

ESSAY

FOUR CHALLENGES CONFRONTING A MORAL CONCEPTION OF UNIVERSAL HUMAN RIGHTS

ERIC BLUMENSON*

ABSTRACT

This Essay describes some fundamental debates concerning the nature and possibility of universal human rights, conceived as a species of justice rather than law. It identifies four claims entailed by such rights and some significant problems each claim confronts. The designation “universal human rights” explicitly asserts three of them: paradigmatic human rights purport to be (1) universal, in that their protections and obligations bind every society, regardless of its laws and mores; (2) human, in that the rights belong equally to every person by virtue of one’s humanity, regardless of character, social standing, disabilities, or other individual attributes; and (3) matters of right which afford certain fundamental individual interests priority over the community’s wishes or welfare. Human rights differ widely in what they afford a right to—life, religious liberty, adequate nutrition, etc.—but they all share a fourth claim on which each distinct right is premised: that (4) the right specified serves to safeguard one such fundamental priority interest.

Each of these claims generates uncertainty and disagreement, even among those who do not doubt the reality of universal human rights. Some theorists favor putting some of these claims to rest by pursuing a different understanding of human rights that makes sense without them. The more modest aim of this Essay is to help inform that proposal by presenting these claims and challenges as concisely and transparently as possible.

* Research Professor of Law, Suffolk University Law School; Fellow, Ethics Institute, Northeastern University. I am grateful to John Basl, Weldon Brewer, Stanley Fisher, Howard Gardner, Craig Lambert, Joel Marks, Stephen Nathanson, Eva Nilsen, Ron Sandler, Ken Simons, Rory Smead, Marion Smiley, Carola Suarez-Orozco, Marcelo Suarez-Orozco, and C. Terrell Ussing, and to my colleagues Nir Eisikovits, Jeff Lipshaw, and Pat Shin for their comments and counsel on this project. I also thank the participants in faculty colloquia at Suffolk University Law School, the Northeastern University Ethics Institute, and the Universidad Torcuato di Tella, Buenos Aires, at which I presented versions of this Essay. Comments are appreciated and may be sent to eblumens@gmail.com. This Essay and all preceding versions copyright Eric D. Blumenson, January 2013–July 2014.

INTRODUCTION

The Universal Declaration of Human Rights (UDHR), now sixty-seven years old, was an extraordinarily aspirational document at its inception and remains so to this day.¹ Nevertheless, the significance of its promulgation can hardly be overstated. Procedurally, it spelled the end of the Westphalian legal order that left states virtually free to rule their people as they wished.² Morally, it marked the birth of a global ideology of democratic equality that would soon overtake imperial and racial ideals that had endured for centuries. Many governments in 1948 still rationalized colonialism as a “civilizing mission,” segregation as “separate racial development,” or caste- and gender-based divisions of labor as the natural order of things. Seven decades later, almost all politicians claim to embrace the first principle of the UDHR, that every human being is born free and equal in dignity and rights,³ and this has left those hierarchical ideologies with few defenders and a limited future.

Of course, words are not deeds, and governments freely and frequently use human rights rhetoric to disguise their agendas rather than guide them. But even when deployed hypocritically, human rights rhetoric may have tremendous transformative power in the long run that is invisible at the moment; the 1975 Helsinki Agreement that helped inspire the Eastern European democracy movements a decade later is one consequential example.⁴ Few ideas

1. This is particularly true of Article 7 (nondiscrimination), Article 16(2) (marriage only by consent), Article 21 (government by popular elections), and Articles 22–25 (economic rights). Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Jan. 1, 1948).

2. Although contested, the conventional view is that the Peace of Westphalia of 1648 gave birth to (1) an international order of sovereign states, each legally entitled to direct its internal affairs free of foreign interference, and (2) an international law limited in subject matter to interstate relations and the exclusion of a state's treatment of its population. LYNN H. MILLER, *GLOBAL ORDER: VALUES AND POWER IN INTERNATIONAL POLITICS* 21–23 (1994). The modern human rights movement substantially qualified the former and put an end to the latter, beginning with its “Bill of Rights”—the Universal Declaration of Human Rights (UDHR), the International Convention on Civil and Political Rights (ICCPR), and the International Convention on Economic, Social and Cultural Rights (ICESCR)—and regional human rights treaties applying to Africa, the Americas, and Europe. Numerous international and regional treaties also target discrete issues or populations, such as torture, enforced disappearance, slavery, women, racial minorities, and disabled persons. A compilation of human rights instruments by subject matter is available at the University of Minnesota's online Human Rights Library, <http://www1.umn.edu/humanrts/treaties.htm>.

3. Universal Declaration of Human Rights, *supra* note 1, art. 1.

4. Known as the Helsinki Final Act of 1975 and signed by thirty-five nations including the United States and the Soviet Union, the agreement was divided into “baskets,” with the first basket effectively accepting Soviet domination of Eastern Europe and the third

have mattered more in recent history than the idea of universal human rights. Mahatma Gandhi, Martin Luther King, Jr., and Nelson Mandela were able to defeat the most powerful and entrenched forces against them on the strength of it.

The turn to human rights was an obvious and powerful reaction to Hitler's death camps and then to colonialism and apartheid, but human rights conventions reach well beyond such egregious crimes to positive economic rights, spousal responsibilities, and numerous aspects of everyday life.⁵ The International Covenant of Economic, Social and Cultural Rights (ICESCR) even asserts a human right to "the highest attainable standard of physical and mental health."⁶ But the global embrace of human rights has not extended to such maximalist rights, and even the conventions that include them hedge to an extraordinary extent.⁷ Some leading theorists have been moving in precisely the opposite direction, formulating minimalist accounts of human rights that focus on the kind of extreme violations that may warrant forcible international intervention. No one doubts that a state violates a human right when it actively subjugates people or destroys their lives, but many doubt that it violates a human right when it fails to halt undue neighborhood noise, as the European Court of Human Rights

basket committing the signatories to respect specified human rights. The agreement and follow-up measures, including the formation of both official and activist monitoring groups, "enabled dissidents to act and speak more openly than would otherwise have been possible [and] contributed to widespread political and social changes in Europe. These shifts helped bring an end to Soviet dominance in Eastern Europe and the end of the Cold War." *Milestones, 1969–1976: Helsinki Final Act, 1975*, OFF. HISTORIAN, U.S. DEP'T ST., <http://history.state.gov/milestones/1969-1976/helsinki> (last visited Dec. 26, 2014).

5. Regarding economic rights, see, for example, International Covenant of Economic, Social and Cultural Rights (ICESCR), G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, (Dec. 16, 1966), art. 9 (social security), art. 11 (adequate food, clothing and housing), art. 12 (physical and mental health). Regarding spousal responsibilities, see, for example, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) art. 16, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13. Regarding aspects of everyday life, see, for example, CEDAW, *supra*, art. 5 (states will modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices), art. 10(c) (encourage co-education), art. 10(g) (equal opportunity in sports), art. 14(2)(f) (equal participation in community activities); ICESCR, *supra*, art. 7(d) (holidays with pay).

6. ICESCR, *supra* note 5, art. 12(1).

7. For example, in stark contrast to the ICCPR, the ICESCR provides that states must merely "take steps . . . with a view to achieving progressively" the rights it specifies and need not take these steps at all to the extent that they exceed "the maximum of its available resources" or are incompatible "with the purpose of promoting the general welfare in a democratic society." *Compare id.* arts. 2(1), 4, with ICCPR, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171, art. 2 (right to effective and enforceable remedy), art. 4 (no derogation from specified articles even in event of public emergency).

ruled in 2004.⁸ The ideas that inspired so many to resist oppression are ever more secure, but the scope and rationale of human rights remain very much in question.

