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THE ESSENCE OF HUMAN RIGHTS: A RELIGIOUS CRITIQUE

*Gordon Butler **

I. INTRODUCTION

The modern era began in 1500 with the Renaissance in Italy, the European discovery of the Americas, and a Reformation in Christianity. These events led to an incredible explosion of economic prosperity and religious conflict. While the modern era is ending, the beginning of the new era is marked by an incredible explosion of world-wide prosperity under the quasi-religious designation of “globalization”—and a world-wide religious conflict has developed around the growth and expansion of radical Islam.

Although standards to restrain and channel the economic forces of globalization still need to be developed, one of the modern era’s last achievements was the 1948 adoption of the Universal Declaration of Human Rights (“UDHR”).¹ The UDHR is aspirational in that it does not carry the force of law. Nevertheless, the United Nations has issued covenants and declarations calling on the nations of the world to come forth and bind themselves to the principles enunciated in the UDHR. Regional covenants and conventions, such as the European Convention on the Protection of Human Rights and Fundamental Freedoms (“European Convention”), have been modeled after UDHR provisions and carry the force of law. In whatever form they appear, the UDHR has become the “coin of the realm” when it comes to human rights world-wide.² Countries who only give lip service to its concepts—

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1. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR], available at http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.

2. See John Witte, Jr., *The Spirit of the Laws, and the Laws of the Spirit: Religion and Human Rights in a New Global Era*, in 2 GOD AND GLOBILIZATION: THE SPIRIT AND THE MODERN AUTHORITIES, 76, 78 (Max L. Stackhouse & Don S. Browning eds., 2001)

while in practice failing to comply with its provisions—feel compelled to recognize and agree to its provisions, albeit with reservations.

There seems to be widespread acknowledgment that the source of the modern idea of human rights is traceable to the Enlightenment, and credit is given to Hobbes, Locke, Rousseau, Mill, and others who were instrumental in “secularizing” philosophy in the Western tradition.³ Without denying the importance of these writers, this article seeks to lay out in brief fashion the biblical doctrines, particularly their development through the time of the English Revolution, that laid a permanent foundation upon which these later writers would construct the freedoms that are incorporated into the human rights regime. This article is titled *A Religious Critique* because it demonstrates that the three pillars of the human rights regime—human dignity, rule of law, and universality—are just as easily supported by religious thought as philosophical thought in the modern world.

Part II sets forth the principal provisions of the human rights regime as they apply to religious practice, such as freedom of religion and the rights to an education and participation in government. It also reviews the Preamble to the UDHR and the stated reasons and goals of its adoption in 1948.

Part III analyzes various theories that are put forth to support each of the three human rights pillars. In evaluating such theories, it becomes obvious that no single theory can support the weight of human rights regimes in a cross-cultural sense. Consequently, Part III also covers theories recognizing that a consensus can be reached in society as to the ends sought, even though a diversity of societal views prevents agreement on a common basis supporting those ends. However, such theories generally reach a minimal definition of human rights.

Part IV suggests that a major flaw infecting all attempts to justify the human rights regime is a presumption that religious reasoning is irrelevant to human rights discussions, and to permit

(“The language of rights has long been common coinage in the currency of global law . . .”).

3. See Yeshoshua Arieli, *On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and His Rights*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 1, 5 (David Kretzmer & Eckart Klein eds., 2002) [hereinafter *THE CONCEPT OF HUMAN DIGNITY*].

such reasoning would render the human rights regime unacceptable to other cultures. That is, to be acceptable in modern thought, a theory cannot admit a religious foundation because a religious foundation cannot be universal. Part IV then describes a number of major contributions from Christian theology, a belief system which developed concepts such as religious liberty, popular sovereignty, and separation of church and state and made possible the recognition of the importance of human dignity, the rule of law, and universality. Particularly important to religious liberty was recognition that the biblical model made plain that civil government had no authority over religious matters and should be constrained to “secular” matters as defined in the second table of the Ten Commandments.

Ultimately, this author sees human rights as a by-product of Christianity’s centuries-long quest for freedom from oversight and control by civil and ecclesiastical establishments and for the individual conscience to worship freely and without fear. In short, religious freedom is the foundation of other rights and has led the way to their recognition.

II. RELIGIOUS FREEDOM AND HUMAN RIGHTS STANDARDS

The United Nations was created in the aftermath of World War II as a forum for the nations of the world to come together, discuss problems, and structure solutions without resorting to war.⁴ The adoption and propagation of the UDHR reflects the belief that certain values are universal, are essential to a proper acknowledgment of the inherent dignity of man, and limit the scope of state action. The UDHR Preamble recognizes that “the inherent dignity [] of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”⁵

Article 1 of the UDHR provides that “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”⁶

4. See generally BASIC FACTS ABOUT THE UNITED NATIONS, U.N. Sales No. E.OO.I.21 (2000), available at <http://www.un.org/aboutun/history.htm>.

5. UDHR, *supra* note 1, at pmbl.

6. *Id.* at art. 1.

Equality, dignity, and inalienable rights are also the cornerstones of America's Declaration of Independence.⁷ The freedoms of religion, speech, press, and association, along with the assurance of a republican government, are embodied in the United States Constitution.⁸ This formula has worked well in the West, but was the result of centuries of intense conflict. The United Nations hopes to impart the blessings of such liberty throughout the world without the need for such conflict. The Preamble continues:

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law . . .

Whereas the peoples of the United Nations have . . . reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women . . .⁹

Among the rights and freedoms protected by the rule of law are the right to participate in government, the freedom to choose one's religion, and the right to an education. Freedom to participate in government is set out in Article 21 of the UDHR:

1. Everyone has the right to take part in government of his country, directly or through freely chosen representatives. . . . 3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.¹⁰

Freedom of religion is set out in Article 18 of the UDHR, which provides that "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching practice, worship and observance."¹¹

7. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (declaring that "[w]e hold these truths to be self evident, that all men are created equal, that they are endowed by their creator with certain inalienable Rights that among these are Life, Liberty and the pursuit of Happiness").

8. U.S. CONST. amend. I.

9. UDHR, *supra* note 1, at pmb1. (emphasis added).

10. *Id.* at art. 21

11. *Id.* at art. 18; see TAD STAHNKE & J. PAUL MARTIN, RELIGION AND HUMAN RIGHTS: BASIC DOCUMENTS 59 (1998) [hereinafter BASIC DOCUMENTS] (defining religion to include non-religions such as atheism and agnosticism thereby expanding the coverage of Article 18).

Article 18 is built “on the philosophical assumption that the individual as a rational being is master of his (her) own destiny.”¹² The “freedom” it embodies is defined as follows:

“Freedom consists in being able to do anything that does not harm another person. This fundamental starting point of the original *Declaration of Human Rights* from the French Revolution (1789) is just another formulation of the famous “golden rule” of the Jewish-Christian tradition: “what you don’t want to be done to yourself, don’t do it to someone else.”¹³

Participation in government and religious freedom are the foundations of Western liberal democracies. The glue that holds them together is the belief that universal education passes the legacy of freedom to succeeding generations.¹⁴ Recognizing the importance of education to the establishment of “universal” values, the UDHR Preamble proclaims:

[T]his Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by *teaching and education* to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among peoples of territories under their jurisdiction.¹⁵

The right to an education is broadly stated in the UDHR and incorporates a duty on the part of the state to teach due respect for the human rights norms set forth in the UDHR.¹⁶ Article 26 of the UDHR provides:

1. Everyone has the right to education. Education shall be free, . . . in the elementary . . . stages. . . . [And] . . . shall be compulsory. . . .
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and

12. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 309–10 (1993).

