁸

The explanation for this gap between formal commitment and improved securities for citizens is invariably complex. The instances that relate most directly to the present discussion are those in which the state authorities fully endorse the international agreements, but have been unable to convince their citizens to amend their behaviors accordingly.

Sonia Harris-Short examined this situation in the context of the *UN Convention on the Rights of the Child*.²⁹ Granting that the “Western educated elites will inevitably assimilate to some degree the dominate philosophical ideas and values of the West,”³⁰ the national representatives nonetheless report that lack of implementation was “exacerbated by the prevailing perception among the local population that the general civil and criminal law, as opposed to customary law and practice, enshrines ‘alien ideas’ that have been forcibly imposed on them by more powerful outsiders.”³¹

The reported lack of improving conditions on the ground, in other words, can be linked to individuals’ perceived foreignness of the mandated standards “to which they have never agreed and in the creation of which they have played no part.”³² The present discussion responds to Harris-Short’s observation that societies resist compliance with rules that do not reflect or even contradict their fundamental values.

²⁸ Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1989 (2002). The finding that treaty ratification is unlikely to lead to positive outcomes is especially true for autocratic regimes, presumably the environments where the human rights protections are most needed. Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RESOL. 925 (2005). See also BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 12 (2009) (offering a slightly more optimistic conclusion) (“[R]egardless of their acknowledged role in generally separating the committed human rights defenders from the worst offenders, treaties also play a crucial restraining role.”). But according to Samuel Moyn, the hope Simmons offers is “a pessimistic reformist hope.” Samuel Moyn, *Do Human Rights Make Enough of a Difference?*, in THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW 329, 330 (Conor Gearty & Costas Douzinas eds., 2012).

²⁹ Sonia Harris-Short, *International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child*, 25 HUM. RTS. Q. 130 (2003).

³⁰ *Id.* at 170.

³¹ *Id.* at 143.

³² *Id.* at 180.

C. ETHNOGRAPHIC ILLUSTRATIONS

Given that a problem may exist in theory between the push for a uniform relationship between the state, its citizens, and the cultural values that give existential meaning to those citizens, a remedy is needed only if we have reason to believe that this tension actively manifests in real world interactions. Unfortunately, instances of such conflicts are not difficult to find.

In Nepal, for example, Buddhists seeking to protest the effort by the state to establish Hinduism as the national religion marched under a banner that “Secularism is a human right.”³³ Although this may appear to be precisely the situation that the UDHR was intended to address, the action, however needful in order to promote their cause, came at a high cost.

In order to defend themselves as Buddhists against the Hindu state, Buddhists have been compelled to call on human rights and to represent themselves according to the ontologies of identity that inhere in liberal law. However, it is precisely by disavowing key aspects of this liberal way of understanding the person that Buddhism distinguishes itself and constitutes its adherents as Buddhist. There is, therefore, an irreconcilable tension between what Buddhists do and the subjectivities they inhabit when they call on human rights, and the acts and identities whose rights are supposed to guarantee.³⁴

To preserve themselves as a distinct group, these Buddhists must adopt a worldview that erases the distinctiveness they hope to preserve. The tension represents a not uncommon instance when “people have been forced to claim rights that in fact represent losses to them.”³⁵

As the Nepali Buddhists illustrate, one of the harmful consequences of the human rights program is that it banishes other means of expressive resistance.³⁶ There now exists only one language in

³³ Lauren Leve, “*Secularism Is a Human Right!*”: *Double-Binds of Buddhism, Democracy, and Identity in Nepal*, in *THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL* 78 (Mark Goodale & Sally Engle Merry eds., 2007). See also David N. Gellner, *From Group Rights to Individual Rights and Back: Nepalese Struggle over Culture and Equality*, in *CULTURE AND RIGHTS: ANTHROPOLOGICAL PERSPECTIVES* 177, 186 (Jane K. Cowan, Marie-Bénédicte Dembour & Richard A. Wilson eds., 2001) (further describing the debate in Nepal).

³⁴ Leve, *supra* note 33, at 79.

³⁵ Jane K. Cowan, Marie-Bénédicte Dembour, *Part II: Claiming Cultural Rights*, in *CULTURE AND RIGHTS: ANTHROPOLOGICAL PERSPECTIVES* 149, 151 (Jane K. Cowan, Marie-Bénédicte Dembour & Richard A. Wilson eds., 2001).

³⁶ Annelise Riles, *Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage*, 108 AM. ANTHROPOLOGIST 52, 56 (2006) (“[H]uman rights discourse has now achieved a kind

which to voice a protest, one that is freighted with culturally specific presumptions about agency and self. The choice becomes to preserve the local values but lose the ability to effectively resist the injury, or to adopt the mandated forms at the cost of undermining the very values wished to be preserved.

The harm here may be mitigated because, according to Leve, the Buddhists are not themselves consciously “disturbed by the personal and cultural translations that the discursive practice of human rights entails” because here, as elsewhere, “people apply different logics and standards in different domains of life.”³⁷ But as a general rule in such matters, the viewpoint of the subject is not wholly determinative in deciding whether an injury exists. Were that the case, many human rights endeavors, such as the struggle to eliminate female genital cutting, would fail for lack of support among the women such projects are intended to benefit.³⁸

In a second ethnographic example, Heather Montgomery points out that many international standards, including the *UN Convention on the Rights of the Child*, presuppose an ideal of childhood that “is based on a Western model which may not be appropriate for all societies. It implies that every child [defined as anyone under the age of eighteen] has a right to a childhood that is free from the responsibilities of work, money and sex: in other words, a Western-style childhood.”³⁹ Although this ideal of childhood as an age of innocence did not become dominant in the West until the Victorian era,⁴⁰ it is now the requirement worldwide.

of hegemonic status: It is ‘the sole approved discourse of resistance’. Hence it is important to pay attention both to what cannot be said in the language of human rights and to the way human rights discourses disempower other discourses of resistance.”)

³⁷ Leve, *supra* note 33, at 106.

³⁸ See, e.g., Bettina Shell-Duncan & Ylva Hernlund, *Female “Circumcision” in Africa: Dimensions of the Practice and Debates*, in *FEMALE “CIRCUMCISION” IN AFRICA: CULTURE, CONTROVERSY, AND CHANGE* 1, 24–25 (Bettina Shell-Duncan & Ylva Hernlund eds., 2000) (“The way that outraged ‘Western’ women championed the issue has since been accused of revealing ‘latent racism,’ ‘intellectual neo-colonialism,’ and ‘anti-Arab and anti-Islamic fervor,’ and efforts to ‘eradicate FGM’ have been seen as an imperialistic intervention from meddling Westerners of privilege.”). Thus we find justifications like the following: “it is not objectionably arrogant to protect interests that the intended beneficiaries have reason to regard as urgent, even if they do not actually do so.” CHARLES R. BEITZ, *THE IDEA OF HUMAN RIGHTS* 204 (2009).

³⁹ Heather Montgomery, *Imposing Rights? A Case Study of Child Prostitution in Thailand*, in *CULTURE AND RIGHTS: ANTHROPOLOGICAL PERSPECTIVES* 80, 83 (Jane K. Cowan et al. eds., 2001).

⁴⁰ HUGH CUNNINGHAM, *CHILDREN AND CHILDHOOD IN WESTERN SOCIETY SINCE 1500* 72 (2005) (“the truly revolutionary impact of Romanticism on thinking about childhood [is a shift] from being the smallest and least considered of human beings, the child had become endowed with qualities which made it godlike, fit to be worshipped, and the embodiment of hope.”). See also

Montgomery illustrates the tension by documenting a rule which seems to promote an uncontroversial common good, that children should be free from sexual exploitation. In Thailand, however, enforcing that right can infringe on other rights:

Child prostitution is not necessarily the self-evident evil it appears to be for outsiders; in Baan Nua, ensuring a child's right to be free from sexual exploitation would mean violating their rights to live with their families and in their communities. . . . Assuring one right only becomes possible at the expense of other rights – in this case to food, shelter and family unity, that is, precisely those rights which these families prioritize over the child's right to be free of sexual intervention.⁴¹

From among equally valued rights, the subject's priorities arguably should prevail, not those of outsiders. This concession is especially prudent given the argument that any effort to prioritize human rights is impossible without recourse to pragmatics and political judgment.⁴² Imposed priorities are not the logical consequences of the rights but only the habitual preferences of external critics.

These children tend not to see themselves as exploited, raising the question whether the rights transplanted from outside should take

PHILIPPE ARIÈS, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* 47 (1962) (“No doubt the discovery of childhood began in the thirteenth century, and its progress can be traced in the history of art in the fifteenth and sixteenth centuries. But the evidence of its development became more plentiful and significant from the end of the sixteenth century and throughout the seventeenth.”). The social construction of childhood was one of the first conclusions from anthropology to receive popular attention. MARGARET MEAD, *COMING OF AGE IN SAMOA* 196 (1972) (“Can we think of adolescence as a time in the life history of every girl child which carries with it symptoms of conflict and stress as surely as it implies a change in the girl's body? . . . [W]e had to answer [this question] in the negative.”).

⁴¹ Montgomery, *supra* note 39, at 94–95.

⁴² Gunnar Beck, *The Mythology of Human Rights*, 21 *RATIO JURIS* 312, 314 (2008). Pessimism about ranking human rights is justified because the values being compared are “incommensurable [meaning] it cannot be said of one that it is either better or worse than the other nor, importantly, that it is of equal value to another so that ‘reason has no judgment to make concerning their relative values.’” *Id.* at 317 (quoting Joseph Raz). See also James Griffin, *The Relativity and Ethnocentricity of Human Rights*, in *PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS* 555, 557 (Rowan Cruft et al. eds., 2015). If this is the case, then the human rights cannot be rationally argued to be superior to any competing moral code, such as those encountered in other societies. In face of this stubborn incomparability, our assumption of “the rationality and self-evidence of our values is itself, it would seem, a socially bred illusion—dogmatism parading under a veneer of reason.” SOLOMON ASCH, *SOCIAL PSYCHOLOGY* 367–368 (1952).

precedence over the “children’s voices or disregard their worldview.”⁴³ Montgomery cautions that:

[R]ights, especially the right to be free from sexual exploitation, do not need to be imposed on children without their consent. Rather, they can be built upon the rights that children claim are important to them. It is not that the child prostitutes do not want the right to be free of sexual exploitation, as promised in the UN Convention. It is, rather, that by taking that right out of context, and by disregarding the cultural prioritization of rights, its implementation is actually inimical to these particular children’s well-being.⁴⁴

A third observation is offered by James Zion, who criticizes the imposition of human rights law upon North American indigenes:

The premises of modern human rights law are that the individual must be protected against the state in equality with all other individuals. While equality before the law and equality in access to the fundamentals of daily life are essential principles, they are not acceptable for Indians in their external relations with the outside world. Unbending equality is essentially assimilationist; and assimilation is ethnocidal and genocidal in its impact upon Indians, both as individuals and as groups.⁴⁵

Built into the core precepts of international human rights law is the assumption that the proper focus is the isolated individual. Although the view of the individual as the appropriate unit for liberal analysis is characteristic of Western political philosophy, alternative views take

⁴³ Montgomery, *supra* note 39, at 95.

⁴⁴ *Id.* at 97. Bell offers a similar description of how an outsider’s perspective may result in a different conclusion concerning the proper priorities that should be given to a suite of interests:

What is the standard of universality against which women’s rights are to be tested? At first glance, Aboriginal customary marriages are in conflict with human rights provisions, for they involve “promised marriage” and “infant bestowal.” The cultural context within which such marriages were contracted, however, binds kin in a web of reciprocal obligations, rights, and responsibilities that have implications for land ownership and ceremonial duties: in short, they were part and parcel of the survival of the culture. By focusing on the individual rights of one woman, the nature of the system of Aboriginal marriage arrangements is obscured.

Diane Bell, *Considering Gender: Are Human Rights for Women, Too? An Australian Case*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 339, 349 (Abdullahi Ahmed An-Na’im ed., 1992).

⁴⁵ James W. Zion, *North American Indian Perspectives on Human Rights*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 191, 193 (Abdullahi Ahmed An-Na’im ed., 1992).

aggregates like the family as the center of moral claims.⁴⁶ Another approach finds that the right exists in the relationships between people, and not in the people themselves.⁴⁷ The point is that:

[C]oncepts of personhood vary dramatically cross-culturally. In India and Melanesia, for example, a dominant view on the individual emphasizes that he or she is a product of social relations and far from that self-sustaining, independent and inviolable ‘monad’ the Western individual is seen as. In such societies, the community rather than the individual is accorded rights, and the individual has duties rather than rights. In such societies, individual human rights can be seen as truly alien, even if they are often promoted and adopted by some segments of society, usually educated middle-class elites.⁴⁸

Zion finds that “[t]he focus on the individual ignores the great importance of the group—of the family (and normally the extended family), of extended relationships of clan and religion, of the band or tribe, and even of ‘Indian-ness’ itself.”⁴⁹ The larger lesson is that such contrary accounts show that human rights as they are ordinarily understood in the international regime do not always evoke recognition or elicit agreement, nor is it obvious that the alternative arrangements are inferior. The harshest criticism for many alternatives is that they are not the self-selected values of Westerners. That pedigree, however, should not be the basis for compelling changes in others. “Our Kantian ethics

⁴⁶ Rhoda E. Howard, *Dignity, Community, and Human Rights*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 81, 84 (Abdullahi Ahmed An-Na'im ed., 1992) (“[I]n most known past or present societies, human dignity is not private, individual, or autonomous. It is public, collective, and prescribed by social norms. The idea that an individual can enhance his or her ‘dignity’ by asserting his or her human rights violates many societies’ most fundamental beliefs about the way social life should be ordered.”).