This Essay explores the nature and parameters of the universal human rights idea, conceived in its traditional form as a species of justice rather than law. It discusses four moral claims conveyed by the assertion of a paradigmatic human right, the specificity and indeterminacy that characterize each claim, and some of the primary challenges they confront. Because these underlying claims generate far more uncertainty and skepticism than many of the human rights they support, some theorists favor pursuing a different understanding of universal human rights that makes sense without them.⁹ The more modest aim of this Essay is to help inform that proposal by presenting these claims and challenges as concisely and transparently as possible, rather than make a case for one side. My own assessment of these claims, challenges, and revisionist alternatives is the subject of a book-length treatment to follow.

I. MORAL, LEGAL, AND POLITICAL CONCEPTIONS OF HUMAN RIGHTS

Conceived as a species of justice rather than law, all paradigmatic human rights make at least four claims. The designation “universal human rights” explicitly asserts three of them. Each of these claims must be refined and qualified, but a useful first take is that all such rights purport to be:

- (1) *universal*, in that their protections and obligations bind every society regardless of its laws and mores;
- (2) *human*, in that the rights belong equally to every person by virtue of one’s humanity, regardless of character, social standing, disabilities, or other individual attributes; and
- (3) matters of *right*, which afford certain fundamental individual interests priority over the community’s wishes or welfare.¹⁰

8. *Moreno Gomez v. Spain*, 2004-X Eur. Ct. H.R. 633, para. 62 (Nov. 16, 2004) (finding that by failing to enforce a noise ordinance against a repeatedly loud nightclub, Spain “failed to discharge its positive obligation to guarantee the applicant’s right to respect for her home and her private life, in breach of Article 8” of the European Convention of Human Rights).

9. See *infra* notes 16–20.

10. “Individual interests,” as used here, should be construed as an expansive term that may include interests in such moral goods as the protection of one’s dignity or equality. Joseph Raz’s interest-based definition of a right holds that “‘x has a right’ if and only if x

Every human right is unique in what it affords a right *to*—life, religious liberty, adequate nutrition, etc.—and in the co-relative duties it imposes on the state or others, but they all share a fourth claim on which each distinct right is premised, that:

- (4) the right specified serves to safeguard one such fundamental priority interest.

A human right may entail other elements, such as a particular addressee who is duty-bound by the right; or, more controversially, that the right be recognized by at least some governments;¹¹ be feasible to enforce;¹² or be a matter of international concern.¹³ We are not concerned with these putative elements here, but only with the fundamental claims that are common to any interpretation of universal human rights as a subset of moral rights. Call these “*moral* conceptions” of human rights so as to distinguish them from other uses of the term that do not purport to express moral rights or requirements of justice.

It is worth a detour to describe these other uses of the term *human rights* in order to better identify the limits of the following discussion. Most obviously, there are no moral claims when the sole referent is a legal right rather than a moral one, as in “every person has a human right to life under Article 6 of the International Covenant on Civil and Political Rights.”¹⁴ This statement only claims to be an accurate description of positive law. It is a separate question whether international human rights law *should* be limited to provisions reflecting moral rights and one that may be discussed only if these distinct uses of the term are not conflated.¹⁵

can have rights, and other things being equal, an aspect of x’s well-being (his interest) is sufficient reason for holding some other person(s) to be under a duty.” Joseph Raz, *On the Nature of Rights*, 93 *MIND* 194, 195 (1984). The interest-based account is often contrasted with “personhood” and “choice” accounts that limit human rights to those that reflect or safeguard a human being’s moral status or autonomous agency, on grounds that these are independent of a person’s interests and may disserve them. *But see* John Tasioulas, *On the Foundations of Human Rights*, in *PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS* (forthcoming Mar. 2015), available at <http://ssrn.com/abstract=2555277> (offering a schema that reconciles these bases). This discussion defers that significant issue by subsuming status and choice in the class of individual interests.

11. Rex Martin, *Human Rights and Civil Rights*, in *THE PHILOSOPHY OF HUMAN RIGHTS* 75, 75–85 (Morton E. Winston ed., 1989).

12. *See, e.g.*, RAYMOND GEUSS, *HISTORY AND ILLUSION IN POLITICS* 143 (2001); JAMES NICKEL, *MAKING SENSE OF HUMAN RIGHTS* 70–91 (2007); Tasioulas, *supra* note 10.

13. CHARLES R. BEITZ, *THE IDEA OF HUMAN RIGHTS* 1 (2009).

14. ICCPR, *supra* note 7, art. 6.

15. As an illustration, consider the rights to “periodic holidays with pay” and “the highest attainable standard of physical and mental health” found in Articles 7(d) and 12(1) of the ICESCR. These provisions attract their share of scorn from people who do

Recently theorists have proposed a revisionist “political” conception of human rights that some believe obviates one or more of these claims. They find the traditional moral conception too detached from the point of human rights as practiced, and focus instead on the role human rights play in regulating the relations between states—as international norms a state must follow to maintain its sovereign right to internal autonomy.¹⁶ John Rawls’ seminal version holds that an individual right qualifies as a human right only if a state’s systematic or widespread violation of the right would justify economic sanctions or foreign military intervention in response.¹⁷ The political and moral conceptions are best understood as answering different questions,¹⁸ but it is hard to imagine a political formulation that can avoid building on the moral one and

not consider them true human rights but rather (perhaps admirable) policies that legislators might wish to adopt. See, e.g., ALLEN BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW* 129 (2004); SIDNEY HOOK, *Reflections on Human Rights*, in *PHILOSOPHY AND PUBLIC POLICY* 67, 92 (1981). Such complaints assume that the ICESCR should be treated exclusively as a codification of moral rights and whatever more specific, action-guiding provisions may be derived from them, rather than as a political and legal document aimed at implementing policies as well. If we adopt the latter view, however, it is not obvious that activists and legislators should forsake their capacity to effect desirable goals through that instrument; there may be reasons to legislate rights beyond recognizing those that constitute or reflect universal moral imperatives.

16. See, e.g., JOHN RAWLS, *THE LAW OF PEOPLES* 79 (1999); Joseph Raz, *Human Rights Without Foundations* (Oxford Legal Studies Research Paper No. 14/2007, 2007), available at <http://ssrn.com/abstract=999874>. Jeremy Waldron helpfully analyzes and critiques this political approach in Jeremy Waldron, *Human Rights: A Critique of the Raz/Rawls Approach* (NYU School of Law, Public Law Research Paper No. 13-32, 2013), available at <http://ssrn.com/abstract=2272745>; cf. ALLEN BUCHANAN, *THE HEART OF HUMAN RIGHTS* (2013) (rejecting the “mirroring view” that international human rights law must reflect moral rights, but offering a political conception that does not limit human rights to sovereignty-affecting rights); Charles Beitz, *Human Rights as Common Concern*, 95 *AMER. POL. SCI. REV.* 269–82 (2001) (although what distinguishes human rights is the role they play in international relations, this includes domestic constraints which, when violated, may justify only noncoercive foreign intervention).