13. Anton Houtepen, *From Freedom of Religion Towards a Really Free Religion*, in FREEDOM OF RELIGION: A PRECIOUS HUMAN RIGHT 43 (Jonneke M.M. Naber ed., 2000) (stating that “[t]he philosopher Immanuel Kant would reformulate the same rule into what he called ‘the categorical imperative’: always act in such a way, that what you do could, in a similar case, be wise for all other people to do”).

14. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Harvey C. Mansfield & Delba Winthrop trans., The University of Chicago Press 2000) (recognizing the important role religion played in the democratic education of the population).

15. UDHR, *supra* note 1, at pmb1. (emphasis added).

16. *Id.* at art. 26.

fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have a prior right to choose the kind of education that shall be given to their children.¹⁷

The precise basis and nature of the human rights regime is disputed. The bases on which human rights have traditionally been justified, such as natural law, utility, culture, experience, and positive law, are all disputed.¹⁸ There seems to be a common agreement that human rights should be recognized, even though agreement might be elusive on whether they should be viewed as (i) divine, moral, or legal rights; (ii) validated through intuition, culture, custom, social contract, distributive justice, or as prerequisites to happiness; (iii) revocable or irrevocable; or (iv) broad or narrow.¹⁹ Human rights are characterized as universal, fundamental, justiciable as well as aspirational, and limited by the rights of others. Essentially:

[H]uman rights are understood to represent both individual and group demands for political power, wealth, enlightenment, and other cherished values or capabilities, the most fundamental of which is respect and its constituent elements of reciprocal tolerance and mutual forbearance in the pursuit of all other such values or capabilities. . . . At bottom, human rights qualify state sovereignty and power, sometimes expanding the latter even while circumscribing the former²⁰

Protection of human rights takes various forms. In the United States, many European countries, and throughout the world, provisions in national constitutions provide basic protection.²¹ In addition, human rights protections are incorporated into international and regional agreements, many of which are modeled after the UDHR.

The ideals of the UDHR are incorporated into two international covenants: the International Covenant on Civil and Political

17. *Id.*

18. 20 THE NEW ENCYCLOPEDIA BRITANNICA 656 (15th ed. 2002).

19. *See id.*

20. RICHARD PIERRE CLAUDE ET AL., HUMAN RIGHTS IN THE WORLD COMMUNITY 20 (2006).

21. U.S. CONST. amend. I (ensuring freedom of religion, speech, press, assembly, and redress of grievances); 1958 Const. pmb. (Fr.) reprinted in JOHN BELL, FRENCH CONSTITUTIONAL LAW 245 (1992) (declaring that "[t]he French people solemnly proclaims its attachment to the rights of man").

Rights (“ICCPR”)²² and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”).²³ These covenants limit governmental and private action, seek to compel certain actions on the part of states, and are referred to as the “International Bill of Rights” (“IBR”).²⁴ The necessity that called for a distinction between the two international covenants was the Cold War conflict between democratic countries, which stressed individual civil rights, and Communist countries, which stressed community and cultural rights.²⁵ The need for this distinction has passed somewhat into history since the end of the Cold War.²⁶

In 1950, the nations of Europe adopted the European Convention and established the European Court of Human Rights.²⁷ This court has the most extensive experience in dealing with problems of human rights and religion.

III. HUMAN DIGNITY, RULE OF LAW, AND UNIVERSALITY

The UDHR is seen as the instrument that transformed the United Nations from a simple organization established to mediate relations between sovereign states into “an instrument for the reconstruction of the international community upon the highest ideals and ethical norms of a humanistic conception of man and

22. International Covenant on Civil and Political Rights, Dec. 19, 1966, S. EXEC. DOC. E 95-2 (1978), U.N.T.S. 171.

23. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S.23.

24. See *id.*; International Covenant on Civil and Political Rights, *supra* note 22, OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, FACT SHEET NO. 2 (REV. 1), THE INTERNATIONAL BILL OF HUMAN RIGHTS (1996), available at <http://www.unhchr.ch/html/menu6/2/fs2.htm>. United Nations international covenants have addressed the first generation through the ICCPR and the second generation through the ICESCR. While these are the primary covenants that address religion and education, the United Nations has adopted additional instruments that bear on these subjects such as the United Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, the “1981 Declaration Against Intolerance,” the UNESCO Convention Against Discrimination in Education, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child, as well as numerous regional conventions.

25. See Eric A. Posner, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758, 1765 (2008).

26. See Posting of Diane M. Amann to Slate, <http://www.slate.com> (Apr. 21, 2008, 17:26 EST); see also Posner, *supra* note 25, at 1765 (stating that today, most countries have ratified both treaties).

27. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 19, Nov. 4, 1950, 213 U.N.T.S. 221.

mankind.”²⁸ The human rights regime is bound up in three essential concepts: human dignity,²⁹ rule of law,³⁰ and universality.³¹ Each of these concepts has been the subject of intense debate and controversy, proving them extremely difficult to define.

Rights have been called “entitlements pertaining to those needs and desires that other people are obligated to fulfill, or to allow *you* to fulfill.”³² The focus is on the individual, and the rights are passive as well as active, but they are generally minimalistic and “pertain[] to what is decent, rather than to what is good.”³³ The idea of rights is often seen as emanating from the Enlightenment, which witnessed the breakdown of societies that had previously provided individuals with a sense of dignity and a place in the world and the subsequent rise of the nation state and its impersonal interactions with the population.³⁴ Thus, the dignity of the individual requires protection from the authority of the group.³⁵

The drafters of the UDHR intentionally stated the concepts in terms of moral universals, without any overt reference to religion, in order to obtain worldwide agreement.³⁶ But religions often claim a universal world view encompassing all humans, and religions have historically formed society’s moral foundations. The

28. THE CONCEPT OF HUMAN DIGNITY, *supra* note 3, at 3.

29. See generally THE CONCEPT OF HUMAN DIGNITY, *supra* note 3.

30. See BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY, 110–11 (2004) (citing T.R.S. ALLAN, LAW, LIBERTY, AND JUSTICE: THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM 21–22 (1993)).

31. See generally HUMAN RIGHTS WITH MODESTY: THE PROBLEM OF UNIVERSALISM (András Sajó ed., 2004) [hereinafter HUMAN RIGHTS WITH MODESTY].

32. RICHARD AMESBURY & GEORGE M. NEWLANDS, FAITH AND HUMAN RIGHTS: CHRISTIANITY AND THE GLOBAL STRUGGLE FOR HUMAN DIGNITY 25 (2008).

33. *Id.* at 26–27.

34. See *id.* at 29 (citing Jack Donnelly, *Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights*, 76 AM. POL. SCI. REV. 303, 312 (1982)). It is also asserted that someone looked behind the social contract theories of Locke and Rousseau and suggested that at some point, the powerless in society became unwilling to beg the powerful for a handout, thereby making human rights a right and not a privilege. *Id.* at 30 (citing ANNETTE C. BAIER, MORAL PREJUDICES 225–26 (1994)).