⁴⁷ ROBERTS, *supra* note 5, at 43–44 (“The relational strand of thought concerning human rights never took hold. But nor did it die out. Within the single word, ‘right,’ regardless of how it is used – legally, politically, philosophically – it always references a complex set of relations. In this sense, a right . . . is not a thing unto itself. Nor can individuals or groups somehow possess a right as the commonly used phrase ‘bundle of rights’ would imply. A right simply defines an ‘individual’s position in a fluid network of social relations’ and institutional configurations. So the meaningful unit of analysis cannot be the individual, the right, or the group – it is the nature of the interaction(s) that simultaneously defines all three.”)

⁴⁸ Thomas Hylland Eriksen, *Multiculturalism, Individualism and Human Rights: Romanticism, the Enlightenment and Lessons from Mauritius*, in HUMAN RIGHTS, CULTURE & CONTEXT: ANTHROPOLOGICAL PERSPECTIVES 49, 64–65 (Richard A. Wilson ed., 1997).

⁴⁹ Zion, *supra* note 45, at 195.

invites us to assume that everyone wishes to be treated like we would like. This is rubbish.”⁵⁰

Disagreements can arise over metaphysical beliefs as in the Nepalese example, the differing prioritization among rights found among Thai child prostitutes, or whether the identified bearer of the itemized right should be an atomized individual or, as among Native Americans, the community. Moreover, it should not escape notice that in all three instances the criticized societies are at a structural disadvantage in their encounters with outsiders seeking to dictate the proper arrangement of internal social relationships. They are thus ill-positioned to flagrantly disregard the demand to comply. Given such power imbalances, altered behaviors may be more accurately understood as submission rather than the result of reform or modernization.

If human rights are to live up to their promise we must assume that, as humans, all peoples should be able to relate in some positive way to any claim asserted under this label. The details may differ, but it would be odd if something that is held out as a fundamental requirement for the development of human potential would be alien, even incomprehensible to a nontrivial portion of the world’s population. Even in a society that denied those rights and repressed those freedoms, the citizens should agree that the proffered human right would be a general good, all things considered. To adopt a contrary opinion colors noncompliant societies as outliers, either as not being fully human, or ignorant of the way to properly manage their own humanity.

II. FRAMING THE PROBLEM

Moving from the description of the problem to the more formal analyses, we find that the difficulty, and its solution, is overdetermined. Independent approaches from jurisprudence and legal anthropology show that if the disagreement is to be rectified, there must be a transparent treatment of what it means to be “human.” If that can be achieved, the identification of human rights should preserve those portions of the current regime that can be validated cross-culturally.

From the perspective of impacted societies, the introduction of human rights obligations raises issues of legal transplants. A term introduced by Alan Watson, “legal transplant” refers to “the moving of a

⁵⁰ Dianne Otto, *Rethinking the “Universality” of Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 1, 2 (1997) (quoting Martti Koskenniemi).

rule or a system of law from one country to another, or from one people to another.”⁵¹ As shown by Watson, that fact does not make the introduced rule illegitimate. Special problems, however, arise that influence how and under what conditions a rule will be received.

To help understand these problems, the next section considers a recent exchange between two legal philosophers, Joseph Raz and Jeremy Waldron. Raz represents a group of thinkers who believe that we should take human rights as a pragmatic given and cease looking for anything deeper that links or justifies them.⁵² The purportedly false premise that “human rights” encodes fundamental assumptions of humanness and personhood has led to an unprofitable debate and distracts from what is truly important, such as policing states to safeguard the rights of their citizens.

Waldron disagrees, arguing instead that Raz’s approach fails to adequately capture why we find the idea of the human right so compelling. While admitting that the search for philosophical foundations for the category can be elusive and frustrating, Waldron believes that anything less misses the point.⁵³

The problem described by Waldron can be reduced to the struggle to define the category of rights of *humans*. What does that word refer to? The final section reviews concerns that have been expressed by anthropologists about the gap between the label and the actual contents of the legal regime.

A. JURISPRUDENTIAL BACKGROUND

The contrast between the rhetoric of a universal human right localized and the practicalities of local ideals universalized can be

⁵¹ ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 21 (2d ed. 1994).

⁵² A thorough defense of this approach is offered by Charles Beitz: “A practical conception [of human rights] takes the doctrine and practice of human rights as we find them in international political life as the source materials for constructing a conception of human rights. It understands questions about the nature and content of human rights to refer to objects of the sort called “human rights” in international practice. There is no assumption of a prior or independent layer of fundamental rights whose nature and content can be discovered independently of a consideration of the place of human rights in the international realm and its normative discourse and then used to interpret and criticize international doctrine. Similarly, it is not assumed that human rights seek to describe what is actually common to all political-moral codes or to state common standards reachable to inference from them. Instead, we take the functional role of human rights in international discourse and practice as basic: it constrains our conception of a human right from the start.” BEITZ, *supra* note 38, at 102–03.

⁵³ See *infra* notes 72–80 and accompanying text.

illustrated through a recent exchange between legal philosophers Raz and Waldron. Their disagreement underscores the ongoing debate over the intrinsic nature of the human right, whether it has an essence at all, and if so, of what kind.

The relevance of the problem to identify what the human rights have in common is of the highest order. Appeals to human rights ideals characterize the theme of the post-World War II political order. Emerging from the chaos and confusion of the destructive excesses of an international system grounded in state sovereignty, human rights arose as a preventive counterbalance. This history renders it possible that human rights are an ad hoc collection of remedies rather than the actualization of a natural kind.

Raz criticizes what he terms the “traditional” approach to human rights, which has two distinctive elements: it “aims ‘to derive’ human rights from *basic features* of human beings which are both *valuable* and in some way *essential to all which is valuable* in human life . . . [and] *Second*, [that] human rights are basic, perhaps the most basic and most important, *moral rights*.”⁵⁴ He finds three weaknesses in all attempts to develop this line of thinking that helps to create the mythology of the human right as supranational values.⁵⁵ First, “[t]hey misconceive the relations between values and rights.”⁵⁶ In other words, not all goods are necessarily rights. Other means exist to achieve normative goals than the reduction of all conflicts and disagreements to fit the model of adversarial legal enforcement of entitlements. Second, foundational efforts “overreach, trying to derive rights which they cannot derive. And they fail either to illuminate or to criticize the existing human rights practice.”⁵⁷

Rather than reasoning forward from first principles such as personhood, dignity, well-being, or actualization, Raz prefers to argue backwards from the fact that human rights institutions and instruments exist, making the primary question how to best refine and demarcate the limits of that practice.⁵⁸ Human rights do not need to be justified; they

⁵⁴ Joseph Raz, *Human Rights without Foundations*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 321, 323 (Samantha Besson & John Tasioulas eds., 2010).

⁵⁵ Raz’s discussion highlights in this regard the efforts of Alan Gewirth and James Griffin.

⁵⁶ Raz, *supra* note 54, at 323.

⁵⁷ *Id.* at 324–24.

⁵⁸ *Id.* at 327.

need to be improved. Following Rawls's discussion,⁵⁹ Raz defines human rights as "rights which set limits to the sovereignty of states, in that their actual or anticipated violation is a (defeasible) reason for taking action against the violator in the international arena."⁶⁰ This approach appears to internationalize the legal realism invoked by Oliver Wendall Holmes's "bad man" rule to identify law as the rules courts are willing to enforce, and not by the statements in statute books.⁶¹ By analogy, human rights are the rules whose breach will justify military intervention against a sovereign state, and only those.

In this view, no human right to education exists (as proclaimed by UDHR Article 26) because it is not likely to be a cause "whose violation might justify international action against a state." As examples of true human rights, Raz offers the list constructed by Rawls:

The right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly).⁶²

Whatever the rights are decided to be, Raz's point is that "the moral principles determining the limits of sovereignty must reflect not only the limits of the authority of state [*i.e.*, what it is thought the state should or should not be able to do], *but also* the relatively fixed limitations on the possibility of justified interference by international organisations and by other states in the affairs of even an offending state."⁶³ Human rights occur at the intersection of the abstract political philosophies on the proper role of governments and the legitimate extent of their powers, with the practical realities of the acceptable justifications one state can offer—to other states and to its own citizens—to invade a sovereign entity that is not directly threatening it.

Raz's thesis forces him into potentially awkward conundrums. He concludes, for example, that because Rawls has, like other traditionalists, similarly failed to differentiate between rights and values,

⁵⁹ See JOHN RAWLS, *THE LAW OF PEOPLES* 79 (2001) ("Human rights are a class of rights that play a special role in a reasonable *Law of Peoples*: they restrict the justifying reasons for war and its conduct, and they specify limits to a regime's internal autonomy.").

⁶⁰ Raz, *supra* note 54, at 328.

⁶¹ Oliver Wendall Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

⁶² RAWLS, *supra* note 59, at 65.

⁶³ Raz, *supra* note 54, at 331.

he asserts as rights matters that are merely wrongs. “Some of [Rawls’s] human rights, for example the human right against genocide, do not appear to be rights at all. To be sure committing genocide is wrong, but is it the case that I have a right against the genocide of any people? . . . Not all wrongs constitute violations of rights. Not all the limits of either state authority or state sovereignty are set by rights.”⁶⁴

Suggesting that genocide violates no human rights is an odd result given that human rights specifically emerged as a response to the acts of genocide by the Nazis. Ordinary citizens may say that if preventing the physical annihilation of an entire people does not rise to the level of the human right, then there are no human rights.

In the end, contrary to the traditionalists he sees himself as arguing against, Raz concludes that:

Individual rights are human rights if they disable a certain argument against interference by outsiders in the affairs of a state. They disable, or deny the legitimacy of the response: I, the state, may have acted wrongly, but you, the outsiders are not entitled to interfere. I am protected by my sovereignty. Disabling the defence ‘none of your business’, is definitive of the political conception of human rights. They are rights which are morally valid against states in the international arena, and there is no reason to think that such rights must be universal.⁶⁵

Raz ends by clarifying his final position:

So that is where human rights come from. They derive from three layers of argument. First, some individual interest often combined with showing how social conditions require its satisfaction in certain ways (e.g. via various forms of instruction) establishing an individual moral right. . . . The second layer shows that under some conditions states are to be held duty bound to respect or promote the interest (or the rights) of individuals identified in the first part of the argument . . . The final layer shows that they do not enjoy immunity from interference regarding these matters. If all parts of the argument succeed then we have established that a human right exists.⁶⁶

⁶⁴ *Id.* at 332. The specification that the claimed right is against the genocide of “any” people is critical to Raz’s argument. If the concern is about genocide of *my* people, then the right dissolves to a more ordinary claim to the right not be killed unjustly. In this light, many asserted human rights may be reducible to a broader power to stand in the place of others who are unable to effectively exercise their individual rights. To speak of a “right against genocide” (and possibly other such collective rights), then, reifies what is essentially a process to assert by proxy a more fundamental right.

⁶⁵ *Id.*

⁶⁶ *Id.* at 336.

Notably, within this framework “human rights need not be universal or foundational.”⁶⁷ In the “first layer” leading to human rights, an “individual interest” combines with “social conditions” to form an “individual moral right.”⁶⁸ These interests and conditions are necessarily variable. With the generation of divergent moral rights differently nurtured under sundry legal systems, the emergent norm of the human right will easily vary over time if not geography. Any general consistency that arises will be due to contingently shared assumptions grounding the initial individual interests, rather than necessary conclusions about the nature of human rights.

There is much to admire in this description. Raz recognizes that to call something a “human right” lacks any helpful analytic edge. He emphasizes the category’s pragmatic application as the solution, a sword to puncture sovereignty when a state fails to adequately protect rights that it can control. If violations would not warrant an all-but literal “nuclear option,” then that interest or value does not qualify as a human right.

The gap within Raz’s account is that while the human rights have indeed become the “ethical *linga franca*” of the modern world,⁶⁹ they have achieved such status on the implied foundational account of the traditionalists. In that story, human rights are grounded in the existential state of being human rather than in the specific relationship between a citizen and the state.⁷⁰ Human rights are what binds us across state borders, and become the expressive vehicle for empathic responses to the suffering of others. The account Raz offers favoring the accidental obligations between governments and citizens may in some sense be more accurate descriptively, but it generates a radically different outcome in terms of popular imagination. Raz’s approach is a rule for states, perhaps, but contains little to inspire people and generate the popular support upon which the human rights regime depends.

⁶⁷ *Id.* at 332.

⁶⁸ *Id.* at 336.

⁶⁹ John Tasioulas, *The Moral Reality of Human Rights*, in *FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR* 75 (Thomas Pogge ed., 2007).

⁷⁰ See, e.g., Abdullahi Ahmed An-Na’im, *Conclusion*, in *HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS* 427, 429–431 (Abdullahi Ahmed An-Na’im ed., 1992) (“[M]uch of the authority of the concept [of human rights] is derived from its presumed or alleged universality—that is, the notion that human rights are the entitlements of all human beings throughout the world with no distinction as to race, gender, religion, and so on.”).