17. According to Rawls’ interpretation, human rights norms mark the outer limits of a country’s internal autonomy; as long as a government observes the small list of rights that fits Rawls’ functional definition, no other country may justifiably intervene militarily for any purpose but self-defense. RAWLS, *supra* note 16, at 79–80. This leads Rawls to exclude rights that a strictly moral conception might include, such as rights to democratic participation, freedom of expression, and education.

18. The moral conception primarily asks the question, “what rights and obligations govern a state’s treatment of its people?” Virtually all human rights treaties constitute answers to this question, albeit modified by many factors relevant to their legal and institutional roles. The political conception is directed to the question of when international intervention is warranted in response to human rights violations—an inquiry that includes concerns irrelevant to the first question, which may include the value of international peace, the apportionment of scarce international resources, and the collateral consequences intervention may have in the particular context.

incorporating its claims. Limiting universal human rights to rights that bear on state sovereignty says nothing in itself about what kind of rights they are. If they are a subset of moral rights—and the most obvious first step in discerning which rights warrant international enforcement is to identify the most important moral rights—then the political conception will assert the same claims as the moral conception (along with others). Joseph Raz says that on his political conception, “human rights need not be universal or foundational,” but his basis for saying so is elusive.¹⁹

Is there space for a positivist political conception that derives human rights not from universal moral goods but from a convergence of state interests? As a partial analogy, consider the Minorities Treaties concluded at the end of World War I. These treaties were based on a state’s interest in protecting those of its people living as minorities abroad and therefore guaranteed individual rights to only certain ethnicities.²⁰ Conceivably, the international community could devise a global human rights regime for similar reasons of state interest—to create reciprocal protections, to avoid migration crises, to diminish interstate conflict, or for other instrumental and contingent reasons that would not suggest the universality entailed by rights grounded solely in one’s humanity. But this idea is difficult to square with an indispensable aspect of the human rights idea on virtually all accounts—that human rights belong to the individuals who have them and are not gifts that states may present or withhold as they wish.

The proper proviso, then, is that the claims and critiques that follow apply to the traditional moral conception of human rights,

19. Raz, *supra* note 16, at 14. According to Raz’s political conception, “[h]uman rights are moral rights held by individuals. But individuals have them only when the conditions are appropriate for governments to have the duties to protect the interests which the right protect,” and these issues must be assessed by relying, “among other facts, on universal evaluative truths.” *Id.* at 17–18. As long as a “universal evaluative truth” remains a prerequisite, however, Raz’s formula seems as dependent on a “foundation” that can underwrite a realm of objective, universal value as a purely moral concept of human rights.

20. The Minorities Treaties were agreements between victorious powers and states that were vanquished, created, or expanded as a result of the World War I. The latter signatories were Albania, Austria, Bulgaria, Czechoslovakia, Estonia, Greece, Iraq, Latvia, Lithuania, Poland, Romania, Turkey, and Yugoslavia. The Minorities Treaties guaranteed minorities within these countries’ borders numerous rights, including the right to equal treatment, the right to use native languages in schools, and the right to establish and control educational and religious institutions. These treaties and their minority protections are listed and analyzed in Helmer Rosting, *Protection of Minorities by the League of Nations*, 17 *AM. J. INT’L L.* 641, 647–53 (1923); see also Jennifer Jackson Preece, *Minority Rights in Europe: From Westphalia to Helsinki*, 23 *REV. INT’L STUD.* 75, 76 (1997).

as well as political conceptions that recognize human rights as a subset of an individual's moral rights.

II. PROBLEMS CONFRONTING THE MORAL CONCEPTION OF UNIVERSAL HUMAN RIGHTS AND ITS PREMISES

A. *A Universal Morality?*

A human right claims universality: it purports to embody a moral norm whose protections and obligations apply everywhere, regardless of whether it is reflected in local laws or mores. This is a corollary of the claim, discussed next, that human rights derive from one's humanity. It follows that these rights belong to every person and obligate every society, whatever its particular time, place, or culture. This universality premise does not imply that all societies must conform to a single model or hold the same values. Any reasonable universalist view will be a pluralist one that respects diverse ways of life while also recognizing that some conduct is wrong everywhere. Nor is universality a claim that human rights are only those "natural rights" that would exist in a state of nature, so that rights to vote, to collective bargaining, or to a fair trial could not be human rights. Human rights are universal in the qualified sense that, however differently they may be applied or specified to take account of particular institutions or local conditions, they always reflect morally compelling interests that are common to human beings everywhere.

A universality claim of this more modest type may still seem exorbitant. Suppose all people *do* share certain morally compelling interests—for example, in nutrition, shelter, health, and security, or in less tangible interests such as self-realization and recognition of one's equal moral status. That is still a long way from the conclusion that a single set of human rights can encompass all the vastly different epochs, cultures, people, and problems it is supposed to govern. Jeremy Waldron cites (without endorsing) the following concern:

[T]he attribution to Cro-Magnon man of the rights that we take to be human rights today makes no sense. The circumstances of his human being and of his human life are so different from the circumstances of ours, that the very idea of trying to establish a normative list of rights we share with him is misconceived.²¹

21. Waldron, *supra* note 16.

The attempt to derive human rights from universal interests, which is to say from a universal human nature, is full of difficulties indeed, most notably including the indeterminacy of such a project. But if we consider what is “misconceived” about the project Waldron describes, it is debatable whether the problem lies with the universality of human rights norms or with the challenge of applying them to such drastically different circumstances. Both the universalist and the relativist will reject the idea that a single human rights formula could apply to both the Stone Age and the Digital Age, but by reason of these contrasting diagnoses that have very different implications for the practice of global justice.

1. The Challenge of Context

For the universalist, Waldron’s example is no more than the *reductio ad absurdum* of an almost fully indeterminate (because incomprehensible) case. It does not discredit the existence of a universal human nature or our ability to discern it in less alien contexts. What is “misconceived” is the effort to identify a single set of rules that is both specific enough to be relevant and abstract enough to be timeless. But the universality claim demands no such thing and, in fact, requires the opposite: rules and their application *must* change with changing circumstances in order to remain true to the universal rights assumed to underlie them. This is because context is a necessary aspect of the most universal principle of justice, to treat like cases alike and different cases differently. For example, a universal right against racial discrimination may demand affirmative action in a rigidly hierarchical culture but colorblindness in a more egalitarian one. That concept applied to law is evident in American jurisprudence, where interpretations of a “living constitution” and common law reasoning seek to be relevant to contemporary conditions while remaining faithful to underlying principles that are centuries old.²² Of course, as we go back further in time—all the way to the Stone Age in Waldron’s example—we cannot possibly understand enough of that world to imagine what the contextualization of many basic human rights would look like. But perhaps we are sufficiently competent to do so in the world in which we live.²³

22. One can envision the most law-like current human rights institution, the European Court of Human Rights, eventually playing a similar role in bridging the gap between underlying principles and highly contextual decision making.