35. See AMESBURY & NEWLANDS, *supra* note 32, at 29.

36. Helen Stacy, *International Human Rights in a Fragmenting World*, in HUMAN RIGHTS WITH MODESTY, *supra* note 31, at 161, 162. Stacy explains:

Enunciating rights without explaining why people have them was also a philosophical response to two confounding chapters in history—the revelation that the Holocaust had been perpetrated under the name of the rule of law and the experience of Stalinism as a stifling of individual agency together galvanized philosophy to subvert the religious concept of truth and to replace it with the less metaphysical concept of freedom.

three “Abrahamic” Religions—Judaism, Christianity, and Islam—all claim universal application, which is the fundamental assumption of the Hebrew, Christian, and Muslim holy books.³⁷ There is one God over all the world and everyone in it. Universal legal principles are found in the Ten Commandments, and universal human dignity is found in the *imago dei* of the biblical creation narrative.³⁸ There are a number of religious and non-religious attempts to ground the morality of human rights.³⁹

Michael Perry strongly suggests that human rights can only be supported on a religious ground.⁴⁰ At the heart of the human rights regime, he sees a twofold moral conviction that each and every (born) human being—each and every member of the species *homo sapiens*—has inherent dignity and is inviolable; not-to-be-violated.⁴¹

Perry lays out a religious defense of the “conviction that every human being has inherent dignity and that we should live our lives accordingly.”⁴² Using scripture, the source of inherent human dignity is the fact that “every human being is a beloved child of God and a sister/brother to every other human being.”⁴³ Therefore, since God is who He is, the world is what it is, and we are who we are, then the most satisfying life is one in which we “sisters and brothers” love one another as Christ has loved us and

37. See MAJID KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* 23, 23–26 (1955); Willtherberg, *Judaism and Christianity: The Unity and Difference*, *J. BIBLE & RELIGION* 67, 69–70 (1953); Richard W. Lee, *Christianity and the Other Religions: Interreligions Relations in a Shrinking World*, 53 *SOC. ANALYSIS* 125, 129 (1992).

38. See Robert G. Kennedy, *Corporations, Common Goods, and Human Persons*, 4 *AVE MARIA L. REV.* 1, 8 (2006); Michael S. Paulsen, *Is St. Paul Unconstitutional?*, 23 *CONST. COMMENT.* 1, 5 (2006).

39. See, e.g., MICHAEL MARTIN, *ATHEISM, MORALITY, AND MEANING* 12 (2002) (arguing that morals and ethics are possible without religious beliefs); LINDA T. ZAGZEBSKI, *DIVINE MOTIVATION THEORY* xii-xiv (2004) (arguing that morals are driven by the attractiveness of the good and that God provides the best exemplar for these good emotions).

40. See MICHAEL J. PERRY, *TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS* 14–29 (2007) [hereinafter *TOWARD A THEORY*]. While some commentators might find a basis for human rights in the sense of awe created by mankind, Perry rejects such a subjective view and asserts that we must find the objective sacredness of man in order to find a reason for granting them respect. AMESBURY & NEWLANDS, *supra* note 32, at 48 (citing MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* 27 (1998)).

41. *TOWARD A THEORY*, *supra* note 40, at 5. Perry further asserts, “again, one violates a human being, according to the morality of human rights, if one’s reason for doing something to, or for not doing something for, a human being denies, implicitly if not explicitly, that the human being has inherent dignity.” *Id.* at 7.

42. *Id.* at 5.

43. *Id.* at 24.

taught us to love one another.⁴⁴ This satisfying life produces love for your enemies, those who violate you, and those who fail to respect your inherent dignity.⁴⁵ By living this satisfying life, we “fulfill our created nature and . . . achieve our truest, deepest, most enduring happiness.”⁴⁶ For Perry, fundamental moral questions cannot be addressed without also addressing, at least implicitly, religious questions.⁴⁷

Perry questions whether any non-religious ground can support the two-fold conviction that “every human being has inherent dignity and is inviolable.”⁴⁸ To state it differently, every human being has inherent dignity and we should live our lives accordingly.⁴⁹ He doubts that a non-religious ground supports “the unashamedly anthropomorphic, . . . claim that we are sacred because God loves us, his children.”⁵⁰ Perry cites non-religious sources who have recognized the philosophical difficulties in asserting why we “should” recognize inherent human dignity.⁵¹

Perry finds the approaches of John Finnis, Ronald Dworkin, Martha Nussbaum, and Richard Rorty inadequate.⁵² He finds Finnis’s claim that it is unreasonable for a human being who values his own well-being to intentionally harm the well-being of another to be patently untrue, because Perry asserts that it is not

44. *Id.* at 12. “God is love, and he who abides in love abides in God, and God in him.” *John* 4:16 (New King James). “A new commandment I give to you, that you love one another; as I have loved you, that you also love one another.” *John* 13:34 (New King James).

45. See TOWARD A THEORY, *supra* note 40, at 10.

46. *Id.* at 11 (citation omitted).

47. See *id.* at 12.

48. *Id.* at 14.

49. *Id.* at 14–15.

50. *Id.* (citation omitted).

51. Perry quotes Jeffrie Murphy as recognizing philosophy’s difficulty in finding a basis for human rights:

[T]he liberal theory of rights requires a doctrine of human dignity, preciousness and sacredness that cannot be utterly detached from a belief in God or at least from a world view that would be properly called religious in some metaphysically profound sense. . . . [T]he idea that fundamental moral values may require [religious] convictions is not one to be welcomed with joy [by nonreligious enthusiasts of the liberal theory of rights]. This idea generates tensions and appears to force choices that some of us would prefer not to make. *But it still might be true for all of that.*

Id. at 17 (citing Jeffrie Murphy, *Afterword: Constitutionalism, Moral Skepticism, and Religious Belief*, in CONSTITUTIONALISM: THE PHILOSOPHICAL DIMENSION 239, 248 (Alan S. Rosenbaum ed., 1988) (emphasis added)).

52. See *id.* at 18–29.

unreasonable for human beings to find those closest to them to be of more worth than other human beings.⁵³

Dworkin sees sacredness (both secular and religious) in the sense of wonder produced in every human being by the process of human reproduction, in which each person is a “creative masterpiece” of natural as well as human creation.⁵⁴ For Perry, it is obvious that such a consensus does not exist and the value placed in the creative process is neither intrinsic nor uniform.⁵⁵ Nussbaum follows Dworkin in suggesting that “the good of other human beings is an end worth pursuing in its own right, apart from its effect on [one’s] own pleasure or happiness.”⁵⁶ Nussbaum answers the normative “should” question by noting that it is a basic social emotion of human beings to care for one another.⁵⁷ For Perry, such care is empirically unverifiable since we cannot say that the Nazis cared for the Jews or the Turks cared for the Armenians.⁵⁸ Citing Nietzsche, Perry asserts that it is naïve to think that “morality could survive when the *God* who sanctioned it is missing!”⁵⁹

An answer to the “should” question provided by evolutionary biology is that man’s nature evolved so as to produce the inherent dignity and the desire to love and care for one another.⁶⁰ Again, Perry rejects such reasoning as not only not accepted by secular philosophers, but also totally implausible because it is being asserted as a unique characteristic rather than as part of a greater view of creation.⁶¹

Rorty would deny there is any such thing as human nature, choosing instead to define human characteristics as the result of socialization and historical circumstances in which man has been freed from the theological or metaphysical realms, so that it is now possible to “substitute Freedom for Truth as the goal of

53. *Id.* at 18–19.