Waldron admits that there can be intellectual difficulties in the traditional struggle to ground human rights in the state of being “human”: “many will say that the attribution to Cro-Magnon man of the rights that we take to be human rights today makes no sense.”⁷¹ As anthropology has demonstrated, a wide range of ways to be human exists. The effort to capture underlying consistencies within that diversity can be daunting.

Waldron begins by identifying two major trends within efforts to analyze the category of the human right. The first follows the traditionalist approach that understands the “human” of human rights to refer to the bearers of the relevant right.⁷² The second “refers not to the right bearers (and their humanity) but to the class of people for whom violations of these rights are properly a matter of concern. . . . The idea is that there is a class of rights such that no human should be indifferent to the violation of any right in that class.”⁷³ Under this second reading, it is conceivable that animals can have “human rights” not because they are human, but because their mistreatment provokes censure from humans. Labeling the human concern approach the “Armed Intervention View,”⁷⁴ Waldron further distinguishes whether the position is permissive or obligatory. Rawls, he says, regarded intervention as permitted, but Raz “couches his view more affirmatively,” implying that “in the absence of reasons to the contrary, non-intervention in response to a violation of one of these rights would be wrong.”⁷⁵

Waldron critiques the Armed Intervention View on three distinguishable grounds. First, intervention is appropriate for multiple reasons, not just for human rights violations. Regional destabilization, whether or not rights are involved, is one such justification. Yet “it seems odd to hold the ‘human’ in ‘human right’ hostage to geopolitical factors

⁷¹ Jeremy Waldron, *Human Rights: A Critique of the Raz/Rawls Approach* 1 (N.Y. Univ. School of Law, Working Paper No. 13-32, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2272745.

⁷² This is the sense adopted in the present paper.

⁷³ Waldron, *supra* note 71, at 2.

⁷⁴ *Id.* at 4 (“According to the version of the human concern approach I have in mind, a right is properly described as a human right if the appropriate response to its violation by an otherwise sovereign state is *armed interference* by an outside state or an international organization aimed at remedying or punishing or preventing the continuance of the sovereign state’s violation.”).

⁷⁵ *Id.* at 7. Waldron may be overstating Raz’s position here. As noted earlier, Raz states that a violation is a “defeasible” reason for intervention, not an obligatory one. Raz, *supra* note 54, at 328.

in this way.”⁷⁶ The second criticism is that decisions to intervene will depend on a plethora of factors beyond the simple identification of a rights violation. Again, these kinds of calculations seem to cut against the understanding of what it means for something to be a human right:

As things stand, we identify rights as human rights using general descriptions—like the right to free speech or the right not to be tortured. We don’t usually refer to them as the right to free-speech-in-Kosovo or the right not-to-be-tortured-in-Iraq. But if the designation of a right as human depends on the all-things considered appropriateness of humanitarian intervention to vindicate that right, then a given right will turn out to be a human right in some settings but not in others, depending on how the array of considerations relevant to the justification of humanitarian intervention plays out in each setting. The right not to be tortured might prove to be a human right in Iraq in 2000, but what we usually identify as the same right might prove not to be a human right in Syria in 2001 because (at the date of writing: May 2013) the practicalities argue against humanitarian intervention against the atrocities of the Assad regime.⁷⁷

It is, he concludes “counterintuitive to have the predicate ‘human’ apply to rights in this contingent and situational fashion.”

The third, and perhaps most troubling flaw in the Armed Intervention View, is “the way it sells short the individualism of human rights.”⁷⁸ We would not intervene in response to the torture of one person, although we may if thousands are tortured. That political reality discredits the injury that has been done to that person since, by definition under the Armed Intervention View, there has been no human right violation because there has been no subsequent intervention. This emphasis away from the individual is at odds with the ordinary discourse of human rights, which underscores the importance and value of each person.

By the end of his analysis, Waldron concludes that we should “reject the proposal to define a right as a *human* right simply in virtue of the type of external response that is appropriate when it is violated.”⁷⁹ He grants, however, both that the traditionalist focus on the rights-bearer has significant difficulties, and that “[s]ome of the ideas picked out by the human concern view are surely important, and it may well be that we

⁷⁶ Waldron, *supra* note 71, at 8.

⁷⁷ *Id.* at 10.

⁷⁸ *Id.* at 11.

⁷⁹ *Id.* at 20.

should seek eclectically some sort of combination of approaches, with a set of rights being identified as human rights both (a) in terms of their being rooted in distinctively human interests, on the one hand, and (b) in terms of their violation being an appropriate subject of global human concern.”⁸⁰

The task, in other words, is to reconcile contradictory intuitions and historical realities. The latter recognizes that the human rights have been created to solve specific problems of political organization based on the presumptive inviolability of state sovereignty. The former, though, insists that human rights exist prior to the state, and demand recognition and reaction. The challenging nature of human rights is that both these mutually exclusive claims are true.

Waldron suggests that a middle course be found that respects both the pragmatics of taking human rights in some sense as a given as well as the intuitions that the value of human rights flows from their roots in our shared status as human beings. Part III will attempt to offer such a compromise by grounding human rights in the shared norms of the world’s societies rather than abstracted out of philosophical principles or selected from the values of only a few powerful groups.

B. ANTHROPOLOGY AND THE VALUE OF DIVERSITY

As admitted by one author, “[t]hat a universal law of human rights has the potential to erase cultural diversity is hardly disputable.”⁸¹ When discussing a draft of this paper, a colleague suggested that this possible outcome was not a true quandary because cultural diversity *should* be eliminated, thus clearing the path to universal and uniform rights for all. Few may state this conviction so bluntly, but in practice it may well be the prevailing posture.⁸² The reasoning appears to be that

⁸⁰ *Id.* at 21. *But cf.* Joseph Raz, *On Waldron’s Critique of Raz on Human Rights*, (Columbia Law School, Working Paper No. 13-359, 2013), <http://ssrn.com/abstract=2307471> (claiming that Waldron has misunderstood his position).

⁸¹ Otto, *supra* note 50, at 7.

⁸² “[V]irtually every government of a sovereign state, north or south, has adopted a modernization outlook that regards premodern culture as a form of backwardness to be overcome for the sake of the indigenous. Proceeding on that basis, the preferred normative response to the existence of indigenous peoples is not deference to their cultural autonomy, but rather their orderly and equitable assimilation into the more benevolent and promising cultural space of the modernizing ethos.” Richard Falk, *Cultural Foundations for the International Protection of Human Rights*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 44, 47 (Abdullahi Ahmed An-Na’im ed., 1992).

some fortunate societies have hit upon a clearly superior way of life and all other versions should converge toward that solution. Whatever disagreement exists on fundamental values will be resolved when dissidents are either assimilated or allowed to slide into extinction.

A different point of view—one typical of anthropologists—holds that human societies display a range of norms and organizational systems, and that this diversity is a good that should be valued.⁸³ Cultural variability is not slightly different shades of the same hue; practices can be markedly divergent so that something commonplace in one can be strangely alien in another. As Posner points out, “foreign countries really are foreign. It is hard for us to understand their peoples, customs, institutions, and pathologies.”⁸⁴ The fact of difference complicates even talking about universal goals, much less attaining them. “For example, during translation of the 1988 Annual Report of the Yukon Human Rights Commission, it was discovered that the term ‘equal,’ in its human rights context, did not have an equivalent in any of the six Aboriginal languages used in the publication.”⁸⁵

Anthropologists grew concerned that a regime of human rights may not be sufficiently respectful of all peoples, prompting them to express early skepticism over the project. When the UDHR was being drafted the American Anthropological Association (AAA) voiced its concerns that parochial values of the victorious West would be projected outward as the only suitable aspirations for all peoples.⁸⁶

⁸³ Cultural diversity has been analogized to the importance of biodiversity. Maffi describes “the interwoven (and possibly coevolved) diversity in nature and culture to be the ‘preeminent fact of existence,’ the basic condition of life on earth. The continued decrease of biocultural diversity . . . would ‘staunch the historical flow of being itself, the evolutionary processes through which the vitality of all life has come down to us through the ages.’” Luisa Maffi, *Linguistic, Cultural, and Biological Diversity*, 29 ANN. REV. ANTHROPOLOGY 599, 603 (2005) (citing DAVID HARMON, IN LIGHT OF OUR DIFFERENCES: HOW DIVERSITY IN NATURE AND CULTURE MAKES US HUMAN xiii (2002)).

⁸⁴ POSNER, *supra* note 4, at 146.

⁸⁵ Allan McChesney, *Aboriginal Communities, Aboriginal Rights, and the Human Rights System in Canada*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 221, 229 (Abdullahi Ahmed An-Na’im ed., 1992).

⁸⁶ Am. Anthropological Ass’n, *Statement on Human Rights*, 49 AM. ANTHROPOLOGIST 539 (1947). Roberts notes that the AAA was not the only skeptical voice over the human rights project. See ROBERTS, *supra* note 5, at 12 (“[P]rominent professional organizations such as the American Bar Association, the American Anthropological Association, and the American Medical Association, as well as progressive thinkers such as Hersch Lauterpacht, Hannah Arendt, and Mohandas Gandhi – each for their own reasons – also rejected key aspects of the new human rights concept.”). Bryan Turner describes how sociology was likewise “skeptical, on historical and comparative grounds, about the possibility of the social existence of universalistic rights and

No matter how well-intentioned the [UN Commission on Human Right's] effort the result of any internationally sanctioned statement of rights would be the imposition of hegemonic moral values on less powerful groups of people whose patterns of behavior were misunderstood and reviled by Western elites.⁸⁷

It feared the document's normative assumptions would disproportionately favor "the personality of the individual" at the expense of the equally important "cultures of differing human groups." Given that "the individual realizes his personality through his culture," and that it is not possible to qualitatively evaluate and rank the world's different cultures,⁸⁸ the risk was high that any expression of idealized values, while seemingly self-evident to those who share similar cultural backgrounds, would be incomprehensible to others. "What is held to be a human right in one society may be regarded as anti-social by another people."⁸⁹

The risk, at least from the perspective of anthropologists, would be that parochial values would be elevated to the status of human universal values and then reverse-engineered to impose them upon nonconforming societies under the authority of UDHR Article 28. Article 28 states that "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized." The "social and international order" envisioned is expressly the modern sovereign state containing economic systems sufficiently complex to require rights to trade unions (Article 23) and "periodic holidays with pay" (Article 24), which leaves little room for the simpler societies historically favored by anthropologists.

obligations." Bryan S. Turner, *Outline of a Theory of Human Rights*, 27 SOC. 489, 489-490 (1993).

⁸⁷ Mark Goodale, *Toward a Critical Anthropology of Human Rights*, 47 CURRENT ANTHROPOLOGY 485, 486 (2006).

⁸⁸ The belief that some cultures are intrinsically inferior to others has become a revived opinion. See, e.g., Shalailah Medhora, *Tony Abbott Says Political Future Not "Entirely Resolved", But Hints He Will Stay in Parliament*, THE GUARDIAN (Dec. 8, 2015, 5:00 AM), <https://www.theguardian.com/australia-news/2015/dec/08/tony-abbott-political-future-not-resolved-but-hints-he-will-stay-in-parliament> ("All cultures are not equal, and frankly, culture that believes in decency and tolerance is much to be preferred than one that thinks that you can kill in the name of God, and you've got to be prepared to say that."); David Brooks, *All Cultures Are Not Equal*, N.Y. TIMES (Aug. 11, 2005), <http://query.nytimes.com/gst/fullpage.html?res=990CE2DA143EF932A2575BC0A9639C8B63>.

⁸⁹ Am. Anthropological Ass'n, *supra* note 86, at 542.

As a profession, anthropology did not reengage in the debates over human rights until the late eighties.⁹⁰ This lack of participation unfortunately allowed many of the background practices and assumptions concerning the identification, application and enforcement of human rights to become normalized into uncontroversial premises without input from the academic specialty most familiar with the range of human organizations. When the field again turned its attention to the topic of international human rights, the renewed attention did not flow from a reduced skepticism concerning the potential for traditional societies to be disadvantaged by global institutions. Instead, it reflected a begrudged realization that the power exerted by these institutions had become too pervasive globally to ignore. Human rights ideology and its accompanying accoutrements had become a part of the cultural landscape that anthropologists endeavor to study.

A recent history of the drafting of the UDHR imparts that the underlying values of the *Declaration* were not quite as narrowly parochial as the AAA had feared.⁹¹ We have good reason to believe that drafters of the UDHR thought themselves to be speaking in the more inclusive sense of *human*. While not venturing beyond the scope of modern states, the preliminary documents at least surveyed a broad spectrum of those members.⁹²

Even if the most significant gaps would eventually be corrected with the UN's later *Declaration on the Rights of Indigenous Peoples*,⁹³ the philosophical problem raised by the AAA remains. The label of "human right" is a powerful talisman, and one that should be used carefully and in full awareness of its unspoken premises. What makes something a human as opposed to a local civil right? The debate can be critical because while civil rights can remain a legitimate focus of

⁹⁰ GOODALE, SURRENDERING TO UTOPIA, *supra* note 11, at 25, 31 ("[H]uman rights vanish from the anthropological radar for almost forty years. . . . American anthropology, not to mention the wider discipline, played almost no role in the formal development of human rights theory or institutional practice in the important first decades of the postwar period. . . . [I]t wouldn't be until the 1980s that anthropology as a discipline took a sustained interest in human rights for the first time."). According to his review, "[a]fter 1949, the phrase 'human rights' did not appear in the title of any article published in the AAA's flagship peer-reviewed journal until 1987." Goodale, *Toward a Critical Anthropology*, *supra* note 87, at 487.