23. Many human rights theorists accept this temporal limitation while upholding contemporary human rights as a reflection or adaptation of universal moral imperatives. *See*,

This temporal constraint helps clarify the nature of codifications such as the UDHR. In specifying human rights for our own time, the task is not to squeeze such contextually sensitive rights into one timeless set of specific rules. We need not exclude a particular instantiation of a universal right on the ground that the two are not the same or that it would have made no sense in ages past. Thus, a universal human right to self-ownership might give normative weight to a derivative right to a fair trial, even though courts were unknown for most of human history. Given the diversity of circumstances and cultures in our own time, a specification of rights at the global level that can serve as “a common standard of achievement” for all peoples today may *still* remain unattainable.²⁴ The point here is not to minimize the challenge but to disentangle two diagnoses of its source. For the universalist, the problem is determining what a faithful contextualization of a universal right would be, and this by itself does not rule out the existence of a universal human nature that may underpin a universal right of persons “as such” or that this right may be specified and applied in alternative but not unlimited ways.²⁵

2. The Challenge to the Objectivity of Morals

The fundamental challenge to moral universality in principle arises from a different quarter. It targets the metaethical premise on which the claim depends: that moral obligations are not merely cultural conventions or just a category of preferences that people feel particularly strongly about, but transculturally objective norms that obligate all moral agents. Although beliefs and tastes may be universal without being objective truths—at one time virtually everyone believed the earth to be flat, and a particular taste might be unanimous by chance—that will not do for a human rights claim about what every person and culture *should* believe or do. To be binding universally, a human right cannot derive from chance or convention but must reflect a transculturally objective moral requirement. This premise is what underwrites the independence of universal human rights from whatever individuals or cultures happen to believe about them.

e.g. John Tasioulas, *The Moral Reality of Human Rights*, in *FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR* 75, 76 (Thomas Pogge ed., 2007).

24. Universal Declaration of Human Rights, *supra* note 1, pmb1.

25. Assuming that this undertaking is not *wholly* indeterminate, it is not clear that there is any better course for someone who feels obligated to resolve differences across diversity with fairness rather than naked will.

The challenge is to understand how this could be possible. Traditionally, religious commandments sufficed, but that is a particularly unconvincing ground for global rights in a world of so many religious and antireligious views. Moral convictions based on revelation lend no greater support to the objectivity of human rights than any other beliefs. There must be a justification for those beliefs that is accessible to any rational person under favorable conditions.

The naturalist possibility considered above—that human rights norms reflect fundamental interests that are common to human beings everywhere—could be such a justification because in principle it is subject to rational examination, but this view must overcome the same kind of skepticism that afflicts the moral objectivity it is supposed to support. On one postmodern view, there is no fixed human nature, no essence that precedes cultural conditioning, and thus no set of fundamental interests that all human beings share.²⁶ And even those who believe that all human beings *do* share fundamental interests may doubt that these common interests point to a universal morality when societies have developed so many different moral codes. That diversity may seem more understandable if moral convictions register something other than a universal morality: power (wielded by elites to universalize their own ideas and impose them on all others),²⁷ or powerlessness (as in Friedrich Nietzsche’s “slave morality”),²⁸ or one’s own subjective feelings,²⁹ or culture. That last view, the cultural relativist idea with us since ancient Greece,³⁰ has dogged the modern human rights movement from its beginnings in the 1940s when it was deployed by critics who opposed U.N. adoption of the UDHR. One oppo-

26. See RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 189 (1989) (asserting that because there is no “core self,” there are no actions that are naturally “inhuman”). According to Tzvetan Todorov, “it is not possible, without inconsistency, to defend human rights with one hand and deconstruct the idea of humanity with the other.” TZVETAN TODOROV, *LITERATURE AND ITS THEORISTS* 190 (1987).

27. MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 224 (2001) (quoting the remarks of Makau Mutua at a Harvard University human rights conference held on November 4, 1998).

28. Nietzsche wrote, “[T]he Jews achieved that miracle of inversion of values . . . (with which is involved the employment of the word for ‘poor’ as a synonym for ‘holy’ and ‘friend’) that the significance of the Jewish people resides: with *them* there begins the *slave revolt in morals*.” FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* 118 (Walter Kaufman trans., Penguin Books 1973) (1886).

29. See, e.g., A.J. AYER, *LANGUAGE, TRUTH, AND LOGIC* (1936) (propounding the emotivist view that moral claims express subjective attitudes toward classes of acts).

30. See, e.g., PLATO, *THEAETETUS* 152a (John McDowell trans., Oxford University Press 1973).

ment, the American Anthropological Association, challenged the UDHR as follows:

Respect for differences between cultures is validated by the scientific fact that no technique of qualitatively evaluating cultures has been discovered. . . . Standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole. . . . Even the nature of the physical world, the colors we see, the sounds we hear, are conditioned by the language we speak, which is part of the culture into which we are born. . . . [M]an is free only when he lives as his society defines freedom³¹

Although the American Anthropological Association later abandoned this view,³² many others continue to press it in one form or another. At the 1993 Vienna World Conference on Human Rights, it took the form of an “Asian values” claim—purported cultural traditions that valorize individual choice less and responsibility, family, community, and security more.³³ But the cultural relativist challenge does not depend on such a sweeping affirmative theory. It may instead simply demand that human rights advocates make good on their claims that gender-based restrictions, child marriage, caning punishments, or other practices violate a universal moral imperative rather than merely their own cultural preference.

Of course, virtually all cultures have some concept of justice and morality; indeed, researchers have found that some nonhuman primates do as well.³⁴ The point of cultural relativism is that these are empty vessels—abstract categories that point to no particular

31. The Exec. Bd., Am. Anthropological Ass'n, *Statement on Human Rights*, 49 AM. ANTHROPOLOGIST 539, 542–43 (1947).

32. *Declaration on Anthropology and Human Rights*, AM. ANTHROPOLOGICAL ASS'N (June 1999), <http://www.aaanet.org/about/Policies/statements/Declaration-on-Anthropology-and-Human-Rights.cfm>.

33. One Asian leader, Lee Kuan Yew of Singapore, is particularly identified with the Asian values claim. See Fareed Zakaria, *A Conversation with Lee Kuan Yew*, FOREIGN AFF., Mar./Apr. 1994, available at <http://www.foreignaffairs.com/articles/49691/fareed-zakaria/a-conversation-with-lee-kuan-yew>. For a theorist's argument in support of the Asian values claim, see Bilahari Kausikan, *Asia's Different Standard*, FOREIGN POL'Y, Fall 1993, at 24, 24–41. The Chinese delegation to the 1993 Vienna World Conference on Human Rights provided a relativist rather than substantive justification for respecting Asian values, arguing that “[t]he concept of human rights is a product of historical development. . . . one should not and cannot think [of] the human rights standards and model of certain countries as the only proper ones and demand all other countries comply with them.” Ineke Boerefijn, *Human Rights News: United Nations*, 11 NETH. Q. HUM. RTS. 293, 294–95 (1993).

34. Sarah Brosnan & Frans B.M. de Waal, *Monkeys Reject Unequal Pay*, 425 NATURE 297, 297–99 (2003). The researchers report that capuchin monkeys demonstrate a sense of

norms or practices at all. It remains for each culture to define “justice” and “morality” in its own way. This view makes *cross-cultural* principles of justice impossible, thereby reducing “global justice” to an oxymoron and the UDHR to an assertion of power by some cultures over others under the *guise* of justice.

Cultural relativism presents a formidable challenge to the universality of human rights in two ways. First, it builds on an entirely credible sociological account of moral convictions that acknowledges the causal role of culture in molding them, and at the least, a moral conviction coexists uneasily with a behavioral account of how one came to hold it.³⁵ If it is not based on the reasons one thinks it is, but is only a behavioral product of one’s culture or upbringing, it cannot constitute a categorical moral *Ought* but only a contingent and arbitrary *Is*. Morality then is not a standard by which we can evaluate our cultural conventions but a mere convention itself.