54. *Id.* at 21 (citation omitted).

55. *Id.*

56. *Id.* at 22 (citing Martha C. Nussbaum, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714, 718 (1994)).

57. *Id.* at 22.

58. *Id.*

59. *Id.* at 23 (citing FRIEDRICH NIETZSCHE, *THE WILL TO POWER* 147 (Walter Kaufmann ed., Walter Kaufmann & R.J. Hollingdale trans., 1967)).

60. *Id.* at 23–24.

61. *Id.* at 23–25.

thinking and of social progress."⁶² Rather than spreading the human rights culture by arguing from transcultural norms, Rorty would simply acknowledge the Western origin of human characteristics and suggest that if others follow our example, they may achieve the same results.⁶³ Perry asserts that this explanation will not be satisfactory to anyone who sees social wrongs as determined not by social norms, but as violations of the essential normative order of the world.⁶⁴ If the human rights regime consists of no more than Eurocentric sentiments and preferences, then any others are merely a statement that our sentiments and preferences are better than yours, since there is no moral compass that judges between us.⁶⁵

Perry summarizes non-religious attempts to find a moral ground for human rights by likening such attempts to a child who pulls a plant from the ground without its roots and expects it to grow in another location.⁶⁶ Perry does not seek to prove that there is no such non-religious ground, but only to suggest that it may not exist—and that if it does not exist, and if any religious ground is a fantasy, "then there is no ground for the morality of human

62. *Id.* at 26 (citing RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* xiii (1989)).

63. *Id.* Rorty suggests:

[T]he rhetoric we Westerners use in trying to get everyone to be more like us would be improved if we were more frankly ethnocentric, and less professedly universalist. It would be better to say: Here is what we in the West look like as a result of ceasing to hold slaves, beginning to educate women, separating church and state, and so on. Here is what happened after we started treating certain distinctions between people as arbitrary rather than fraught with moral significance. If you would try treating them that way, you might like the results.

Id. at 27 (citing Richard Rorty, *Justice as a Larger Loyalty*, in *JUSTICE AND DEMOCRACY: CROSS-CULTURAL PERSPECTIVES* 19–20 n.9 (Ron Bontekoe & Marietta Stepaniants eds., 1997)).

64. *Id.* at 27.

65. *See id.* at 28.

66. *Id.* at 14. Perry quotes Leo Tolstoy:

Attempts to found a morality outside religion are similar to what children do when, wishing to replant something they like, they tear it out without the roots and plant it, rootless, in the soil. . . . [R]eligion is a particular relationship that man establishes between his own separate personality and the infinite universe, or its origin. And morality is the permanent guide to life that follows from this relationship.

Id. (citing LEO TOLSTOY, *A CONFESSION AND OTHER RELIGIOUS WRITINGS* 150 (Jane Kenish trans., 1987)).

rights, no warrant for the claim that every human being has inherent dignity and is inviolable."⁶⁷

At the other end of the spectrum from Perry and those presenting non-religious foundations for human rights is Alasdair MacIntyre, who denies even the existence of human rights, and famously suggested that "belief in them is one with belief in witches and in unicorns."⁶⁸ By rights, he refers to those that belong to human beings simply as human beings. His argument is essentially that the success of the Enlightenment in creating modern man as an "individual moral agent" by freeing him from the external restraints of divine law, natural theology, hierarchical authority, or teleology has left man devoid of any moral rules or *telos* having an independent and objective authority.⁶⁹ This is true of the attempt by utilitarians to provide the greatest happiness or the Kantians' effort to identify standards through reason.⁷⁰ Modern society, according to MacIntyre, is left with "emotivism," which is "the doctrine that all evaluative judgments and more specifically all moral judgments are *nothing but* expressions of preference, expressions of attitude or feeling, insofar as they are moral or evaluative in character."⁷¹ Thus, any attempt at providing a foundation for human rights is destined to fail.

Recognizing the extremes of this debate, the IBR is built on three controversial and hard-to-define concepts: human dignity, rule of law, and universality, each of which is discussed in the following pages.

A. *Human Dignity*

The core value protected by the UDHR is "the inherent [human] dignity . . . of all members of the human family."⁷² "Inherent dignity" is (along with "equal and inalienable rights") recognized as the "foundation of freedom, justice and peace in the world."⁷³ Human beings are "born free and equal in dignity and rights . . .

67. *Id.* at 26.

68. ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 69 (2d ed. 1984).

69. *Id.* at 68.

70. *Id.*

71. *Id.* at 11-12.

72. UDHR, *supra* note 1, at pmb1.

73. *Id.*

[and] are endowed with reason and conscience,” with the result that all human beings should act in a “spirit of brotherhood.”⁷⁴ People are called to “reaffirm[] their faith . . . in the dignity and worth of the human person.”⁷⁵ One contributor to a recent volume on human dignity emphasizes that:

[T]here is one term in the Universal Declaration that cannot be tucked away nor separated from its sources, namely, “the Inherent Dignity of all human beings.”

It is the concept and term of “the inherent Dignity” that carries the whole burden of being the fountainhead from which the equal rights of man follow which leads us back to the deistic or theistic worldview.⁷⁶

Another contributor states:

Dignity . . . has emerged as a convergence point for what is perceived to be a non-ideological humanistic point of departure towards a social liberal ideal. . . . In that sense, human dignity appears to stand as an absolute value, being the actualization of certain basic political and moral values such as liberty, self-determination, and equality, while being the paramount value, which in its inalienability and inviolability is at the source of an extended value system that has the capacity to project an assembly of constitutional values.⁷⁷

These statements begin the task of defining “inherent dignity,” a task which the UDHR sidesteps.⁷⁸ The ICCPR asserts that “these rights derive from the inherent dignity of the human person,” but it is unclear how this is so, except to the extent that the authors of the UDHR identified those values which must be enforced and protected by the rule of law so that people could resist tyranny and oppression without the need for rebellion.⁷⁹ Resistance to tyranny focuses on individual rights, but the UDHR goes further and incorporates social and cultural rights (such as a right to an education), all of which are claimed to be “inherent” and to preexist creation of the UDHR (e.g., “the peoples . . .

74. *Id.* at art. 1.

75. *Id.* at pmbl.

76. Arieli, *supra* note 3, at 8.

77. David N. Weisstub, *Honor, Dignity, and the Framing of Multiculturalist Values, in THE CONCEPT OF HUMAN DIGNITY, supra* note 3, at 263, 263.

78. Klaus Dicke, *The Founding Function of Human Dignity in the Universal Declaration of Human Rights, in THE CONCEPT OF HUMAN DIGNITY, supra* note 3, at 111, 118.

79. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Mar. 23, 1976), available at http://www.unhchr.ch/html.menu3/b/a_ccpr.htm.

have . . . reaffirmed their faith in . . . the dignity and worth of the human person”).⁸⁰

Because human dignity is such a broad concept, there are numerous approaches to defining it. Many commentators find it difficult to see a foundation in law, philosophy, ethics, or religion upon which to build, other than the Enlightenment argument that human rights are “self-evident” and can be defined, as stated in the UDHR, by “reason and conscience.”⁸¹ This is more than objective reasoning alone; it incorporates “conscience” as a subjective reaction.⁸² Although human dignity supports human rights claims, human dignity does not define a substantive norm from which each claim can be deducted.⁸³ Instead, each claim must be “conditioned by historical, economic, political, cultural or even financial circumstances of the society in which it is articulated.”⁸⁴ One approach finds a triad of values in the UDHR: “freedom, equality and participation in a political, social and international order.”⁸⁵ The approach then suggests that when any of these three values are endangered, a proper “respect for human dignity calls for a human rights policy” and intervention.⁸⁶

Other approaches define human dignity not as an ethical concept but as a “(theological-) anthropological frame of reference” that can be used to establish boundaries within which ethics and law operate.⁸⁷ This frame of reference sees human rights as a “juridical concretization of the more general concept of [h]uman [d]ignity” that existed prior to human rights, and therefore belongs to the pre-ethical, pre-political, and pre-juridical realm.⁸⁸ As an anthropological assertion, four notions of human dignity are suggested:⁸⁹ (1) as envisioned by the Stoic Philosophers,⁹⁰ human

80. UDHR, *supra* note 1, at pmb1.

81. *Id.* at art. 1.

82. *Id.*; see also Dicke, *supra* note 78, at 117. Klaus Dicke is Professor of Political Theory and History of Ideas at Friedrich Schiller-University Jena, Germany. Because the UDHR chose “reason and conscience” over reason alone, Dicke suggests the UDHR follows Rousseau and Kant rather than Voltaire or the Encyclopedists and establishes equality around moral reasoning. Dicke, *supra* note 78, at 117.

83. Dicke, *supra* note 78, at 118.

84. *Id.*

85. *Id.* at 119.

86. *Id.*

87. Dietrick Ritschl, *Can Ethical Maxims Be Derived from Theological Concepts of Human Dignity?*, in *THE CONCEPT OF HUMAN DIGNITY*, *supra* note 3, at 87, 92.

88. *Id.* at 92.

89. *Id.* at 95–97.

dignity is axiomatic in nature and is inherent and inalienable;⁹¹ (2) as a biblical tradition, human dignity is imparted to man as created in the image of God rather than inherent in man;⁹² (3) from Hobbes and Locke, who saw that human dignity existed prior to the state, but was vulnerable and in need of protection by the willful actions of the state which confers it through the social contract;⁹³ and (4) from Kant, who saw humans elevated above nature and endowed, not with the *imago dei*, but with a reasoning power that enabled them to exercise freedom and follow the moral imperative never to treat others as a means, but rather as an end.⁹⁴

These four concepts suggest that human dignity must be grounded in a creed, but that grounding it in an ontological or quasi-empirical assertion of inherent human dignity creates difficulties of definition because of wide individual and cultural dif-

90. It is commonly asserted that the Stoic conception of man is the basis of all universalistic conceptions of political philosophy, from the Renaissance until the Age of Enlightenment. This assertion reflects the secularization of the theory of the law of nature beginning with Suarez and Althusius, who introduced the theory that contract is the basis of social and political relations. Arieli, *supra* note 3, at 13 & n.31. He continues with a description of the important contribution of Grotius. *Id.* at 13 n.31.

91. Cicero is credited with the first use of term "dignity of man" and his comments can be traced through Renaissance thinkers through Kant and the Enlightenment. Hubert Cancik, "Dignity of Man" and "Persona" in *Stoic Anthropology: Some Remarks on Cicero De Officiis I 105-07*, in *THE CONCEPT OF HUMAN DIGNITY*, *supra* note 3, at 19. In Cicero's treatise, *ON APPROPRIATE ACTIONS*, it is stated:

But it is important for any disquisition on appropriate action to bear in mind how much the nature of man has precedence over cattle and other beasts But also, if we consider what excellence and dignity is in the nature of man, we'll recognize how shameful it is to be dissolved in luxury and to live in a spoilt and weak way, and how virtuous in a moderate, continent, severe, and sober way.

Id. at 20-21 (citation omitted). Cancik continues:

The text sets forth Stoic anthropology and morals as follows: [t]he human mind . . . constitutes the fundamental difference between man and animal; it is the foundation of moral decision . . . and behaviour Nature herself has imposed this *persona* . . . ; it is common to all human beings. This is the "first *persona*;" it bestows excellence and distinction on man over all other living beings. . . . From it, the dignity of man is derived.

The second role is individuality; the third is formed by the historical situation by which we are shaped; and the fourth is made by our own free will.

Id. at 21.

92. Ritschl, *supra* note 87, at 95.

93. *Id.* at 96.

94. *Id.* at 96-97.

ferences.⁹⁵ Furthermore, a Stoic view, which finds God in everything, would be summarily rejected.⁹⁶

Each approach has supporters. One suggestion is to follow the biblical tradition of having human dignity imparted from outside, while recognizing that it is imparted to a person not by God, but by the words and actions of others.⁹⁷ This concept would place the weight on the way one treats others, rather than on the one who asserts the right on his own behalf, and is applicable to every person simply for being a human being.⁹⁸ Such a definition focuses on the actions of others, somewhat in the light of Kant.⁹⁹

The French Revolution is credited with the idea that dignity can only be justified by acknowledging it as an innate element of every human being.¹⁰⁰ A humanist view of freedom, derived from scholastic theology and the Renaissance, centers on a high view of man:

[T]he existential freedom, the potential powers of man to raise himself to the highest levels of excellence in understanding, virtue, holiness and creativity, his capacity of change and progress, raise man to the central position in the created world. . . . Seen in this light, freedom and the possibility for self-determination are the necessary attributes for man and the rights follow logically from man's status of worth, dignity and creativity.¹⁰¹

Still, it is important to remember the compelling biblical narrative deeply embedded in the Western Christian world. Such an approach finds wide acceptance:

[I]f no theological value is attributed, namely that dignity, as the core of personhood, is not attached to the image of God in Creation, the ontological origin of the concept remains as puzzling as giving any other highly-valued concept such as privacy a specific place in the hierarchy of values. This dilemma becomes apparent when other values have to be interpreted according to exact terms.¹⁰²

95. *Id.* at 97–98.

96. *Id.* at 95–98.

97. *Id.* at 98.

98. *Id.* at 95–96.

99. *Id.* at 96–97.

100. Joern Eckert, *Legal Roots of Human Dignity in German Law*, in *THE CONCEPT OF HUMAN DIGNITY*, *supra* note 3, at 41, 45. The categorical imperative was restated by Kant as: “Act in such a way as to treat humanity, whether in your own person or in that of another, always as the end, never merely as the means.” *Id.* at 46 (citation omitted).

101. Arieli, *supra* note 3, at 10.

102. Weisstub notes:

The importance of the *imago dei* is seen in the Book of Genesis, in which the death penalty is the only punishment equivalent to the crime of murder because man is made in the image of God.¹⁰³ Many Jews and Christians avoid or reject the death penalty as an infringement on the dignity of man, while others deny any connection between the modern idea of human dignity and these ancient concepts of the sanctity of blood and the *imago dei*.¹⁰⁴

For Christian and secular thinkers alike, recognition of rational thought and free will was the starting point for a knowledge of human dignity.¹⁰⁵ Darwinism tended to undermine the traditional supports for human dignity, God's image, and man's superiority to animals.¹⁰⁶ Man's self-determination is seen as a motivation to seek a "true knowledge of the created world" and a rejection of a transcendent interpretation of that world.¹⁰⁷ As history is viewed as "the movement toward human autonomy, the concept of the city of man—the *saeculum*—has been reinstated and has inherited the city of God."¹⁰⁸ The conflict between (and separation of) *sacrum* and *saeculum* (church and state) has had a profound effect on the development of freedom within Western Christendom, although prior to the modern era the *sacrum* was dominant.¹⁰⁹

It is in the nature of all constitutional decision-making structures in Western society to have attempted, since the earliest inception of legal narrative, to locate the values of a given legal order in an ultimate source, whether it was in the pronouncement of the deity or in higher order values as the embodiment of pure or ultimate reason.