⁹¹ See MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (2001).

⁹² *Id.* at 73 (reflecting responses to "about seventy questionnaires asking for reflections on human rights from Chinese, Islamic, Hindu, and customary law perspectives, as well as from American, European, and socialist points of view.").

⁹³ G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

spirited discussion, once something has been named a “human right,” in practice all reasonable dissent ceases.

If the reasons behind the proposal of specific human rights were to become more transparent we might then reliably sort which should (or should not) be contained within the category. This, incidentally, was precisely the tactic that the UN Committee had eschewed: Believing a consensus on human rights could be found if everyone was allowed to use their own viewpoints, the drafting committee omitted any mention of the philosophical sources for the named rights.⁹⁴ This reticence contrasts with the U.S. *Declaration of Independence*, for example, which was able to justify its claims “that all men are created equal” and that they possess “certain inalienable Rights” by the dual assertions that these conclusions were at once “self-evident” and thus needed no further justification, but also that, if such were needed, these rights were gifts from “their Creator.” But while avoiding any fundamental justifications may have been a pragmatically successful strategy to achieve consensus on the UDHR among culturally and philosophically diverse groups, the document remains nonetheless committed to the position that human rights were recognized rather than conferred by the member states. In theory, the UDHR articulates rights individuals already possess, and which states are tasked to respect and, when necessary, defend. Even when intending to be agnostic on the ontology of human rights, assuming that they are fundamentally inherent to all peoples seems to be unavoidable if they are to have the desired impact. Despite efforts like Raz’s, the clash between human diversity and human rights cannot be dissolved by tinkering with our formal definition of *human rights*.

In that confrontation between law and culture, a significant change has been the improved understanding of culture. When anthropologists returned to the question of human rights they brought with them a more sophisticated concept. Whereas earlier there had been a tendency to speak of culture as timeless and unchanging, and thus an unyielding obstacle to the introduction of new values without inevitably “breaking” or damaging the society, that blanket premise is no longer widely held. “The tendency in much of anthropology over the past fifteen

⁹⁴ “The main difficulty in framing the introductory ‘General Principles,’ [Rene] Cassin later wrote, was to ‘find a formula that did not require the Commission to take sides on the nature of man and society, or to become immured in metaphysical controversies, notably the conflict among spiritual, rationalist, and materialist doctrines on the origin of human rights.’” GLENDON, A WORLD MADE NEW, *supra* note 91, at 68.

years [has been] to complicate or even abandon the notion of culture.”⁹⁵ Rather than a stagnant receptacle to preserve the past, culture’s function is to solve problems in the present, which requires that it be capable of dynamically adapting to a changing environment.

Cultures consist of repertoires of ideas and practices that are not homogeneous but continually changing because of contradictions among them or because new ideas and institutions are adopted by members. They typically incorporate contested values and practices. Cultures are not contained within stable borders but are open to new ideas and permeable to influences from other cultural systems, although not all borders are equally porous. Cultural discourses legitimate or challenge authority and justify relations of power.⁹⁶

Former pessimism among anthropologists about the influence of human rights rules on traditional societies has faded. Now, the realization is that a culture can absorb and interpret almost any new information, especially if that information is properly introduced over adequate time. This openness results in change, but in a manner that allows the understanding of itself as a distinctive group to remain coherent. This revised culture concept means that groups are more active in their responses to the introduction of new and sometimes contradictory values. No longer mere carriers of an unchanging past, societies can each devise their own ways forward.

Nevertheless, there is a limit to the expected cultural flexibility while still remaining true to the culture’s self-understanding. Cultural teachings concerning what is right, good, and normal form the building blocks of identity and default worldview, and thus cannot be easily or quickly rewritten. The norms of culture deeply permeate the definitions of self and are the standards by which we each find meaning and purpose in life. The powerful influence of these formative assumptions become evident when migrating into a new context with different conclusions on those questions.⁹⁷ Dissonance can result in well-intentioned people inadvertently violating the normative expectations of the new society.

⁹⁵ Karen Engle, *From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947 to 1999*, in *ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES* 344, 345 (Richard Shweder et al. eds., 2002).

⁹⁶ SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* 11 (2006).

⁹⁷ *See, e.g.*, RALPH LINTON, *THE TREE OF CULTURE* 39 (1961) (“Even the most deliberately unconventional person is unable to escape his culture to any significant degree.”).

Change is possible, but should be expected to be neither easy nor painless.

Other instances of clashes between cultural diversity with new norms of social regulation prove instructive to illustrate this difficulty. Within the American criminal legal system, this dissonance has been framed as a question concerning the legitimacy and permissibility of the “culture defense.”⁹⁸ To the extent courts are concerned with fair and equitable outcomes, judges have sometimes allowed evidence of foreign cultural norms to serve as mitigating circumstances during sentencing, or, more rarely, as defenses to the charge itself.⁹⁹ These allowances are feasible only after understanding that others can act in ways that are reasonable from their view. Just as we act in ways that are reasonable in ours, so too may others lack the required “guilty mind” often required for punishment.¹⁰⁰

Once it has been thought inequitable to demand that all persons in every circumstance comply with a uniform set of criminal rules, the door opens to recognize that societies can view the broader norms of behavior differently. Any claim enforcing a universal standard of conduct, the human rights, should therefore reflect that diversity in either the substantive rules themselves or through the processes that craft the rules.

Recognizing normative diversity compels us to be more explicit about what are the assumptions generating the global roster of human rights. Where the supposedly universal human right reflects locally

⁹⁸ ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* (2004). Although more popularly referred to as “cultural defenses,” the preceding paragraphs demonstrate that all defenses are cultural. To refer to those asserted by immigrants as “cultural” creates the falsely misleading impression that only foreigners have “culture,” while we rely on something else, perhaps reason and rational judgment. The term “cultural defense” is thus subtly ethnocentric, and should be avoided. See also James M. Donovan & John Stuart Garth, *Delimiting the Culture Defense*, 26 QUINNIPIAC L. REV. 109 (2007).

⁹⁹ A second area of study within this third category concerns legal pluralism: when one unit, such as a political state, contains within it subsets of additional legal rules. To find this condition it is usually necessary to have a broad definition of what constitutes “law.” But even more strict narrow definitions find pluralism to have been the normal condition under colonial rule when one set of laws governed matters of interest to the occupying state, while the indigenous peoples were allowed to maintain or develop their own solutions for conflicts of little interest to the foreign administrators, such as family and probate complaints.

¹⁰⁰ The facts of *State v. Kargar*, 679 A.2d 81 (Me. 1996) offer an easy illustration of this point. An Afghani immigrant was charged with gross sexual assault after kissing the penis of his nine-month-old son. A show of respect within his own culture, this same act was criminalized by the state as a sexual perversion. This was a difference of which Kargar could not reasonably have been aware, leading to his acquittal.

avored, but ultimately arbitrary preferences, the dominant powers should question the appropriateness of imposing it upon societies with different but equally valid ideas. These hidden assumptions can be gleaned from the earlier examples: the collision with human rights forced the Nepalese Buddhists to act as though the individual is the moral center; the realities experienced by Thai child prostitutes were shoehorned into a model of development in which children are carefree and irresponsible for eighteen years; and the First Peoples of North America were compelled to subordinate their group living in favor of personal desires. Even when the actions urged by outsiders are beneficial in a utilitarian calculus, that outcome does not support their characterization as universally valid normative rules. But it is also possible that some reasonable candidates for presumptively universal normative rules do exist, if a suitable method can be found to identify them.

Diversity has its own value. Human rights advocates must leave a place for difference in their plans. In those situations where diversity concerns have been fully considered, the modern understanding of culture presents no obstacle to change. Adaptation is possible, but only slowly, and only when communicated in a manner that frames the need to adapt in the vernacular of local norms rather than as a demand to adopt foreign manners.

III. FINDING “HUMAN” HUMAN RIGHTS

Instead of the top-down transplant of human rights, several writers have suggested human rights should be built bottom-up upon the values that societies already have.¹⁰¹ If that can be done, the challenge shifts from condescendingly schooling the “Other” in what it means to be human, to encouraging them to live by the standards they themselves believe they should observe. These norms can be identified empirically, providing the raw conceptual material to draft human rights standards that embody priorities recognized by most cultures. This is the “least common denominator” method most closely associated with the early work of Alison Dundes Renteln.

¹⁰¹ “A committed vanguard of scholars has arisen to resolve, in a sense, the tension between cultural diversity and the universalist program of international human rights by identifying those points at which cultural traditions overlap in a way that reconciles them to both the idea and the substantive content of international human rights.” GOODALE, *supra* note 11, at 80.

Abdullahi Ahmed An-Na'im offers a different solution that begins by acknowledging that societies often contain a range of opinions on normative questions. Taking the existing regime of international law as given, An-Na'im proposes successive dialogues.¹⁰² The first seeks to resolve existing normative diversity within a society in the direction of the formal human rights rules.¹⁰³ Remaining disagreement between societies would be negotiated by subsequent cross-cultural dialogues.¹⁰⁴

In combination, these techniques promise to yield a defensible list of human rights that protect relevant interests against state interference while being translatable into the existing norms of all groups. The missing piece, however, is an independent standard of evaluation that can be employed to break any impasse during cross-cultural dialogues. Because all societies possess the idea of fairness, Part IV proposes employing that intuition to complete the description of a realistic method to identify the human rights.

A. LEAST COMMON DENOMINATOR

Societies are adaptive responses to panhuman problems rooted, according to Turner, in the universal experience of "human frailty" (*e.g.*, shelter, sustenance, reproduction, security).¹⁰⁵ Because many of these problems are best approached in groups rather than individually (*e.g.*, hunting large animals, defense against opposing groups), much of the work of social living concerns balancing individual desires and motivations with cooperative goals.¹⁰⁶ Anything claiming to be a human

¹⁰² See *infra* Section III.B.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Turner, *supra* note 86, at 504 ("The argument is that we can, in the absence of natural law, avoid sociological relativism through a re-interpretation of philosophical anthropology to assert an ontology of rights in the claim that human frailty is a universal feature of human existence.")

¹⁰⁶ See, *e.g.*, Bronislaw Malinowski, *The Group and the Individual in Functional Analysis*, 44 AM. J. SOC. 938, 949 (1939) ("Every cultural activity again is carried out through co-operation. This means that man has to obey rules of conduct: life in common, which is essential to co-operation, means sacrifices and joint effort, the harnessing of individual contributions and work to a common end, and the distribution of the results according to traditional claims. Life in close co-operation—that is, propinquity—offers temptations as regards sex and property. Co-operation implies leadership, authority, and hierarchy, and these, primitive or civilized, introduce the strain of competitive vanity and rivalries in ambition. The rules of conduct which define duty and privilege, harness concupiscences and jealousies, and lay down the charter of the family, municipality, tribe, and of every co-operative group, must therefore not only be known in every society, but they must be sanctioned—that is, provided with means of effective enforcement.")

universal should generally relate to those same broad interests rather than the more specialized problems arising in only a few forms of political organizations or modern economies (e.g., the right to paid vacations, the treatment of workers in industrial economies). Instead of defining human rights through top-down processes that favor the priorities of the powerful representatives at the table, they should be built up from the empirically identified experiences from the broadest possible sample of human societies.

In the literature, this is sometimes called the Least Common Denominator [LCD] approach,¹⁰⁷ and is frequently associated with the work of Alison Dundes Renteln.¹⁰⁸ Noting that “to date negligible progress has been made in the direction of establishing that human rights are universal or even that certain moral principles are widely shared,”¹⁰⁹ Renteln devises a method recognizing the bounded diversity of cultures, one that seeks “homeomorphic equivalents” of proposed rights in each culture.¹¹⁰ Reviewing the literature, she finds support to propose the case of retribution as a candidate universal principle.¹¹¹ By employing independent methods—ethnographic descriptions and tenets of major religious traditions, and case examples of blood money and the feud—Renteln feels justified in concluding that “all cultures have mechanisms which are intended to limit violence and to prevent needless killing.”¹¹²

This result does not lead directly to the claim that a right against excessive punishment is a cross-cultural universal, but it does support a practical reliance on a preexisting indigenous ethos capable of providing “a foundation for human rights.” In this instance, Renteln suggests that,

Were we to hold a global referendum on international human rights, all societies, if they were to vote according to their own ideals, would

See also ALAN GEWIRTH, *THE COMMUNITY OF RIGHTS* 67 (1996) (“The universality of human rights . . . is a direct consequence of the universality of the needs of agency among all human being.”).

¹⁰⁷ *See, e.g.*, MELVILLE HERSKOVITS, *CULTURAL RELATIVISM: PERSPECTIVES IN CULTURAL PLURALISM* 31–32 (1972) (“*Absolutes* are fixed, and, as far as convention is concerned, are not admitted to have variation, to differ from culture to culture, from epoch to epoch. *Universals*, on the other hand, are those least common denominators to be extracted from the range of variation that all phenomena of the natural or cultural world manifest.”).