Second, we seem to lack an equally persuasive alternative story that can underpin a noncontingent universal morality. The most straightforward normative account, which justifies moral imperatives on the strength of its supporting reasons or intuitions, seems dependent on a metaphysical contrivance that can transcend behavioral influences: a Moral Law existing outside history, beyond culture and circumstance, that binds all moral agents. To this, Alasdair MacIntyre objected that “[m]orality which is no particular society’s morality is to be found nowhere. There was the-morality-of-fourth-century-Athens, there were the-moralities-of-thirteenth-century-Western-Europe, there are numerous such moralities, but where ever was or is morality as such?”³⁶ Instead, we see diverse moral cultures that variously emphasize fairness, welfare, conscience, loyalty, honor, social harmony, purity, liberation from suffering, respect for authority, or submission to God.

Moreover, even if such a transcendent moral law *could* exist, there remain the epistemological mysteries of how we would know what it is and why we would be moved to respect it. What is the

fairness, in that their subjects would reject an ordinarily desired reward when they saw another monkey receive a reward they desired more for accomplishing the same task. *Id.*

35. As a sequel to this Essay will argue, this problem afflicts cultural relativism too because relativism *also* posits binding moral norms, however local. It does not merely describe the diversity of cultures in the world but invests each culture with normative moral authority. Thus the relativist too must explain how genealogical facts give rise to normative conclusions.

36. ALISDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 265–66 (2d ed. 1984).

mode of access for people whose beliefs and motivations typically reflect the time and place of their upbringing? How does one discard these cultural lenses and replace them with the impartial Archimedean “view from nowhere?”³⁷

This last worry runs much deeper than the problem of clashing values, as the 1947 American Anthropological Association’s statement suggests. Values must be applied to facts, and even cultures that share the same values may perceive the world differently enough to generate very different moral conclusions. A slaveholder might have believed *both* that all human beings have a right to liberty *and* that slaves are not full human beings, for example. If one’s perceptions are socially constructed, then the cardinal principle of justice mentioned above—to treat like cases alike and different cases differently—may lead anywhere. Depending on place and time, treating like cases alike may mean treating abortion and murder as identical crimes, and treating different cases differently may mean assigning roles according to caste or limiting the vote to the propertied class.

These challenges have become all the more pressing with the accelerating contact and interdependence among both states and peoples. Isolated cultures cannot even conceive of relativism and universality; a multicultural world like ours cannot avoid them. Now, cultural diversity is a fact of our neighborhoods, and events across the globe can hijack local politics; the turmoil in France surrounding the Muslim headscarf and the worldwide protests against newspaper cartoons depicting Mohammed are examples.³⁸ Consequently, there are more calls for coercive intervention against divergent cultural practices, and more resistance to what its practitioners view as cultural imperialist power plays.

37. Thomas Nagel coined this phrase as a title for his seminal book on objectivity and impartiality, *The View from Nowhere* (1986).

38. See Angelique Chrisafis, *France’s Headscarf War: It’s an Attack on Freedom*, *GUARDIAN* (July 22, 2013, 1:37 PM), <http://www.theguardian.com/world/2013/jul/22/frances-headscarf-war-attack-on-freedom> (reporting that the row over the Muslim headscarf provoked two days of rioting in a Paris suburb); see also John Ward Anderson, *Cartoons of Prophet Met with Outrage*, *WASH. POST* (Jan. 31, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/30/AR2006013001316.html> (cartoons in Danish and Norwegian newspapers depicting Mohammed triggered outrage “across the Middle East, sparking protests, economic boycotts and warnings of possible retaliation against the people, companies and countries involved”).

B. *Who Counts Morally? The Claim of Equal Human Dignity*

By its terms, a universal human right belongs to every human being, regardless of individual merit, ethnicity, law, mores, or any other contingency. Human rights derive instead from one's humanity, by virtue of "the dignity and worth inherent in the human person," according to the 1993 Vienna Declaration on Human Rights. *Every* person, having dignity and worth, should be valued accordingly, in part by recognition of her individual rights. There is no global consensus regarding the *basis* of human dignity—The soul? Autonomous agency? One's capacity to suffer?—so human rights instruments evade the question.³⁹ They focus instead on the shared conclusions that every person counts as a subject owed justice rather than a mere object to be exploited; and that because one's humanity alone confers this moral status, every person counts equally, in contrast to the divine right of kings, caste, apartheid, and other conceptions of moral privilege.

This view is relatively recent in the arc of human history, and it remains challenged in much of the world. In India, which will soon comprise one-fifth of the world's population, a different ideology survives, even after years of equality-promoting laws. There the ancient caste system still prevails as the basic principle of social life in much of rural India (so much so that genetic markers arising from millennia of separation still reflect one's caste),⁴⁰ while in more affluent areas, access to ultrasound and sex-selective abortions has reduced the Indian female birth rate to approximately nine girls for every ten boys.⁴¹ Throughout the non-Western

39. Jacques Maritain, one of the UDHR's drafters, stated after its promulgation that despite opposing ideologies, his colleagues were able to agree on a list of human rights but only "on condition that no one asks us why." Jacques Maritain, *Introduction to UNESCO SYMPOSIUM: HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS* 1, 9 (1949).

40. Adam Rutherford, *India's Genes Uncovered*, *GUARDIAN* (Sept. 26, 2009, 8:00 PM), <http://www.theguardian.com/commentisfree/2009/sep/26/india-genetics-genes-science> ("[E]ndogamy within castes has kept social groups relatively separate for thousands of years, and hence defined India's population in genetic terms."); see also Nicholas Wade, *In Caste System, Women Can Marry Up*, *N.Y. TIMES*, Oct. 27, 1998, at F6, available at <http://www.nytimes.com/1998/10/27/science/in-caste-system-women-can-marry-up.html> (explaining that the caste system is thought to be over two thousand years old, "long enough to have impressed a subtle genetic signature on the population, according to a team of American and Indian biologists").

41. More precisely, 914 girls were born per 1000 boys born in India, according to the 2011 census. Palash Ghosh, *Abortions of Female Fetuses Creating Widening Gender Imbalance in India*, *INT'L BUS. TIMES* (Sept. 18, 2012 12:12 PM), <http://www.ibtimes.com/abortions-female-fetuses-creating-widening-gender-imbalance-india-790122>. In more affluent states such as Punjab, there are 846 girls under age of six for every 1000 boys. Stephanie Nolen, *Rate of Aborted Female Fetuses Increases in India*, *GLOBE & MAIL* (Apr. 1, 2011), <http://www>

world, other traditional societies exclude women from school, organize benefits and burdens around ethnicity, or provide dictatorial powers to spiritual leaders.

In the United States, ideologies that afford certain people a privileged moral and legal status based on race, caste, or wealth are discredited, however much our practices retain unacknowledged hierarchies. Apart from fringe extremist groups, no one questions the principle that every human being counts equally as a rights-bearing moral subject. But we still have a practical need to discern the principle's underlying basis to guide more contested cases, and because there is no consensus on what that basis is, our politics remain in the grip of impassioned disputes over its scope and application. The long standing disputes over abortion, assisted suicide, and euthanasia all testify to the significance and elusiveness of a rationale for moral status; we cannot know whether conception, viability, birth, sentience, rationality, brain function, or a soul is relevant to moral status if we do not know why *anything* would be relevant to moral status.⁴²

To resolve such issues on a principled basis requires some idea of what characteristics underlie every person's right to moral consideration. But which characteristics are these? It is exceedingly difficult to come up with a persuasive answer if we leave religious concepts such as the soul behind, for two reasons. First, no fact about most human beings—as bearers of rationality, language, self-consciousness, genetic humanity, culture, or creativity, for example—is common to all human beings. If moral status derives from the capacity for self-consciousness or rationality, for example, infants and some mental patients may be excluded. Even genetic properties cannot draw a boundary around all human beings, given that numerous beings we recognize as obviously human are born genetically defective and billions of individual cells that are obviously not human beings are genetically complete.