Weisstub, *supra* note 77, at 267.

103. Yair Lorberbaum, *Blood and the Image of God: On the Sanctity of Life in Biblical and Early Rabbinic Law, Myth, and Ritual*, in THE CONCEPT OF HUMAN DIGNITY, *supra* note 3, at 55, 57–58. Lorberbaum's main focus, *imago dei*, is found in the Book of Genesis: "Whoever sheds the blood of man by man shall his blood be shed for in God's image did He made man." *Id.* at 57 (citing *Genesis* 9:6).

104. *See id.* at 84.

105. *See* Christian Starck, *The Religious and Philosophical Background of Human Dignity and Its Place in Modern Constitutions*, in THE CONCEPT OF HUMAN DIGNITY, *supra* note 3, at 179, 180. Starck continues and recognizes Pufendorf's belief that "human dignity provides the basis for morally anchored freedom and equality" and Kant's idea that humans are morally autonomous but subject to a moral duties. *Id.* at 181–82.

106. Daniel Statman, *Humiliation, Dignity and Self-Respect*, in THE CONCEPT OF HUMAN DIGNITY, *supra* note 3, at 209, 210.

107. Arieli, *supra* note 3, at 6.

108. *Id.* at 7 (emphasis added); *see also infra* note 339 and accompanying text (discussing St. Augustine's book).

109. Arieli, *supra* note 3, at 11–12. Arieli asserts that these "elements are the necessary conditions for the development of legal-political thought of universal significance." *Id.* at 12. He continues:

The fusion of these two ultimate conceptions of human life into one civiliza-

Jews and Muslims reject the distinction and see a unity in the law: the Torah was given to Moses for Jews and the Qur'an was given to Mohammed for Muslims.¹¹⁰

Dignity and human rights can also be approached by expanding "dignity" in such a way as to create a framework for identifying human rights violations.¹¹¹ This is done in policy-oriented jurisprudence, which aims at establishing "a world public order of human dignity."¹¹² Advocates identify eight categories of values (i.e., human aspirations) that are claimed to be "logically exhaustive, but empirically open," and then suggest that a deprivation of any such value (especially the value of respect) constitutes a human rights infringement.¹¹³ The eight values defining human dignity are the desire for respect, power, enlightenment, well-being, wealth, skill, affection, and rectitude.¹¹⁴ Each value can be expanded into a set of preferred policies relating to the world process of value fulfillment and deprivation.¹¹⁵ The supreme challenge, then, for those who wish to observe:

the world community as a whole is assisting those who are identified with rivalrous and hostile systems of faith, belief, and loyalty to perceive common values, and to cooperate in consolidating an effective public order which is designed to defend and extend common

tion, which took place with the Christianization of the Roman Empire, seems to be a prescription of instability. Yet it was indeed this permanent tension between the secular authority of the Empire and the religious authority of the Church, the co-existence of church and state, which was decisive for the shaping of the mentality of the West and the emergence of a secular culture and civilization which characterize Modern History.

Id.

110. The commonality is described as follows:

Both realms form a unity under the all-embracing authority of the Shari'a . . . The law is not man-made; it was given as command of precepts to all Israel in Judaism and to the whole world in the Dar el Islam. One law and rule of beliefs order the behavior and relations of men in society and their beliefs and faith in the Islam through the Shari'a and in Judaism through the Halacha.

Id. at 16.

111. Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM. J. INT'L L. 316, 317-18 (1999).

112. *Id.* at 334.

113. *Id.* at 318-19.

114. *Id.* at 318.

115. MYRES S. MCDUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 381-99 (1980).

values. In today's world the principal systems of political myth are secular ("liberal," "communist," etc.) rather than sacred ("Christian," "Muslim," etc.).¹¹⁶

Thus, policy-oriented jurisprudence is seen as including both secular as well as religious systems in an integrated analytical framework of values.¹¹⁷ Its goal is to maximize access by all to the processes which shape and share the things humans desire and value.¹¹⁸ One such value is rectitude, i.e., aspiring to live up to the standard of responsibility and to justify and celebrate these norms in religious, metaphysical, or ethical terms.¹¹⁹ Religion is thus integrated into this analytical and aspirational framework.¹²⁰ Interestingly, McDougal, Lasswell, and Chen's perceived challenge of communism has markedly receded, and the then-unforeseen religious challenge from Islam has emerged.¹²¹

Notwithstanding the difficulties of definition, human dignity has become central in some recent European constitutions¹²² and in the Basic Law of Israel.¹²³ As the willingness to accept absolute values waned after World-War II,¹²⁴ constitutionalism became "the receptacle from which to draw important references about

116. *Id.* at 371.

117. *See id.* at 376.

118. *See id.* at 374-75.

119. Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence*, 44 GERMAN Y.B. INT'L L. 96, 108 (2001) (citation omitted).

120. *See id.*

121. *See* ADEEB KHALID, ISLAM AFTER COMMUNISM: RELIGION AND POLITICS IN CENTRAL ASIA 1-2 (2007). In proposing this intricate system of values under which the world should congregate, the author sees a parallel with the development of international law in the seventeenth century by Grotius and others, and notes that the time of Grotius was a time when the most evocative symbols were theological. Hugo Grotius (1583-1645) was first a theologian and later a jurist. *See* HAMILTON VREELAND, JR., HUGO GROTIUS: THE FATHER OF THE MODERN SCIENCE OF INTERNATIONAL LAW 156, 164 (1917) (citation omitted). In his 1622 book, *The Truth of the Christian Religion*, Grotius asserted the superiority of Christianity over paganism, Judaism, and Islam, and that it was "as certain as the truth of reason." MASTERPIECES OF CHRISTIAN LITERATURE: IN SUMMARY FORM 432-36 (Frank N. Magill, ed. 1963) (summarizing Grotius's arguments).

122. "Human dignity shall be inviolable." Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, Federal Law Gazette [BGBl] art. 1; Starck, *supra* note 106, at 179-80.

123. Basic Law: Human Dignity and Liberty, 1992, S.H. 1391, available at http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm.

124. For example, it has been noted that the effort to place human dignity as the ultimate value in the legal order is relativism, which evolved in the 1930s from American Legal Realism and which opposes any ontological certainty about absolute values. Weisstub, *supra* note 77, at 268.

core values in a democratic liberal state.”¹²⁵ Human dignity has now become a mainstay of values, and constitutional experts “have become the modern philosophers of values for their societies.”¹²⁶ The source of societies’ moral values has shifted from religion to jurists: “In constitutional law, basic freedoms for democratic behavior are conceived and elaborated upon in our societies that have dismissed religion as the source for infusing moral content into the law. Constitutionalism has taken up the space of the clarifier of fundamental values.”¹²⁷

In American jurisprudence, privacy and non-discrimination—which go to the core of human dignity—have become the centralizing principles for human autonomy and respect, and have become the standard-bearers for such rights as the right to contraceptives, abortion, and equality of sexual preferences.¹²⁸ These principles also undermine dominant religious values. The problem with such centralizing principles is that one is never certain how they will be used or developed in any given situation to drive the value agenda in a specific society. Like human dignity, these principles lack clear definitions and obfuscate “any clear understanding about its legal ontology.”¹²⁹

Finally, expanding the concept of human dignity to encompass all rights, including individual, group, and developmental rights, may overburden the concept, thereby making it meaningless. One commentator puts it this way: “Today, the concept of human dignity has become ubiquitous to the point of cliché—a moral trump frayed by heavy use, a general principle harried by constant invocation.”¹³⁰

125. See *id.* The concept developed in American analytical jurisprudence. *Id.*

126. *Id.* at 271.