¹⁰⁸ ALISON DUNDES RENTELN, *INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM* (1990).

¹⁰⁹ *Id.* at 95.

¹¹⁰ *Id.* at 11.

¹¹¹ *Id.* at 95–96.

¹¹² *Id.* at 133.

unanimously favor certain standards.¹¹³ In particular, they would endorse the principle that “No one shall be arbitrarily deprived of his life” (Article 6(1), International Covenant of Civil and Political Rights). (This is not to say that they would subscribe to the other provisions of this article, e.g., the inherent right to life.) It would follow that they would also agree with Article 6(3) of the Covenant and the Convention on the Prevention and Punishment of the Crime of Genocide, both of which condemn the arbitrary deprivation of life that is genocide. Any form of killing which lacks justification, e.g., summary executions, would be contrary to the universal principle of retribution. In the absence of the prior wrong, no society tolerates killing.¹¹⁴

The general methodological conclusion is that “where it is possible to demonstrate acceptance of a moral principle or value by all cultures, it will be feasible to erect human-rights standards. The reality of universality depends on marshaling cross-cultural data.”¹¹⁵ The benefits of the method is that through such efforts, human rights can be anchored “via cross-cultural universals, [making] the standards more likely to be accepted and taken seriously.”¹¹⁶

Granting that “[a]fter a century of ethnographic work, anthropologists believe that all societies have human rights propositions,”¹¹⁷ the LCD project appears feasible in theory. Yet not everyone is convinced about the legitimacy of the leap from local norms to universal human rights. Richard Wilson blithely opines that “Renteln makes a naïve conflation of what is common and what is morally

¹¹³ Others have expressed the opinion that human rights could be identified by popular referendum. Bertrand G. Ramcharan, *The Universality of Human Rights*, 58-59 INT’L COMM. JURISTS REV., Dec. 1997, at 105, 106 (“There is an irrefutable democratic test that confirms the concept of the universality of rights. It is a simple matter. Just ask any human being: Would you like to live or be killed? Would you like to be tortured or enslaved? Would you like to live freely or in bondage? Would you like to have a say in how you are governed? If there is any critic of universality who would argue that an individual would choose execution to life, and bondage or serfdom to freedom, let him or her come forth. The democratic test of universality is, in our view, the basis for its strongest affirmation.”) As with most polls, the outcome would be a function of the wording. The options are rarely as polarized as suggested in this excerpt. Moreover, most people agreeing that they’d rather be rich than poor does not make wealth a human right.

¹¹⁴ RENTELN, *supra* note 108, at 136.

¹¹⁵ *Id.* at 135.

¹¹⁶ *Id.* at 138-39.

¹¹⁷ Theodore E. Downing, *Human Rights Research: The Challenge for Anthropologist*, in HUMAN RIGHTS AND ANTHROPOLOGY 9, 10 (Theodore E. Downing & Gilbert Kushner eds., 1988).

justifiable.”¹¹⁸ Presumably, if most world societies believe that infanticide is acceptable, then that practice satisfies Renteln’s criterion to be deemed a human right. But her case study proposes no such mechanical cranking through the ethnographic literature blind to the moral implications of custom. She begins with general statements she already has reason to believe are “morally justifiable.” The only problem is to see if their geographic dispersion is sufficiently wide to warrant recognition as human universals, and thereby human rights.

A more substantive critique is offered by Rhoda Howard:

To seek an anthropologically based consensus on rights by surveying all known human cultures . . . is to confuse the concepts of rights, dignity, and justice. One can find affinities, analogues, and precedents for the actual content of internationally accepted human rights in many religious and cultural (geographic and national) traditions, but the actual concept of *human* rights . . . is particular and modern, and representing a radical rupture from the status-based, nonegalitarian, and hierarchical societies of the past and present.¹¹⁹

While all societies may not have independently arrived at the abstract notion of generic humanness (the names by which many societies call themselves, for example, translate to mean “The People”¹²⁰), that observation does not speak to the primary point. The question is not whether all groups recognize that every person merits the protections of human rights; the concern here is that when the demands to comply with human rights are brought to them, that they see reflected in these rules the values they already hold. In that way, as Renteln says, “the standards are more likely to be accepted and taken seriously.” While the LCD method will not prove the cross-cultural salience of the concept of the human right, it does provide an empirical foundation upon which to argue that a specific right reflects broad values.

What Renteln’s account does not state explicitly, but which the present argument would support, is the stronger claim that without the demonstrated acceptance of at least the broadest formulation of the value

¹¹⁸ Richard A. Wilson, *Human Rights, Culture and Context: An Introduction*, in *HUMAN RIGHTS: CULTURE & CONTEXT, ANTHROPOLOGICAL PERSPECTIVES 7* (Richard A. Wilson ed., 1997). The criticism misses its mark. Renteln is responding to the argument that human rights are universal, and reasonably argues that, if that is true, they must indeed be, in some sense, “common.” If that were not true, then human rights are not universal and thus are not “human.”

¹¹⁹ Howard, *supra* note 46, at 81.

¹²⁰ See, e.g., *Original Tribal Names of Native North American People*, NATIVE LANGUAGES OF THE AM., <http://www.native-languages.org/original.htm> (last visited Jan. 10, 2017). For example, the Navajo called themselves *Dine’e*, which in their tongue means “the people.” *Id.*

at issue, the proposed right fails to qualify as a human right. Such a rule should be rebuttably deemed a local civil right that has been exported and imposed upon alien societies often to the detriment of indigenous values.

C. MANAGING CROSS-CULTURAL DISSENSUS

Even if we optimistically find that all societies share norms such as Renteln's "retribution tied to proportionality," there will inevitably be disagreement over the triggering details. One group's standard to find the death penalty "proportional" may be much lower than another's, for example. Due to such variability, all groups will not reach the same substantive conclusions about the specifics of identified rights. Or, granting the right, there may still be strong disagreement over its appropriate bearers and objects. One society may view retribution to be a personal right, and others a prerogative of society. Divergence will be especially likely on property and family matters because, in addition to the usual work to organize society, these norms tend to define the essence of the group itself.

Resolution of disagreements, according to Abdullahi Ahmed An-Na'im, should follow a process of exchanges which (like Raz) "accepts the existing international standards while seeking to enhance their cultural legitimacy within the major traditions of the world through internal dialogue and struggle to establish enlightened perceptions and interpretations of cultural values and norms."¹²¹ He envisions, first, an "internal cultural discourse" in order to edge to the forefront existing values that better accord with established international standards,¹²² and then "cross-cultural dialogue" through which to compare the results of the prior process.

To be effective, this discussion must be conducted in good faith. This means that the Western powers should "be open to a corresponding

¹²¹ Abdullahi Ahmed An-Na'im, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment*, in *HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS* 19, 21 (Abdullahi Ahmed An-Na'im ed., 1992).

¹²² "My thesis does not assume that all individuals or groups within a society hold identical views on the meaning and implications of cultural values and norms, or that they would therefore share the same evaluation of the legitimacy of human rights standards. On the contrary, I assume and rely on the fact that there are either actual or potential differences in perceptions and interpretations of cultural values and norms." *Id.* at 20.

inducement in relation to their own attitudes and must also be respectful of the integrity of the other culture.”¹²³ The present regime assumes that the practices and norms of the West set the standard that others must strive to emulate. According to An-Na’im it may be the West that needs to change its practices in favor of something favored by others. For the call to human rights to be legitimate, they cannot be “something that Americans . . . take to others without allowing human rights advocates from other countries to intervene here.”¹²⁴

Under this plan, the dialogues will yield rules upon which parties can agree, and which offer more guidance on behavioral norms than the abstract principles that emerge during LCD distillation. An-Na’im appears to be open to some irreducible remainder of cultural diversity that cannot be mapped onto the existing legal regime. Even when agreeing, for example, upon a standard against cruel, inhuman, or degrading punishment, the specifics of what would be thus forbidden “should be determined by the moral standards of that society.”¹²⁵ Invoking a comparison that may strike many today as more controversial than when he first offered it, An-Na’im suggests that:

For example, a North American may think that a short term of imprisonment is the appropriate punishment for theft, and wish that to be the universal punishment for this offense. A Muslim, on the other hand, may feel that the amputation of the hand is appropriate under certain conditions and after satisfying strict safeguards. It would be instructive for the North American to consider how she or he would feel if the Muslim punishment were made the norm. Most Western human rights advocates are likely to have a lingering feeling that there is simply no comparison between these two punishments because the Islamic punishment is “obviously” cruel and inhuman and should never compete with imprisonment as a possible punishment for this offense. A Muslim might respond by saying that this feeling is a product of Western ethnocentricity.¹²⁶

¹²³ Abdullahi Ahmed An-Na’im, *Introduction* to HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 1, 5 (Abdullahi Ahmed An-Na’im ed., 1992).

¹²⁴ Laura Nader, *Introduction: Registers of Power*, in THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL 117, 119 (Mark Goodale & Sally Engle Merry eds., 2007).

¹²⁵ *Id.*

¹²⁶ *Id.* at 38. Another example of the hidden ethnocentricity that can filter how we perceive the appropriateness of certain acts is offered by Carneiro da Cunha: “In the sixteenth century, Portuguese colonial authorities blamed the Tupi Indians along the Brazilian coast for ceremonially killing and eating their enemies instead of killing them on the battle field or enslaving them ‘as all civilized countries do.’” Manuela Carneiro da Cunha, *Custom Is Not a*

Missing from the Western reaction is the recognition that the “religiously sanctioned punishment . . . will absolve an offender from punishment in the next life because God does not punish twice for the same offense,”¹²⁷ as well as an awareness of how some regard imprisonment as an extreme and cruel punishment. John Stuart Mill argued that imprisonment was worse than capital punishment.¹²⁸ More recently, sociologist Peter Moskos has challenged anyone forced to choose between five years in prison and ten vicious lashes to not opt for the latter.¹²⁹ The cruelty of imprisonment becomes even less controversial when the damaging effects of solitary confinement—a common practice in U.S. penal systems¹³⁰—are taken into account.¹³¹ Perhaps for similar reasons, within many traditional societies “imprisonment as a form of punishment was almost unknown.”¹³²

Thing, It Is a Path: Reflections on the Brazilian Indian Case, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 276, 293 (Abdullahi Ahmed An-Na'im ed., 1992).

¹²⁷ Ahmed An-Na'im, *supra* note 121, at 35.

¹²⁸ John Stuart Mill, *Capital Punishment*, (21 April, 1868), in THE COLLECTED WORKS OF JOHN STUART MILL, VOLUME XXVIII - PUBLIC AND PARLIAMENTARY SPEECHES PART I NOVEMBER 1850 - NOVEMBER 1868 (John M. Robson & Bruce L. Kinzer eds., 1988), http://oll.libertyfund.org/titles/262#Mill_0223-28_621 (“What comparison can there really be, in point of severity, between consigning a man to the short pang of a rapid death, and immuring him in a living tomb, there to linger out what may be a long life in the hardest and most monotonous toil, without any of its alleviations or rewards—debarred from all pleasant sights and sounds, and cut off from all earthly hope, except a slight mitigation of bodily restraint, or a small improvement of diet?”).

¹²⁹ PETER MOSKOS, IN DEFENSE OF FLOGGING 2 (2013) (“Think about it: five years hard time or ten lashes on the behind? You’d probably choose flogging. Wouldn’t we all?”).

¹³⁰ ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, USE OF RESTRICTIVE HOUSING IN U.S. PRISONS AND JAILS, 2011-12 (2015) (“Nearly 20% of prison inmates and 18% of jail inmates had spent time in restrictive housing, including disciplinary segregation, administrative segregation [largely nonpunitive], or solitary confinement [involving isolation and little out-of-cell time], in the past 12 months or since coming to their current facility, if shorter.”).

¹³¹ Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. UNIV. J.L. & POL’Y 325, 333 (2006) (“[F]or many of the inmates so housed, incarceration in solitary caused either severe exacerbation or recurrence of preexisting illness, or the appearance of an acute mental illness in individuals who had previously been free of any such illness.”). The U.N. Special Rapporteur on Torture has called solitary confinement for persons under eighteen “cruel, inhuman or degrading treatment [that] violates article 7 of the International Covenant on Civil and Political Rights and article 16 of the Convention against Torture.” HUMAN RIGHTS WATCH & ACLU, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 74–75 (2012), <https://www.hrw.org/sites/default/files/reports/us1012ForUpload.pdf>.

¹³² T.O. Elias, *Traditional Forms of Public Participation in Social Defence*, 27 INT’L REV. CRIM. POL’Y 18 (1969).