.theglobeandmail.com/news/world/rate-of-aborted-female-fetuses-increases-in-india/article580726 (last updated June 8, 2013).

42. The U.S. Supreme Court's decision in *Roe v. Wade* explicitly sidesteps the claim of fetal personhood, stating that when "those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Roe v. Wade*, 410 U.S. 113, 159 (1973); see also Fredrica Hodges, *The Assault on Choice, in ABORTION RIGHTS AND FETAL 'PERSONHOOD'* 1, 2 (Edd Doerr & James W. Prescott eds., 1989) (noting that in the 1974 Vatican Congregation on the Faith's Declaration on Procured Abortion, the Roman Catholic Church admits that there is no consensus on "the moment when the soul is infused").

The second hurdle is to show a connection between a particular physical or psychological attribute and the various kinds of moral treatment it calls for. Why should the presence or absence of rationality determine whether one has a right against torture? Why is genetic composition any more relevant to whether one has a right to life than one's height or one's race would be? With the advent of artificial intelligence, engineered species, and other invented beings, people may come to view the characteristics of human form and genetic composition as morally irrelevant as well—physical characteristics that suggest no reasoned justification for withholding moral consideration from those who lack them.

Perhaps we come closest to a universal *and* morally relevant attribute in the capacity for suffering present in all but irreversibly comatose human beings—but moral rights derived on this basis will also extend to many animals, of course. Animal rights activists now press that case and also draw on research showing that a subset of animals have rationality, compassion, self-awareness, culture, concerns for fairness, and other faculties previously thought to belong to human beings alone.⁴³ They claim that the idea of *human* rights is morally defective because it arbitrarily dismisses the rights of animals, and argue that these humanist blinders result in wholesale violations of these rights through institutions such as factory farms, animal experimentation, and leg-hold traps.⁴⁴ This

43. For example, zoologists report that dolphins can use rudimentary symbol-based language, inspect themselves in the mirror, and constitute “the world’s second most intelligent creatures after humans.” Jonathan Leake, *Scientists Say Dolphins Should Be Treated As Non-Human Persons*, SUNDAY TIMES (Jan. 3, 2010), http://www.thesundaytimes.co.uk/sto/news/uk_news/article194197.ece. Moreover, according to researchers:

[Anatomically,] dolphin brains have many key features associated with high intelligence. . . . The studies show how dolphins have distinct personalities, a strong sense of self and can think about the future. It has also become clear that they are “cultural” animals, meaning that new types of behavior can quickly be picked up by one dolphin from another. . . . Other research has shown dolphins can solve difficult problems, while those living in the wild co-operate in ways that imply complex social structures and a high level of emotional sophistication.

Id. Scientists involved in these studies believe dolphins are “non-human persons” and that it is morally unacceptable to keep them in amusement parks, or to kill them for food or by accident when fishing. *Id.*

44. Peter Singer argues that in order to base moral status on any actual human characteristics, “these characteristics must be some lowest common denominator, pitched so low that no human lacks them—but . . . any such set of characteristics which covers all humans will not be possessed only by humans.” Peter Singer, *All Animals Are Equal*, in APPLIED ETHICS 215, 226 (1986); see also Charles Siebert, *Should a Chimp Be Able to Sue Its Owner?*, N.Y. TIMES MAG. (Apr. 23, 2014), <http://www.nytimes.com/2014/04/27/magazine/the-rights-of-man-and-beast.html> (reporting on a New York habeas corpus petition on behalf of a chimpanzee); STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (2000); INGRID NEWKIRK, THE PETA PRACTICAL GUIDE TO ANIMAL RIGHTS: SIMPLE

view has been slowly migrating into the laws and courts of some countries. New Zealand afforded great apes legal protection against medical experimentation in 1999;⁴⁵ Germany amended its constitution to guarantee “the dignity of humans and animals” in 2002;⁴⁶ and in the United States, lawyers recently filed the first habeas corpus petition on behalf of an animal, arguing that a chimpanzee is a “legal person” with a right to release from custody.⁴⁷

So we should not think that, having rejected hierarchy and embraced the equality of all human beings, we have finished with the issue of moral status. There remains the question of who is included in the society of moral subjects and why. That question—with its importance to the issues of abortion, euthanasia, and obligations to future generations, and with its inextricable implications for our treatment of animals—remains entirely unsettled, as does the methodology for answering it. It is the issue that most severely tests our ability to derive human rights from a secular morality based on reason.

C. *Rights: A Domain of Individual Primacy?*

If every human being counts as a moral subject owed justice, we must then specify *how* she counts—what kind of consideration she is due and from whom. Although some human rights constrain individuals—rights against enslavement and murder, for example—let us focus on the state’s obligation because, as typically conceived, most human rights impose their co-relative duties on the state.

At the least, the state owes each individual *some* consideration of her wishes and interests, or it would be treating her as no more than a resource for others. Given conflicting desires and scarce resources, however, it owes something *less* than the fulfillment of her every whim and interest; therefore the state must distinguish among them. Capitalist countries, including the United States, typically do so with a tripartite division. In the first, ordinary case, market forces determine which of one’s interests and wants are ful-

ACTS OF KINDNESS TO HELP ANIMALS IN TROUBLE (2009); GARY L. FRANCIONE, ANIMALS AS PERSONS: ESSAYS ON THE ABOLITION OF ANIMAL EXPLOITATION (2008); TOM REGAN, DEFENDING ANIMAL RIGHTS (2001); MARK ROWLANDS, ANIMAL RIGHTS: A PHILOSOPHICAL DEFENSE (Jo Campling ed., 2009); PETER SINGER, ANIMAL LIBERATION (2d ed. 1990).

45. Animal Welfare Act 1999, § 85(1)–(8) (N.Z.).

46. *Germany Guarantees Animal Rights in Constitution*, USA TODAY (May 18, 2002, 7:27 AM), <http://usatoday30.usatoday.com/news/world/2002/05/18/germany-rights.htm>.

47. Siebert, *supra* note 44, at 28.

filled: I get to travel abroad only if I can afford to do so, for example. But we resist the commodification of some interests that should not be subject to the power of wealth: all citizens should have an equal say in who governs them, so we elect legislators on a one-person-one-vote basis.⁴⁸ In this second case, every person's vote has equal weight, but the majority rules. The domain of universal human rights demarcates a third group of individual interests—interests so fundamental that they should not be left hostage to market forces, majority preferences, or the cost-benefit calculations that typically determine government policy. Human rights safeguard these individual interests by expressing them as priority claims that should ordinarily prevail over such forces. In James Griffin's felicitous phrase, these rights "secure the distribution of control over the central features of one's fate."⁴⁹

Self-ownership is the cardinal example of such a right. Every person has a human right to be free regardless of how popular or useful a slave class may be to the majority. Every person has a right to bodily integrity even though mandating the donation of one eye would give more people sight. These are both libertarian rights, which assert and demarcate areas of individual sovereignty that others may not invade or appropriate. If economic security also qualifies as a human right, it is a right to government assistance rather than a right to be left alone, but it too constitutes a right in that it takes precedence over simple cost-benefit calculations.