127. *Id.* Weisstub states:

It has been an essential characteristic of American legal liberalism in the twentieth century to downplay both the efficaciousness and moral integrity of taking the historical common law direction of covering cases through existing rules within the system. . . . In contrast, the American constitutional ethos has been to expand the discretionary force of judges by the mandates of higher principles, accepting the belief that it is only through such principles that the integrity of the system can be squarely lodged.

Id.

128. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 575 (2003); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

129. Weisstub, *supra* note 77, at 271–72.

130. John Witte, Jr., *Between Sanctity and Depravity: Human Dignity in Protestant Perspective*, in *IN DEFENSE OF HUMAN DIGNITY* 119, 121 (Robert P. Kraynak & Glen Tind-

B. *Rule of Law*

The rule of law is considered “*the* preeminent legitimating political ideal in the world today, without agreement upon precisely what it means.”¹³¹ If there is widespread agreement across many fault lines on any one point, it is that “the ‘rule of law’ is good for everyone.”¹³² It has been observed that “no government in the world today openly rejects the rule of law, while many government leaders pay public homage to it.”¹³³ Moreover, the rule of law is the fundamental protection afforded human rights, as stated in the preamble to the UDHR: “Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”¹³⁴

Although the UDHR does not specifically define the rule of law, its presence is recognized throughout the UDHR.¹³⁵ In fact, it is often thought of as a panacea for every social ill, with the ability to retrieve order from chaos. One commentator, Martin Krygier, asserts:

It still seems to me a “cultural achievement of universal significance,” if only because the sources of threat and confusion throughout the world are so pervasive that a life without the rule of law, virtually anywhere today, is likely to be worse than a life with it. And in most cases, very much worse. But what “it” will turn out to be in any particular case is best known, perhaps only known, after the event, and . . . as human goods go it is at times somewhat qualified.¹³⁶

Going further, Krygier highlights the important truth that, to be effective in society, the rule of law must compete with other influences in society and force decisions contrary to those demanded by those other influences.¹³⁷ In other words, law must

er eds., 2003).

131. TAMANAHA, *supra* note 30, at 4. However, expenditure of hundreds of millions of dollars and several decades has produced minimal results indicating the difficulty in establishing the rule of law in areas where it has not been established. *Id.* (citing Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95, 96, 103–04 (1998)).

132. *Id.* at 1.

133. *Id.* at 141.

134. UDHR, *supra* note 1, at pmb1.

135. *See id.*

136. Martin Krygier, *False Dichotomies, True Perplexities, and the Rule of Law*, in HUMAN RIGHTS WITH MODESTY, *supra* note 31, at 277.

137. Krygier states:

The only time the *rule* of law can occur, when law might then be said to rule,

rule even though it is not known what makes law rule. Empirical evidence suggests that rule of law is incredibly difficult to establish where it does not already exist.¹³⁸ One condition for its development is that political power be diffused and available for use by the courts.¹³⁹

The rule of law is seen as a necessary condition on which to build the future.¹⁴⁰ First, it is a universal truth in a global world, and a way to simplify complex realities in a diverse world; second, it is appealing to our need for a check on arbitrary power.¹⁴¹ The rule of law is analogized to Adam Smith's "invisible hand," bringing a natural order to situations without the intervention of human intention:

It promises order without bureaucracy; governance without government; social choice without politics. Just as the invisible hand of the market produces wealth without intentional human agency, the black box of legal reasoning resolves social and economic disputes without moral judgment or political bias. In an age when politics and social engineering are reviled as wasteful and corrupt, the rule of law presents itself as the perfect complement for a free-market based view of development, offering to fix whatever problems the market fails to fix on its own.¹⁴²

It is asserted that the rule of law is a necessary prerequisite to support legal institutions that promote economic growth, although there is little empirical evidence that supports such an assertion.¹⁴³ Nevertheless, the rule of law is brought forth as a panacea for almost any social problem or method of bringing stability out of chaos.¹⁴⁴

But the rule of law has its fair share of critics, some of whom claim that its overuse can tend to dilute its usefulness and impact. For example, critics recognized that, as governments ex-

is when the law counts significantly, is distinct and in competition with sources of influence, in the different realms of thoughts and behavior, the normative economy, and significant sectors of a society. But we do not know what makes law count.

Id. at 266.

138. *See id.* at 265.

139. Frank K. Upham, *The Illusory Promise of the Rule of Law*, in HUMAN RIGHTS WITH MODESTY, *supra* note 31, at 282, 284–85.

140. *See id.* at 279–80.

141. *Id.* at 280.

142. *Id.*

143. *Id.* at 279.

144. *See id.* at 312–13.

panded into social welfare states, judges were asked to apply open-ended standards like fairness or good faith and to make value choices about how best to achieve legislatively established policy goals, all of which tended to undermine traditional rule of law criteria.¹⁴⁵

In a broad account of the ingredients of the rule of law, it is suggested that the rule of law should focus on three concepts.¹⁴⁶ First, government is limited by law.¹⁴⁷ Second, there is formal legality which requires public, prospective rules to have the qualities of generality, equality of application, and certainty.¹⁴⁸ Third, the rule of law requires some balance and self-restraint in application so that the law does not descend into rule by judges.¹⁴⁹ There are signs that these concepts are being accepted around the world, providing hope that the rule of law will have an influence in the future.¹⁵⁰

C. *Universality*

The human rights regime is summed up as follows: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."¹⁵¹ These remarkable words purportedly apply to every person, regardless of any external circumstance, and transcend every national border, race, economic status, or any other category, natural or created. In this regard, human rights reflect a unique presumption of Western law that its basic precepts and assumptions need to take on a universal

145. TAMANAHA, *supra* note 30, at 82–83.

146. *Id.* at 114

147. *Id.* at 114–19.

148. *Id.* at 119–22.

149. *Id.* at 122–26.

150. *Id.* at 1, 3, 141.