Against this background, the scales are not “obviously” in favor of the West’s preferred treatment of the thief. The argument by the Muslim that amputation is more merciful than imprisonment becomes less radical, just as incarceration may not be as enlightened as often assumed. Arguably, imprisonment could be the more cruel and inhuman, not least because it exposes the thief “to what the offender will suffer in the next life should the religious punishment not be enforced in this life.”¹³³ This perspective may be insurmountably difficult for the Westerner to credit, but that is precisely the point. If one takes religion seriously—as the secular West typically does not¹³⁴—then the priority is clear.¹³⁵ Societies with different hierarchies of values, though, will reach different conclusions. An-Na’im states there must be room for both, because neither is obviously wrong and each lifeway is the source of meaning for its participants.¹³⁶

Such emotionally charged examples demonstrate that what many Westerners believe to be obviously immoral can be more nuanced. The proposed dialogues, however, can shed greater light on what is at stake. What the West may see as barbaric retribution that could be easily updated with fines or prisons, may resist overt revision due to its embeddedness in a coherent religious and existential context. When change occurs, it will not come from demands from outsiders that denigrate the sincere convictions of a people; indeed, such efforts are

¹³³ Ahmed An-Na’im, *supra* note 121, at 35.

¹³⁴ Only 53% of Americans in 2014 stated they thought their religious beliefs were “very important,” down from 56% in 2007. *Importance of Religious in One’s Life*, PEW RES. CTR, <http://www.pewforum.org/religious-landscape-study/importance-of-religion-in-ones-life/> (last visited Feb. 17, 2017). See Press Release, Gallop International, *Losing Our Religion? Two Thirds of People Still Claim to be Religious* (Apr. 13, 2015), http://www.wingia.com/en/news/losing_our_religion_two_thirds_of_people_still_claim_to_be_religious/290/ (offering a broader perspective) (“The research discovered that the most religious regions are Africa and MENA (Middle East and North Africa) where 86% and 82% respectively of the people consider themselves to be religious. . . . Western Europe (51%) and Oceania (49%) are the only regions where approximately half of the population are either not religious or convinced atheist.”).

¹³⁵ More could be said on this example, especially in light of the current negative reactions against Islamic culture. Westerners may insist that intervention in such situations is exactly the purpose of human rights laws. Yet it certainly should make a difference in that decision whether the thief views the amputation as wrong generally, or only as applied in his case. The former provides at least a *prima facie* opening for a human rights argument, but not the latter. For an example of one man explaining why he willingly submitted to have his hand amputated, see *INSIDE A SHARI’AH COURT*, (Films Media Group 2007) (seg. 44:14).

¹³⁶ Ahmed An-Na’im, *supra* note 121, at 24 (“Enlightened ethnocentricity would therefore concede the right of others to be ‘different,’ whether as members of another society or as individuals within the same society.”).

likely to result in a renewed commitment to the rule as a show of independence and group solidarity. Any positive reform will likely be through exercise of what Max Gluckman identified as the inherent ambiguity of all legal rules. While giving the appearance of stability, the application of rules can prove quite malleable.¹³⁷ Thus, while remaining a formal penalty the amputation may, like the Judeo-Christian's mandate to kill homosexuals,¹³⁸ eventually become a never-enforced outdated artifact.¹³⁹ But that transition must come from within, not under duress.

It is in this light we see how An-Na'im's plan is incomplete. As a consequence of the embedded effects of cultural learning,¹⁴⁰ disagreements over specific rights are unlikely to be resolved easily because changes may be tantamount to erasure of group self-identity. For that reason, the dialogues he requires are vulnerable to becoming locked. Each side will view its own preferences as "natural" and "self-evident," not sufficiently arbitrary to be open to negotiation much less discard.

Without a means to resolve this dialogic impasse, the project is prone to collapse into the current system in which disagreements are resolved in favor of those better able to impose their viewpoints through economic or military persuasions. Demands under threat of censure from external powers as a means of dispute resolution are inferior to one that frames the reasons for change in terms of local values. If, for example, a human rights norm emerges against capital punishment, the rule can be strengthened by linking it to a society's existing values promoting

¹³⁷ MAX GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* 326 (1955) ("The varied flexibility of the key concepts of Lozi law and ethics is one of their attributes as instruments of argument. It enables the law to cover various situations and to develop so that it can accommodate social change. In this way the law in general is channeled through law in action to cover the infinite variety of situations in social life. Each legal ruling is united to its situation of dispute: it is stated in terms of fixed principles."). See also Stephen Sedley, *Human Rights: A Twenty-First Century Agenda*, 1995 PUB. L. 386, 387 (1995) ("Law spends its life stretched on the rack between certainty and adaptability, sometimes groaning audibly but mostly maintaining the stoical appearance of steady uniformity which public confidence demands. But lest the mask become the face, it is important that new generations of lawyers should become actively curious about why the certainties of the law themselves change constantly.").

¹³⁸ *Leviticus* 20:13 ("If a man has sexual relations with a man as one does with a woman, both of them have done what is detestable. They are to be put to death; their blood will be on their own heads.").

¹³⁹ *INSIDE A SHARI'AH COURT*, *supra* note 135, at 45:38 ("In Gusau prison no one is currently waiting to have their hand cut off. I was told that in other states they're sent to prison for a few years to await the amputation and then quietly released.").

¹⁴⁰ See discussion *supra* Section II.B.

redemption and discouraging vengeance than through rebukes and accusations of savagery from foreign powers.

D. PRACTICAL IMPLEMENTATION

The description of the human rights bureaucracy highlights its top-down procedures with formal organizations articulating what shall be the human rights. These conclusions are then evangelized outward, often resulting in attempts to instruct peoples about their rights, not infrequently against their will. The limitations of the human rights system, and the anthropological realities outlined earlier, suggest the following amendments to the ways in which candidate human rights are identified. The proposal satisfies Waldron's hope for a compromise between the unresolved search for abstract foundations and the pragmatic acceptance of the current legal regime.

Step 1: Determine the Cross-Cultural LCD

The LCD technique modeled by Renteln should be employed to identify what norms peoples recognize from the broadest range of cultural contexts possible.

Selecting the investigatory starting point is important. Renteln already had in hand a hypothetical rule—the proportionality of punishment—when she began her review. The sources of these initial statements can vary, but they are likely to include various versions of existing ethical, moral, and religious standards. The LCD process, therefore, is not a *de novo* inquiry, but uses the outputs of other procedures as inputs for its own examination, verification, and when needed, restatement of general rules of conduct.

Results from the LCD survey will be mapped onto the rules of international law. Those finding matches would be the most prototypical of the human rights.

In the mapping we are not looking for direct correspondences. Renteln does not require that there be a one-to-one relationship, but only that there be enough of an overlap such that the formal rule can be linked

to preexisting values with or without the assistance of bridging notions.¹⁴¹

The LCD goal is that an identified human right be capable of recognition within local value systems.¹⁴² Current rights that cannot be associated with LCD norms should be reevaluated for their suitability as human rights. Demotion from the status of human right does not require that the goal be abandoned. In keeping with Raz's concern to distinguish rights and values, failure to be a right means only that the norm should be advanced through other channels, by other arguments.

Step 2: Resolve Cross-Cultural Disagreement through Dialogue

Although An-Na'im offers his cross-cultural legitimacy approach as an alternative to the LCD method for creating consensus on the catalog of human rights,¹⁴³ his own description assumes the existence of that foundation: "despite their apparent peculiarities and diversity, human beings and societies share certain fundamental interests, concerns, qualities, traits, and values that can be identified and articulated as the framework for a common 'culture' of universal human rights."¹⁴⁴ Therefore, rather than an alternative, his method should be applied to further refine the norms identified through the LCD method and mapped onto the current rules.

*In the likely eventuality that the LCD method identifies disparate versions of a focal norm, the variability of normative opinions must be reasonably resolved before the mapping onto current rules can occur. Through dialogue a consensus emerges that adequately captures the range of opinion.*¹⁴⁵

¹⁴¹ Cf. Griffin, *supra* note 42, at 557 ("[F]or a pair of values to be commensurable in this sense, there must be a bridging notion in terms of which the comparison between them can be made.").

¹⁴² Cf. MERRY, *supra* note 96, at 1 (2006) ("In order for human rights ideas to be effective, however, they need to be translated into local terms and situated within local contexts of power and meaning.").

¹⁴³ See Ahmed An-Na'im, *supra* note 121, at 21. ("Instead of being content with the existing least common denominator, I propose to broaden and deepen universal consensus on the formulation and implementation of human rights through internal reinterpretation of, and cross-cultural dialogue about, the meaning and implications of basic human values and norms.").

¹⁴⁴ *Id.*

¹⁴⁵ Some may object that seeking to find a single position on a value does a disservice to the complex multivocality associated with such important issues. That is true, but at least now the

This process may not always be feasible within large heterogeneous groups but can be effective in smaller indigenous societies whose voice An-Na'im hopes to capture.

After the mapping of norms from multiple societies, the resulting list may display considerable variety. The final step looks to ascertain whether the range reflects only reasonable variation of the existing rule, or whether it contains substantive differences. In the latter situation a new semantic center must be sought, in which case the current rule will need to be revised or replaced.

While the Step 1 itemization of the LCD is a comparatively straightforward empirical question (what do people believe and value, and how does this comport with actual behaviors), the second step involves finding consensus among competing alternatives. An-Na'im does not describe how such conversations would proceed. From the earlier discussion of the psychology of enculturated norms we can expect that when two societies differ on a fundamental value they will not easily relinquish their own traditional ways of life. This resistance is not always out of stubbornness or political gamesmanship. Necessarily the focus is on the basic values of each society, significant changes in which can threaten the coherence of the group's understanding of itself and its place in the world. Because all parties are instinctively protective of their fundamental values, talks could quickly become frozen as each merely reasserts the self-evident reasonableness of its own position.

To increase the likelihood of productive outcomes, the process requires an external standard whereby some choices can be judged more acceptable than others because they better respect even more basic values or because they make other desired outcomes more likely. That standard must be shared by all societies, otherwise its introduction risks merely pushing back the impasse. Such a standard may not mechanically determine the debate's outcome, but it could beneficially provide a shared vocabulary for the conversation so that incommensurable positions can be considered from a new perspective. An-Na'im's proposal sparks optimism, but only to the extent that we are able to tentatively identify an evaluative standard that could fill this unique role.

uniform rule is one rooted in the local reality, rather than the transplanted rule that was enacted without their input.

To find a suitable candidate by which to evaluate the proposed human rights, recall the anecdote mentioned earlier from the drafting history of the UDHR. Disparate countries were able to agree on the list of human rights only because they did not discuss *why* they supported those decisions.¹⁴⁶ It can be argued—in a version of the LCD analysis—that each delegate found the items acceptable (or at least not wholly objectionable) because they comported with what would on balance be equitable or fair for their interests. They got at least as much as they gave, and on the points that they lost, nothing central was sacrificed. Conceived in these familiar economic terms, irresolvable philosophical differences could be avoided and result in a good bargain. The UDHR passed the United Nations General Assembly with only seven abstentions.¹⁴⁷ If this rendering accurately captures the underlying motivations that made the UDHR possible, then our intrinsic judgments on whether a specific situation is “fair” may be able to serve as the independent standard required to make An-Na’im’s cross-cultural dialogues productive.

IV. FAIRNESS: A SHARED INTUITION¹⁴⁸

For cross-cultural dialogues on fundamental values to produce a consensus position, an independent standard that can impartially critique or rank the options will be necessary. To do its work, the standard must exist in all societies, otherwise its use would reintroduce the disagreement over basic values it was intended to resolve.

One possibility that at least has the required morphology is the intuition regarding fairness. A sense of fairness is possessed by all humans and represents perhaps the most elemental of our moral judgments. Ethological,¹⁴⁹ ethnological,¹⁵⁰ and human developmental

¹⁴⁶ See discussion *supra* Section II.B. See also ROBERTS, *supra* note 5, at 126 (“[C]reating a human rights treaty would be virtually impossible if discussions of theory and metaphysics were permitted at the drafting table”).

¹⁴⁷ GLENDON, *supra* note 91, at 162.

¹⁴⁸ Many ideas in this section are developed in more detail by Donovan. See James M. Donovan, *Reciprocity as a Species of Fairness: Completing Malinowski’s Theory of Law*, in BRONISLAW MALINOWSKI’S CONCEPT OF LAW (Mateusz Stępień ed., 2016); James M. Donovan, *Half-Baked: The Demand by For-Profit Businesses for Religious Exemptions from Selling to Same-Sex Couples*, 49 LOY. L.A. L. REV. 39 (2016).

¹⁴⁹ E.g., Sarah Brosnan & Frans de Waal, *Monkeys Reject Unequal Pay*, 425 NATURE 297 (2003); Sarah Brosnan, *Nonhuman Species’ Reactions to Inequity and Their Implications for Fairness*, 19 SOC. JUST. RES. 153 (2006).

studies¹⁵¹ overwhelmingly point to the conclusion that the ability to notice an inequitable distribution of resources is deeply rooted in the evolutionary histories of all cooperative species, including *Homo sapiens*. Such results support a conclusion that fairness evaluations are a human universal. While some disagreement across cultures about what is “fair” would not be impossible,¹⁵² since the category itself is already shared, the assessment can serve as a common metric against which to conduct the cross-cultural dialogues that An-Na’im envisioned.

A. A NATURAL HISTORY OF FAIRNESS

In order to determine whether fairness can serve in the needed role of tie-breaker, we must attempt a firmer grasp of what it means to describe an arrangement as “fair.”

For some, fairness may be a synonym for justice, in which case the claim here appears circular. Human rights are creatures of the law, and thus serve the interests of international justice. Disagreements over human rights cannot be resolved by appeal to the same principles being argued over. But excepting the limited circumstances described by Rawls’s original condition, behind the veil of ignorance,¹⁵³ justice is not usually fairness. In some casual uses they are loosely interchangeable, yet in principle justice and fairness promote different ends.