This does not imply that a human right is necessarily absolute. One may agree with the U.S. Supreme Court that Nazis have a right to march in Skokie, Illinois, but draw the line at speech that threatens to incite a riot.⁵⁰ Moreover, if two rights conflict, both cannot be absolute. But for a right to constitute a universal human right, the simple cost-benefit calculations that normally determine governmental policy cannot count as reason enough to override it. In Ronald Dworkin's shorthand, rights "trump" the collective inter-

48. Of course, theory and practice diverge dramatically in the United States; the one-man-one-vote doctrine is belied not only by gerrymandering and the historically-justified anomaly of the Senate, but also increasingly by voter identification laws and Supreme Court decisions overturning limits on the role of money in elections. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *McCutcheon v. Fed. Elections Comm'n*, 134 S. Ct. 1434 (2014).

49. James Griffin, *Towards a Substantive Theory of Rights*, in *UTILITY AND RIGHTS* 137, 140 (R.G. Frey ed., 1984).

50. *Nat'l Socialist Party of Am. v. Skokie*, 434 U.S. 1327 (1977).

est, at least in the absence of unusually compelling and weighty conflicting interests.⁵¹

Of course, the most basic and longstanding objection to individual rights prevailing over the collective benefit emanates from utilitarianism, most famously articulated in Jeremy Bentham's description of natural rights as "nonsense on stilts."⁵² The most common utilitarian criterion, "the greatest good for the greatest number," abandons the view that individual rights serve as independent constraints on aggregate utility.⁵³ Utilitarianism stands almost as far as one can get from American individualism, and it will almost certainly remain so—but now, even in the United States, the events of September 11, 2001 have put popular pressure on the priority of individual rights. The repeatedly portrayed "ticking bomb" torture scenario leads some people to a more consequentialist moral conclusion, in which a state must inflict some injustice when it would prevent more, or would safeguard its constituents' wellbeing, at least when the stakes are high enough.⁵⁴

As noted, this erosion of rights is occurring in a country virtually unrivaled in its individualist and libertarian culture and for that reason is limited and thought to require justification—hence the "ticking bomb" scenario. In the vast part of the world containing hierarchical, role-based cultures, however, our elevation of individual choice and conscience has little purchase to begin with. In Rhoda Howard's description, "in most known societies, human dignity is not private, individual or autonomous. It is public, collective and prescribed by social norms. . . . Part of the dignity of a human being consists of the quiet endurance and acceptance of what a human rights approach would consider injustice."⁵⁵ Thus, at the

51. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi, 92 (1977). "Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them." *Id.* at 68; see also JOHN RAWLS, *A THEORY OF JUSTICE* 3 (rev. ed. 1971) ("Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.").

52. Jeremy Bentham, *Anarchical Fallacies*, in 2 *THE WORKS OF JEREMY BENTHAM* 914 (1843).

53. However, utilitarians might justify rights derivatively, on the condition that they work to increase utility.

54. See, e.g., Memorandum from U.S. Dep't Justice, Office of the Assistant Attorney General to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) (the "Torture Memos" of the Bush administration); see also Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 *STAN. L. REV.* 703 (2005).

55. Rhoda E. Howard, *Dignity, Community, and Human Rights*, in *HUMAN RIGHTS IN CROSS CULTURAL PERSPECTIVES* 81, 84 (Abdullahi Ahmed An-Na'im ed., 1992).

1993 Vienna World Conference on Human Rights, some delegates argued that the copious rights Westerners view as self-evident truths about justice others see as instruments of an uncompromising and individualist ideology that threatens to supplant their historical traditions.⁵⁶ An obvious illustration of this difference is the marital rights article in the Convention on the Elimination of All Forms of Discrimination Against Women, which obligates states to ensure that marriages conform to a progressive egalitarian model of choice and equality that is alien to the practices of many cultures that treat gender roles as fundamental.⁵⁷

Some communitarian philosophers lodge more theoretical complaints that lend some support to these objections, in that they decry the devaluation of shared values and communal connection they attribute to the modern focus on individual rights. In their view, excessively rights-based cultures are too concerned with individual choice and too indifferent to the value of what is chosen, and this nurtures freedom over responsibility, absolutism over compromise, isolation over community and an identity within it, and a withering away of the virtues that sustain our public and private lives.⁵⁸ Of course, communitarians must couple this critique of liberal neutrality with a positive substantive theory of pertinent responsibilities and virtues if they are to draw a principled line between the communitarian values they favor and the repressive traditions they reject.

D. Which Interests Are Protected as Rights?

The claims that all human beings possess moral rights by virtue of their humanity alone, and that these individual rights normally take precedence over the collective will or welfare, suggest that the domain of human rights is limited. Not every human want, need, or interest should or could be protected as a right; whether the state should build more roads or reduce taxes, for example, is best settled, directly or indirectly, by elections. But which interests *are*

56. EVA PFÖSTL, HUMAN RIGHTS AND ASIAN VALUES 210–11 (2008); *see also* JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 107–23 (2d ed. 2003).

57. CEDAW, *supra* note 5, art. 16.

58. *See, e.g.*, MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); *see also* Kausikan, *supra* note 33 (arguing that the West's economic problems may be due to "its tendency to transform every social issue into an uncompromising questions of 'rights' and place the claims of the individual and special interests over those of society"). For an attempt to find a middle way between liberalism and communitarianism that allows for government endorsement and inculcation of certain civic virtues, *see* JAMES E. FLEMING & LINDA C. McCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES AND VIRTUES (2013).

appropriately protected by human rights? Even those who agree that every person possesses certain interests that must be safeguarded as rights dispute which interests they are.

Commentators speak of the “three generations” of human rights—starting with negative liberty rights found in the French Declaration of Rights and the U.S. Bill of Rights, continuing with the positive economic rights of the nineteenth century socialists, and now including peoples’ rights, such as rights to their natural resources and to self-determination.⁵⁹ Of course, this progression does not imply that liberties, economic rights, and peoples’ rights are all accepted as moral entitlements. As noted above, libertarians, socialists, and communitarians each have very different, sometimes mutually exclusive, ideas regarding which human interests give rise to human rights. For instance, a people’s right to collective self-determination or to practice its culture may fundamentally conflict with a woman’s right to nondiscrimination. Libertarians may complain that a labor right to occupational safety violates an individual’s rights to property and freedom of contract,⁶⁰ while egalitarians may believe that these formal liberties maintain the advantage of the powerful without addressing basic human needs.⁶¹

Many of these differences reflect more general disagreements regarding the purpose universal human rights are supposed to serve. If rights are supposed to safeguard a person’s autonomy and self-ownership, the list will emphasize liberty rights. If rights are a way to ensure that each person can lead a minimally decent life, the list may emphasize rights to food, shelter, and other material necessities. The Cold War reflected such ideological differences, and indeed, the international community abandoned the human rights treaty that was to follow the 1948 Universal Declaration of Human Rights when it became clear that many countries were willing to endorse political and liberty rights, or economic and social

59. The division of human rights into three generations began with French jurist Karel Vasak and has become standard analysis. See, e.g., Burns H. Weston, *Human Rights: Concept and Content*, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 17, 21–23 (Richard Pierre Claude & Burns H. Weston eds., 3d ed. 2006).

60. See, e.g., LIBERTARIAN PARTY PLATFORM §§ 2.1, 2.7 (2014), available at https://www.lp.org/files/2014_LP_Platform.pdf.

61. See, e.g., G.A. Cohen, Freedom and Money 14 (2001) (unpublished manuscript), available at <http://www.howardism.org/appendix/Cohen.pdf>; KARL MARX, ON THE JEWISH QUESTION 40–41 (1844).

rights, but not both. In its place, separate treaties were promulgated for the different constituencies.⁶²

Liberty is part of America's cultural DNA; most Americans believe that one's life should be one's own, and that the liberty to choose what to think and who to be constitutes a basic human right. Political and civil rights, such as the rights to democratic participation and to equal protection under the rule of law, are also virtually beyond dispute. The idea that every person also has a moral right to adequate health care (or adequate nutrition, shelter, or other material necessities) has proven much more controversial for a number of reasons. One is the libertarian claim that redistribution is beyond the legitimate powers of government and thus constitutes a form of theft or forced labor.⁶³ Another objection asserts that positive rights to health care and other assistance require tradeoffs and compromises to a degree that negative liberty rights do not, and therefore the distribution of such resources should be settled democratically.⁶⁴ And beyond these differences, a further criticism suggests that human rights suffer from inflation: the argument is that human rights exist to set minimum standards based on the most fundamental interests and that these crucial safeguards have been devalued by the transformation of too many other goods and ideals into rights.⁶⁵ Minimalists sometimes cite the ICESCR's rights to periodic holidays with pay and to the highest attainable standard of physical and mental health as such objectionable "faux" rights.

E. *Do Arguments About These Issues Matter?*

Some readers may object that the issues explored in this Essay are of academic interest only and neither useful nor advisable in international human rights discourse. They may think this for either of two reasons. Some may believe that the above analysis sets the bar too high—that the soundness of a human rights claim does not depend upon the soundness of all the elements allegedly entailed by it. Others may reject this philosophical project wholesale, on grounds that one can be fully warranted in adhering to

62. PAUL SEIGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* 25 (1983); HENRY J. STEINER ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 136 (3d ed. 2008).

63. ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 169 (1974).

64. See, e.g., Aryeh Neier, *Social and Economic Rights: A Critique*, 13 *HUM. RTS. BRIEF*, no. 2, 2006, at 1.

65. See, e.g., Jacob Mchangama & Guglielmo Verdirame, *The Danger of Human Rights Proliferation*, *FOREIGN AFF.* (July 24, 2013), <http://www.foreignaffairs.com/articles/139598/jacob-mchangama-and-guglielmo-verdirame/the-danger-of-human-rights-proliferation>.

strong moral convictions without depending upon a reasoned justification to support them. In that case, as Ludwig Wittgenstein suggested about some intractable philosophical problems, parsing these issues would be akin to the fruitless buzzing of a fly trapped in a bottle that will cease as soon as the fly escapes: beside the point and best abandoned.⁶⁶ Or worse, moral reasoning might be positively misleading and likely to lead us away from, rather than toward, moral truth.⁶⁷

Richard Rorty was well known for lodging both of these objections. In his last two decades as a philosopher, he argued for extricating human rights from the particular premise that they must be transculturally objective—a claim he thought unnecessary and unwise. And he suggested, more generally, that trying to reason people into accepting human rights is futile.⁶⁸ The better course, he insisted, is to promote a “human rights culture” through stories that can reach the heart, not “metaphysical proofs” aimed at the mind.⁶⁹

Although narratives, thick descriptions, and inspiring examples surely *are* critical ways to develop values and moral discernment, the negative part of Rorty’s agenda is neither theoretically sound nor—despite his pragmatist credentials—useful in practice. Perhaps with enough empathy in the world there would be no need for morality at all, let alone the transcultural claims of human rights. But in this imperfect world, it is simply not possible to “sustain a human rights culture” while dismissing the question of transcultural validity because doing so eviscerates the very idea such a

66. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 309 (G.E.M. Anscombe trans., 2d ed. 1958).

67. For example, some empirical research indicates that the less educated residents in Nazi-occupied France and Poland did the most to protect Jews, while the most educated, who presumably were also most likely to intellectualize moral dilemmas, did little. See MICHAEL L. GROSS, *ETHICS AND ACTIVISM: THE THEORY AND PRACTICE OF POLITICAL MORALITY* 150 (1997) (interpreting data reported in SAMUEL P. OLINER & PEARL M. OLINER, *THE ALTRUISTIC PERSONALITY: RESCUERS OF JEWS IN NAZI EUROPE* 261–356 (1988)). Citing this data and his own observation that law students lose their idealism during law school, Richard Posner argues that moral philosophy does not promote moral behavior. Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 *HARV. L. REV.* 1637, 1682–84 (1998).

68. RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM (ESSAYS: 1972–1980)*, at xiv (1982); 1 RICHARD RORTY, *PHILOSOPHICAL PAPERS: OBJECTIVITY, RELATIVISM, AND TRUTH* 31 (1991).

69. RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 44 (1989); see also Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in *ON HUMAN RIGHTS* 111 (Stephen Shute & Susan Hurley eds., 1993). Rorty argues that such narratives are a form of “sentimental education” which, by widening the circle of sympathy and identification with others, is more likely to reduce cruelty than claims about what rationality and morality require. Rorty, *supra*, at 119, 122–23, 133–34.

culture depends on—that a human right is a command of justice and not merely an elaborate excuse for one culture to dominate another. A human rights culture therefore necessarily presumes that some aspect of justice transcends cultures, and that a line can be drawn between morally justified interventions and culturally imperialistic ones. If one does not even try to draw this line, one abandons the very idea that justice, not power, is the basis for human rights. So the question of transcultural objectivity is an inextricable part of Rorty’s “human rights culture.”

With respect to the second objection, asserting the futility of *reasoning* about human rights questions, it is certainly true that people need not think things through before they can act with moral integrity. It is also true that people acquire other kinds of complex knowledge without recourse to reason or conscious rules, such as the kind of intuitive knowledge one draws on when recognizing a family resemblance, anticipating a musical progression, or speaking grammatically without knowing the rules. Certainly, some moral knowledge could be like that, and human rights could indeed constitute the “self-evident truths” the Declaration of Independence says they are. But this possibility surely does not justify simply accepting one’s gut feelings without reflection. In a dispute over which of two competing rights should have priority, for example, our moral sensibilities are only a starting point. We must then also resort to thought and reason, not because we should necessarily expect to persuade another that our views are justified, but because, in good faith, we must at least consider whether they are. The suggestion is not that our immediate intuitions or convictions should play *no* role. It is rather that we also have to analyze them.

So although the questions outlined in this Essay are philosophical and abstract, they are also relevant to practice, notwithstanding the contrary claims of some proponents of the political conception of human rights. They are *highly* relevant, because human rights policy issues so often force us to consider them—to consider where acceptable cultural diversity ends and a universal moral imperative begins, as the practice of female genital cutting requires us to do; or what moral consideration, if any, is due to the unborn or the permanently unconscious; or whether a particularly threatening circumstance is compelling enough to justify overriding a human right, as in the torture question. We can make no sense of these human rights issues without thinking through the questions that are the subject of this Essay. In an enterprise that is deeply grounded on the distinction between justice and power, it simply

defeats the moral basis of human rights to ignore them. The aim of this Essay has been to convey these central challenges confronting the moral conception of human rights. A forthcoming work will endeavor to examine and assess their strength.