Among the world’s cultures the distinction between the two concepts is widely recognized. As Gluckman found, justice is often what

¹⁵⁰ Using versions of the Ultimatum Game, fieldworkers have demonstrated that fairness determinations are present in all societies. While the results show cultural variability on how fairness is defined, “this variation correlates with differences in patterns of interaction found in everyday life.” Joseph Heinrich et al., *Introduction and Guide to the Volume to FOUNDATIONS OF HUMAN SOCIALITY: ECONOMIC EXPERIMENTS AND ETHNOGRAPHIC EVIDENCE FROM FIFTEEN SMALL-SCALE SOCIETIES 5* (Joseph Heinrich et al. eds., 2004).

¹⁵¹ “The reaction of children to perceived unfairness shows how deeply seated these sentiments are, and the egalitarianism of hunter-gatherers suggests its long history.” FRANS DE WAAL, *THE AGE OF EMPATHY* 184 (2009).

¹⁵² Heinrich et al., *supra* note 55, at 49–50 (“We summarize our results as follows. First, the selfishness axiom is not supported in *any* society studied, and the canonical model fails in a variety of new ways. Second, there is considerably more behavioral variability across groups than had been found in previous research. Third, group-level differences in economic organization and the degree of Market Integration explain a substantial portion of the behavioral variation across societies. . . . ; Fourth, individual-level economic and demographic variables do not explain behavior either within or across groups. Fifth, behavior in the experiments is generally consistent with economic patterns of everyday life in these societies. “).

¹⁵³ See John RAWLS, *JUSTICE AS FAIRNESS, A RESTATEMENT* (2001).

we wish for our enemies, while fairness is what we hope for ourselves.¹⁵⁴ In this rudimentary sense, justice refers to the coldly impartial application of general rules, while fairness attends generously to the specific facts of a particular conflict.¹⁵⁵ Justice is blind; fairness notices the things we care about.

Although both justice and fairness play similar roles within systems of dispute resolution, even here they differ qualitatively. Justice takes the short view, demanding that the scales be balanced immediately; fairness tends toward the long view, taking note of how the parties will need to maintain relationships in the future. Justice is a non-iterative exchange between strangers, while fairness allows for a short-term imbalance in light of long-term interests of an ongoing relationship.¹⁵⁶

The basis for an idea of fairness is given through its roots in market economics. “Fair” in this view refers to the primary experience of entitlement and desert from ownership and exchange. This is the innate sense of knowing how much grain to give in exchange for some cattle. At some point the traders will agree on a given amount as being acceptable to both—otherwise one or the other will walk away and find a new partner. That mutually agreeable price we describe as fair, meaning one that satisfies both bargainers.

Underlying the process is an understanding that the grain is “mine” and the cattle is “yours,” and that neither of us can take what belongs to the other without his agreement. Without those boundaries, there does not exist sufficient distinction between us to make the exchange possible. Once the distinction between self and other has been acquired in this core sense, the rudimentary ideas of entitlement and desert built out of tangible property for exchange—of recognizing what is mine, and that I control its disposition and can command a price to

¹⁵⁴ GLUCKMAN, *supra* note 137, at 55 (“Matters of property-rights, contract or injury in permanent multiplex relationships require reconciliation; the same matters between strangers do not.”).

¹⁵⁵ The tension between the two can be plainly illustrated in the disagreement about the correct outcome in Fuller’s hypothetical of “The Case of the Speluncean Explorers.” Should the trapped cave explorers be convicted of murder after cannibalizing their companion in order to survive, or should the extreme circumstances of the act serve as an excuse? Justice argues for the strict application of the formal rule against the willful taking of another’s life; fairness advocates a more lenient judgment due to the special circumstances in which the defendants found themselves. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

¹⁵⁶ Cf. Laura Nader & Harry F. Todd Jr., *Introduction: The Disputing Process to THE DISPUTING PROCESS—LAW IN TEN SOCIETIES* 13 (Laura Nader & Harry F. Todd Jr. eds., 1978) (“Relationships that are multiplex and involve many interests demand certain kinds of settlement, such as compromise, which will allow the relations to continue.”).

surrender that control—can be analogically extended to other kinds of property, both real and metaphorical. This foundation is preserved in the background awareness of a right as an entitlement, as something that one is owed by another.

The analogic economic foundations of self and property suffice to explain why I believe that I have rights whose transgression I describe as unfair. Further steps, however, are required to account for the recognition that others besides myself are entitled to this same respect. As noted earlier, human rights as a distinct category of thought emerged in the eighteenth century in documents such as the US Bill of Rights and the French Declaration of the Rights of Man and Citizen. Lynn Hunt connects these events with a sea-change of psychological perspective that arose from the rise of popular reading of novels and other literature.

Reading accounts of torture or epistolary novels had physical effects that translated into brain changes and came back out as new concepts about the organization of social and political life. New kinds of reading (and viewing and listening) created new individual experiences (empathy), which in turn made possible new social and political concepts (human rights).¹⁵⁷

While her defense of this thesis is correlational, later research has found the relationship she describes between reading, brain activity, and empathetic imagining.¹⁵⁸

¹⁵⁷ HUNT, *supra* note 21, at 33–34. Martha Nussbaum makes a similar argument. Symposium, Martha Nussbaum, *Exactly and Responsibly: A Defense of Ethical Criticism*, 22 PHIL. & LITERATURE 343, 354 (1998) (“And, following Rousseau, I insisted that where our society has created sharp hierarchical separations we may well fail to have compassion for those on the other side of the barrier. Just as Rousseau’s kings found it difficult to see their lot in the suffering of a peasant, so too we should expect Nazis to experience great difficulty in seeing their own possibilities in the sufferings of a Jew. I argue that literary works can help us cross these barriers, if they display the person on the other side of the barrier in a certain way, as a human being worthy of sympathy.”). See also Turner, *supra* note 86, at 506 (“Ultimately my argument has to assume that sympathy is also a consequence of, or a supplement to, human frailty. Human beings will want their rights to be recognized because they see in the plight of others their own [possible] misery.”).

¹⁵⁸ E.g., Gregory S. Berns et al., *Short- and Long-Term Effects of a Novel on Connectivity in the Brain*, 3 BRAIN CONNECTIVITY 590 (2013); David Comer Kidd & Emanuele Castano, *Reading Literary Fiction Improves Theory of Mind*, 342 SCI. 377 (2013). Keith Oatley offers a summary of this literature, from which he concludes that “engaging with fiction is fundamentally helpful in enabling us to understand each other as human beings,” which can explain the increase in empathy that has had, as “[o]ne of its consequences [the] acknowledgement of the rights of other people, even when these others belong to different cultures.” Keith Oatley, *Fiction: Simulation of Social Worlds*, 20 TRENDS COG. SCI. 618, 626 (2016). In this vein, similar reports describing the changes in brain functioning arising from use of the internet bode ill for the long term prospects for the ability to empathize with the situations of others, and thus for the concern with human

This hypothesis fits well with the observations of well-placed practitioners. Andrew Chapman, having served for many years as the representative of Amnesty International to the United Nations, suggests that “the real seeds of the human rights movement [are] a feeling of sympathy for the distress of others, coupled with a sense of injustice when governments resort to measures which invade the perceived natural rights of the individual.”¹⁵⁹

For this description, Chapman perhaps relies upon philosopher Richard Rorty, who, believing like Raz that foundationalist projects are outmoded, argues that “the emergence of the human rights culture seems to owe nothing to increased moral knowledge, and everything to hearing sad and sentimental stories.”¹⁶⁰ Rorty asserts that “the work of changing moral intuitions”—toward the end of expanding recognition and respect for fundamental human rights—“is being done by manipulating our feelings rather than by increasing our knowledge” about what rights “are” in the foundationalist sense. The Syrian refugee plight, for example, was largely ignored until attention was sparked by the image of a boy who drowned trying to reach safety in Greece.¹⁶¹ We should therefore “concentrate our energies on manipulating sentiments, on sentimental education” to better increase everyone’s openness to human rights claims.¹⁶²

As an empirical matter, this account suggests that the idea of universal human rights will be most prevalent in contexts where private property ideologies predominate, and where the individual has emerged out of the social background as an entity of subjective awareness.¹⁶³ This

rights generally. The same tool that reveals the shocking range of human rights violations blunts the edge of our caring. *E.g.*, Daniel M. Wegner & Adrian F. Ward, *How Google is Changing Your Brain*, 309 SCI. AM. 58 (2013).

¹⁵⁹ ANDREW CLAPHAM, *HUMAN RIGHTS: A VERY SHORT INTRODUCTION* 9 (2007).

¹⁶⁰ Richard Rorty, *Human Rights, Rationality and Sentimentality*, in *TRUTH AND PROGRESS* 167, 172, 176 (1998).

¹⁶¹ Helena Smith, *Shocking Images of Drowned Syrian Boy Show Tragic Plight of Refugees*, *THE GUARDIAN* (Sept. 2, 2015), <https://www.theguardian.com/world/2015/sep/02/shocking-image-of-drowned-syrian-boy-shows-tragic-plight-of-refugees>.

¹⁶² Rorty, *supra* note 160, at 176.

¹⁶³ According to Hegel, these achievements occurred simultaneously where they happen at all. G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* §40 (Allen W. Wood, ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (“A person, in distinguishing himself from himself, relates himself to *another person*, and indeed it is only as owners of property that they two have existence [*Dasein*] for each other. Their identity *in themselves* acquires existence [*Existenz*] through the transference of the property of the one to the other by common will and with due respect of the rights of both—that is, by *contract*.”). *See also* Turner, *supra* note 86, at 499 (“The concept of rights is thus still criticized on the grounds that there is no ontological foundations for

in fact appears to be the case: human rights are often accused of being a “Western” idea, as opposed to more communitarian Asian cultural models that have not prioritized ownership by individuals to the same extent.¹⁶⁴ The complaint against human rights as a Western ideal is not that the lineage is incorrect, but that being Western alone makes it either right or appropriate for imposition on everyone else.

The uneven distribution of the idea of universal human rights has been a fact retrospectively accounted for with varying success, often in ways unflattering to the societies that lack it. The present model, however, predicts that outcome in a way that does not disparage late-comers as being in some way morally immature. But as the following section argues, it is not necessary that all societies have the idea of the universal human rights, but only that the relationships contained in those ideas reflect local values. Universal human rights can thus emerge out of an environment where all rights are local.¹⁶⁵

B. THE FAIRNESS STANDARD IN PRACTICE

To turn panhuman intuitions into a referee for human rights dialogues, it is necessary to invert the analysis. Although the literature speaks of fairness, what is being perceived are conditions of *un*fairness.

claims about universality, that it is an individualistic concept of western (liberal) philosophy, and that it is covertly but inevitably tied to the idea of (private) property.”)

¹⁶⁴ See William P. Alford, *Making a Goddess of Democracy from Loose Sand: Thoughts on Human Rights in the People’s Republic of China*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 65, 70 (Abdullahi Ahmed An-Na’im ed., 1992) (“[T]he centrality in Chinese society of the notion that individuals derived meaning in life through their membership in an intricate web of social relationships, rather than chiefly on their own or in a solitary nexus with a higher authority.”)

¹⁶⁵ The emphasis on seeking consensus to identify human rights may lead some to object that if one society declines to recognize a right, then that right cannot be a human right lacking as it would the requisite universality. It permits, in other words, a heckler’s veto on the identification of any human right, and given the diversity of human societies renders unlikely that any right may attain this status.

A possible response to the problem of the heckler’s veto draws attention specifically to the locus of the relevant fairness evaluations. The social recognition required is not what the right-bestowers grant to others, but what they demand for *themselves*. Fairness is, at its root, an assessment of comparative conditions between one’s self and another, and thus we should not be distracted by abstract statements that posit absolute states without reference to the expectations of the framers. If, for example, we wish to consider whether a right qualifies as a human right, and find that a power-wielding majority in a society granted itself this right but withheld it from members of other minorities, in our cross-cultural comparison it would be upon the former allowances to the self and not the deprivations from others that we should focus.

“Our instances of ‘unfairness’ seem to be much clearer, sharper, and more concrete than the more abstract, aerial notions of ‘fairness.’”¹⁶⁶

This simple fact has profound implications for the identification of human rights. First, given that “[w]hereas human happiness is noted for its variety, human misery is relatively uniform,”¹⁶⁷ greater success will likely be found in achieving consensus on rights that seek to prevent evils rather than on promote goods.¹⁶⁸ This practical limitation reflects back to the original impetus for the human rights project, the crimes of the Second World War. Given the elusiveness of the idea of the human right, Hunt suggests that the only sure way to know “that a human right is at issue [is] when we feel horrified by its violation.”¹⁶⁹ Raz, it seems, had a valid point when he favored limiting human rights to those violations which would provoke interventions. He failed, though, to clearly describe his argument’s inevitable conclusions concerning what kinds of violations those are likely to be. To the extent human rights are intended to create a better world, they would do this by eliminating the worst evils, not by promoting utopian ideals.¹⁷⁰ Human rights are the floor beneath which state actions cannot sink, not a ceiling toward which governments must aspire. These higher goals should be the commitment of locally enforced civil rights. If we seek the greatest amount of cross-cultural agreement, human rights should be framed as negatives: what must not be done, rather than as affirmations of what should be done.

We have indirectly seen the practical correctness of limiting human rights to the prevention of harms. Three efforts to cross-culturally identify and justify rules of human rights have all been framed as targeting the worst of human actions. Renteln used as the example to test her LCD analysis the rule of retribution tied to proportionality. An-

¹⁶⁶ NORMAN J. FINKEL, *NOT FAIR!: THE TYPOLOGY OF COMMONSENSE UNFAIRNESS* xiii (2001).

¹⁶⁷ This observation has a long pedigree. See Wilson, *Human Rights, Culture and Context: Introduction*, *supra* note 118, at 5. See, e.g., BARRINGTON MOORE, JR., *REFLECTIONS ON THE CAUSES OF HUMAN MISERY AND UPON CERTAIN PROPOSALS TO ELIMINATE THEM* 1–2 (1972) (“If human beings find it difficult to agree upon the meaning and causes of happiness, they find it much easier to know when they are miserable.”). But see LEO TOLSTOY, *ANNA KARENINA* 1 (Henri Troyat trans., Mod. Library, 2000) (“Happy families are all alike; every unhappy family is unhappy in its own way.”).

¹⁶⁸ Cf. Michael McDonald, *Should Communities Have Rights? Reflections on Liberal Individualism*, in *HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS* 133, 155 (Abdullahi Ahmed An-Na’im ed., 1992) (“[H]uman rights should be aimed at avoiding great evils, at what Falk described as ‘the intolerable,’ not at achieving great goods.”).

¹⁶⁹ HUNT, *supra* note 21, at 26.

¹⁷⁰ E.g., POSNER, *supra* note 4, at 7–8 (“Humanitarians should abandon the utopian aspirations of human rights law for the hard-won truths of development economics.”).

Na'im examined the expectation that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."¹⁷¹ Handwerker performed a similar study to defend the proposition that "[f]reedom from violence stands as an important candidate for a universal human right."¹⁷² To imagine a credible alternative phrased as positive entitlements is not impossible, but these efforts typically come not from those looking at the array of actual peoples but from scholars such as philosophers working in the abstract.¹⁷³

Some may worry that restricting human rights to negative limitations would deprive many groups of affirmative protections they require. For example, Article 2 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities¹⁷⁴ states that:

Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.

Under the proposal, minorities would arguably lose these rights. It may be possible to rephrase them, however, as negatives. Note, for

¹⁷¹ Ahmed An-Na'im, *supra* note 121, at 29.

¹⁷² W. Penn Handwerker, *Universal Human Rights and the Problem of Unbounded Cultural Meanings*, 99 AM. ANTHROPOLOGIST 799 (1997).

¹⁷³ E.g., WILLIAM J. TALBOTT, WHICH RIGHTS SHOULD BE UNIVERSAL? (2005). Talbott identifies as the nine basic rights:

1. a right to physical security
2. a right to physical subsistence (understood as a right to an opportunity to earn subsistence for those who are able to do so)
3. children's rights to what is necessary for normal physical, cognitive, emotional, and behavioral development, including the development of empathic understanding
4. a right to an education, including a moral education aimed at further development and use of empathic understanding
5. a right to freedom of the press
6. a right to freedom of thought and expression
7. a right to freedom of association
8. a right to a sphere of personal autonomy free from paternalistic interference
9. political rights, including democratic rights and an independent judiciary to enforce the entire package of rights. *Id.* at 178.

¹⁷⁴ G.A. Res. 47/135, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Dec. 18, 1992).

example, that the list of rights offered by Rawls¹⁷⁵ can be easily defined as rules against interference rather than guarantees of enjoyment. The Article 2 language can be similarly restated:

Persons belonging to national or ethnic, religious and linguistic minorities shall not have their enjoyment of their own culture, profession and practice of their own religion, and use of their own language interfered with.

The versions admittedly are not functional equivalents. Depending upon one's theory of rights,¹⁷⁶ especially employing Hohfeldian analysis,¹⁷⁷ the original rule suggests that in order for minorities to exercise these rights someone must have a correlative duty. Recall that this discussion began with Wasserstrom's definition, which states that human rights are "assertable, in a manner of speaking, 'against the whole world.'"¹⁷⁸ Given a right to use a minority language, the state arguably has a duty to provide programs that encourage and preserve that right and thus make enjoyment possible. The negative version implies that if a minority uses its own language, the state may not discourage that use—as has been done by the United States¹⁷⁹ and other countries—but neither is it obliged to intervene to foster its flourishing so that future members of the minority can enjoy the same privilege.

Reframing important positive rights into negative protections in most cases would preserve the principle interest behind the rule while demanding less from the state. Many of a libertarian bent would welcome such a structural limitation on the powers of government to intervene in the ordinary lives of its citizens, even under the banner of promoting their general welfare. The primary benefit, though, is that these are the principles most likely to achieve cross-cultural consensus. If we are serious that human rights should reflect the priorities and interests of diverse societies, limiting the category to negative prohibitions appears the best approach.

¹⁷⁵ RAWLS, *supra* note 59, at 65.

¹⁷⁶ See Leif Wenar, *Rights*, STAN. ENCYCLOPEDIA OF PHIL. (Sept. 9, 2015), <http://plato.stanford.edu/entries/rights/>, for a general review of theories of rights, including Hohfeldian analysis.

¹⁷⁷ See Wesley HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS: AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* (Walter W. Cook ed., 1919).

¹⁷⁸ Wasserstrom, *supra* note 6, at 632.

¹⁷⁹ In one example in its past, the United States banned the Hawaiian language in schools in 1896 soon after it wrest control of the kingdom from the native rulers. 1896 Haw. Sess. Laws, Act 57. Sec. 30.

If human rights are limited to the universe of prohibitions that must never be broken, the second practical outcome of the proposed method is that, at the end, there will be few human rights. Several authors, including Mary Ann Glendon¹⁸⁰ and Eric Posner,¹⁸¹ have spoken in this vein, urging that human rights are too many, too common, and that as a result their invocation has become insipid and mundane.¹⁸² Some scholars view a restricted number of recognized human rights as a *reductio ad absurdum* by which to criticize the effort to derive human rights from human nature.¹⁸³ An-Na'im pointed to this critique as a weakness of the least common denominator method.¹⁸⁴ Still, the one point on which both Raz and Waldron seem to agree is that the growing menu of asserted rights is unlikely to fall within any sustainable or credible justification for the category. The present discussion endorses

¹⁸⁰ MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE xi (1991) (“A rapidly expanding catalog of rights—extending to trees, animals, smokers, nonsmokers, consumers, and so on—not only multiplies the occasions for collisions, but it risks trivializing core democratic values. A tendency to frame nearly every social controversy in terms of a clash of rights (a woman’s right to her own body vs. a fetus’s right to life) impedes compromise, mutual understanding, and the discovery of common ground.”).

¹⁸¹ POSNER, *supra* note 4, at 137–138 (“Give priority to a narrow set of rights . . . This approach is a dead end because the relevant rights-enforcers cannot agree that a specific subset of rights are fundamental while the others are not.”). See also Steven Lukes, *Five Fables about Human Rights*, in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993 19, 38 (Stephen Shute & Susan Hurley eds., 1993) (“[T]he list of human rights should be kept both reasonably short and reasonably abstract.”).

¹⁸² WILLIAM A. EDMUNDSON, AN INTRODUCTION TO RIGHTS 178–179 (2004) (“So-called ‘minimalist’ approaches are perhaps motivated by the worry that human rights discourse seems to be on its way to becoming ‘a club too heavy to lift.’ As rights claims proliferate, the language of human rights takes on unnecessary and unwieldy baggage of both normative and metaethical kinds. Added normative baggage consists in the fact that with each additional generation of rights consensus is left farther and farther behind . . . When human rights claims are expanded beyond the reach of consensus, not only is the expansion likely to fail to win any effective advantage for the putative right-holders, but the very language of rights is debased in a way that enfeebles protections even for consensus first-generation rights.”)

¹⁸³ See, e.g., BEITZ, *supra* note 38, at 4–5 (“An extreme version of this type of skepticism holds that nothing ‘called a human right can be derived from human nature’ because the behavioral dispositions we actually observe in human beings are too diverse and conflicting to allow for any coherent generalization. A more moderate position holds that the interests that are in fact shared by all human beings are too few to provide a foundation for any but the most elemental prohibitions—for example, of murder, torture, severe material deprivation . . . The result of accepting this idea is not a wholesale skepticism about human rights but rather a skepticism about international human rights doctrine as it exists today: its scope will appear to extend well beyond what might reasonably be seen as rights belonging to human beings ‘as such.’”)

¹⁸⁴ See Ahmed An-Na'im, *supra* note 121, at 25 (“[T]he existing least common denominator may not be enough to accommodate certain vital human rights. This fact would suggest the need to broaden and deepen common values to support these human rights.”).

that conclusion, and provides a rationale in its support. A small number of human rights will be the necessary outcome of the described process, and not an arbitrary normative limit.

The unfairness standard would be employed whenever discussants prove intractable over alternative versions of a norm. The different proposals should be evaluated on the degree to which they are perceived as unfair. That assessment will not be automatic or necessarily conclusive, but it does provide a different dimension for consideration. Because all peoples innately calculate the unfairness of a given situation, all that is needed is a good faith effort to reach the best outcome, even when that is not one's own.¹⁸⁵

Invocation of background fairness considerations would allow one side to yield on contentious points while preserving its primary moral principles. Yielding would not come from losing the argument or adopting a foreign value, but because the change in view comported with already accepted values. The spread of human rights principles under this view is not a patronizing evangelical missionizing, but more a Platonic dialogue like the *Meno*, wherein we are led to discover convictions we already hold.

V. CONCLUSION

While the motives to propose a universal moral code reflect the best intentions, the project suffers from three shortcomings. First, it has failed to adequately address the reality of cultural diversity. The present international human rights law regime arguably favors normative preferences of the industrialized West that are not necessarily shared by all societies expected to conform to those standards. Second, the formalized human rights treaties have thus far been demonstrably underwhelming in their ability to compel recalcitrant states to reform their behaviors, and third, the uncontrolled growth in the number of human rights weakens the impact of appeals to that standard.

Although previously treated as independent issues, this paper finds that these three limitations of the current approach to human rights are in fact sufficiently linked that a remedy to the first will simultaneously resolve the others. Parts I and II describe how the

¹⁸⁵ One can imagine that fairness evaluations could productively be elicited through a Rawlsian thought exercise of applying each candidate rule to the original position, behind a veil of ignorance.

imposition of human rights values onto some societies may inflict unintended harms to the extent that they undermine the justification and support for human rights altogether. Against that background the challenge is to find ways to realize the goods of the human rights project without injuring those it intends to benefit. The goal is to build an understanding of human rights that reflects the norms of all humans and not a mere subset characterized by power and economic dominance.

Those who despair of a viable solution may take this tension as reason to deny the reality or usefulness of human rights. Alasdair MacIntyre, for example, has rejected the idea of human rights by pointing out that:

The best reason for asserting . . . that there are no [human] rights is indeed of precisely the same type as the best reason which we possess for asserting that there are no witches and the best reason which we possess for asserting that there are no unicorns: every attempt to give good reasons for believing that there are such rights has failed.¹⁸⁶

This judgment is certainly pessimistic, and arguably premature. This paper offers reasons to believe that human rights can be a defensible category when they meaningfully reflect the norms of most humans. Sections III and IV propose that in order to be initially categorized as a human right, a candidate rule must have analogues in a broad array of societies as identified by the LCD analysis. Residual differences would be negotiated through cross-cultural dialogue with impasses resolved by appeal to good-faith comparisons of fair outcomes.

This process would generate a list of rights that will be recognized by most cultures as being a reflection of their own values rather than imposed under threat by foreign powers. The expectation is that when societies regard the legal requirements as related to their own norms, treaty compliance will improve, thereby addressing the second shortcoming. This outcome is more likely because in order to achieve consensus the rules will predominantly refer to the things that governments must not do, on which most people agree, rather than on what they should aspire to achieve, on which much more disagreement exists. Finally, if the catalog of human rights is limited to rules on which most societies agree, and which are therefore most likely restricted to negative prohibitions, the number of recognized rights will be small. Fewer appeals to human rights will make any that do occur more

¹⁸⁶ ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 67 (1981).

significant for signaling an exceptional and critical condition that must be promptly remedied.

Rather than pondering ways to transport human rights ideals from their native environments into settings where they are seen as alien demands, the emphasis should be on translating the formal rules of human rights law into the vernacular of local values. This project has been at the center of work by Sally Engle Merry:

Translation requires three kinds of changes in the form and presentation of human rights ideas and institutions. First, they need to be framed in images, symbols, narratives, and religious or secular language that resonate with the local community Second, they need to be tailored to the structural conditions of the place where they are deployed, including its economic, political, and kinship systems Third, the target population needs to be defined.¹⁸⁷

Through the method described, international human rights—once they have been designed to reflect the consensual norms of the world's diverse societies—can in turn be translated into local idioms, rather than transplanted as an alien invasive species of values.

¹⁸⁷ MERRY, *supra* note 96, at 220.