151. UDHR, *supra* note 1, at art. 1.

character.¹⁵² That is, they are assumed to apply everywhere and to all people:

In brief, the current surge of concern for human rights represents the potential development of a universal "doctrine" about humanity in community, implying a social ethic. Contained in this doctrine is the implicit assertion that certain principles are true and valid for all peoples, in all societies, under all conditions of economic, political, ethnic, and cultural life. Further, human rights implies that these principles are somehow present in the very fact of our common humanity, properly understood.¹⁵³

Claiming universal rights and defining them has proven more difficult than first imagined.¹⁵⁴ Events in the twentieth century worked to undermine the certainty of any consensus on which values should be promoted to shape political and social relations.¹⁵⁵ The result has left open the question of whether human rights have a transcultural content.¹⁵⁶ One commentator notes a shift from religious truth to freedom as an ontological basis for giving human rights legitimacy:

Enunciating rights without explaining why people have them was also a philosophical response to two confounding chapters in history—the revelation that the Holocaust had been perpetrated under the name of the rule of law and the experience of Stalinism as a stifling of individual agency together galvanized philosophy to subvert

152. Man's "inherent dignity" is placed as the basis for recognizing that "all human beings are born free and equal in dignity and rights." *Id.* The Theistic world view is clearly seen as a fusion between Jewish-Christian and classical and humanists views of man. Arieli, *supra* note 3, at 9. This fusion resulted in the West conceiving its basic assumptions and norms in universal terms and basing its "first principles and basic values on secular norms and principles." *Id.* at 7, 11. This is unique in the West. *Id.* at 11. It is asserted that "[a]nthropological studies confirm that in all cultures law shares with religion four elements: ritual, tradition, authority, and universality." HAROLD J. BERMAN, *THE INTERACTION OF LAW AND RELIGION* 25 (1974) (citing HUSTON SMITH, *THE RELIGIONS OF MAN* 90–91 (1958)).

153. MAX L. STACKHOUSE, *CREEDS, SOCIETY, AND HUMAN RIGHTS: A STUDY IN THREE CULTURES* 1 (1984) [hereinafter *CREEDS*]. Michael Perry asserts the proposition in the form of a question:

Why—in virtue of what [source]—is it the case both that every human being has inherent dignity and that should we live our lives accordingly, that is, in a way that respects this dignity? . . . To affirm the morality of human rights is to affirm the twofold claim that every human being has inherent dignity and is inviolable.

TOWARD A THEORY, *supra* note 40, at 5–6.

154. See generally *CREEDS*, *supra* note 153, at 10–14.

155. See *id.*

156. See *id.* at 13–14.

the religious concept of truth and to replace it with the less metaphysical concept of freedom.¹⁵⁷

The claim of universality is more hotly challenged than claims about human dignity or the rule of law.¹⁵⁸ The principal objection, other than the fact that all attempts to empirically demonstrate universality have failed,¹⁵⁹ is that human rights are merely a reenactment of nineteenth century cultural imperialism with a secularized Western, liberal, and individualist morality that does not transcend cultural difference.¹⁶⁰ Human rights are simply the product of the Western Enlightenment and are being imposed on the world by Western capitalists seeking economic advantages in non-Western countries.¹⁶¹

Opposing the claim of Western dominance is the suggestion that the great Western powers were initially reluctant to embrace the human rights regime until pressed to do so by smaller nations, religious groups, and non-governmental organizations.¹⁶² Likewise, it is suggested that human rights standards reflect the combined input of the entire world, particularly a group of non-Western philosophers who found that several of the human rights concepts were so sufficiently widespread to be considered "implicit in man's nature as a member of society."¹⁶³ This opposition does not dispel the notion of Western dominance.

157. Stacy, *supra* note 36, at 162.

158. See generally HUMAN RIGHTS WITH MODESTY, *supra* note 31.

159. Human rights universality has been rejected on the basis of cultural relativism, although many attempts have been made to defeat the cultural relativists with empirical evidence. Additional efforts have been made to find a universal "mother notion," such as "human dignity," and derive specific human rights from that concept. This effort is impeded by the failure to produce an empirically verifiable "mother notion" and even by the failure of cultures to interpret the concept with respect to the specific human rights. Eva Brems, *Reconciling Universality and Diversity in International Human Rights Law*, in HUMAN RIGHTS WITH MODESTY, *supra* note 31, at 213-16.

160. Stacy, *supra* note 36, at 162.

161. It is virtually undeniable that international human rights reflect eighteenth-century Enlightenment values incorporated in the French Declaration of the Rights of Man and the American Bill of Rights. See Brems, *supra* note 159, at 224.

162. See Wiktor Osiatynski, *On the Universality of the Universal Declaration of Human Rights*, in HUMAN RIGHTS WITH MODESTY, *supra* note 31, at 34-41. Osiatynski notes "that during the drafting period only Saudi Arabia made a claim that the freedom to marry and a right to change one's religion were purely Western, rather than universal." *Id.* at 40.

163. *Id.* at 40 (citing MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 226 (2001) (internal quotation marks omitted)). The UNESCO inquiry is found in HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS (United Nations Educational, Scientific, and Cultural Org., ed., 1949).

There is, of course, some basis in fact for the claim of Western dominance, and some commentators take the claim further.¹⁶⁴ They assert that the core principle of human rights is the concept of man created in the image of God,¹⁶⁵ and that the Enlightenment merely secularized the concept, and obscuring its true foundation.¹⁶⁶

Some commentators see the UDHR as combining two traditions.¹⁶⁷ One, the Lockean tradition of rights inherent in the individual, focuses on protecting individual autonomy and limiting government.¹⁶⁸ It is reflected in UDHR Articles 16.3 (recognizing the family as the fundamental group unit of society)¹⁶⁹ and 26.3 (recognizing the right of parents to choose their child's education).¹⁷⁰ The other tradition views rights as given by an enlightened state.¹⁷¹ Referred to as a "dignitarian" tradition, it focuses on providing basic human needs and is reflected in concepts such as the "free development of personality" seen in UDHR Articles

164. AMESBURY & NEWLANDS, *supra* note 32, at 29.

165. Shlomo Avineri, *The Paradox of Religion and the Universality of Human Rights*, in HUMAN RIGHTS WITH MODESTY, *supra* note 31, at 317–18. Avineri points out that human rights developed from this tradition, and not Greco-Roman republican classical tradition, since that tradition developed no concept of rights against the state. *Id.* at 318. One wonders at Avineri's statement, "[W]hile modern concepts of citizenship, elections, and political consent have their origins in the traditions of the Greek *polis* and the Roman republic, this is not the case regarding the question of rights." *Id.* at 318.

166. *See id.* at 318. Avineri comments,

Modern historiography . . . is so steeped in the Enlightenment tradition and the idealization of Greco-Roman republicanism that both sometimes find it difficult to admit that something as central as the concept of rights against the state, and the universality of these rights, does not stem from classical republicanism but from the Judeo-Christian tradition."

Id. at 319. Another commentator observed the irony that the drafters of the UDHR, responding to the barbarisms of the twentieth century, turned to concepts of human rights and democracy developed in the Enlightenment for guidance, but it is seldom noted that such concepts themselves were "rooted in previously established theological assumptions that derive from antiquity." Max L. Stackhouse, *Religion and Human Rights: A Theological Apologetic*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES 485 (John Witte, Jr. & Johann D. Van der Vyver eds., 1996).

167. *See, e.g.*, Osiatynski, *supra* note 162, at 41.

168. *Id.*

169. UDHR, *supra* note 1, at art. 16.3.

170. *Id.* at art. 26.3.

171. *See* Osiatynski, *supra* note 162, at 41. The author notes, "Horst Dippel in his study of the influence of the American Declaration of Independence in Germany has demonstrated that the concept of the inalienable rights preceding government was simply incomprehensible for the majority of educated and enlightened Europeans in the late eighteenth century." *Id.* at n.24 (citing HORST DIPPEL, GERMANY AND THE AMERICAN REVOLUTION 1770–1800, at 163–67 (Bernhard A. Uhlendorfftrans, 1977)).

22 (rights to social security), 26.2 (rights to education), and 29.1 (duties to community).¹⁷²

Non-Western themes appear in the human rights regime. The Third World preference for developmental rights, the Asian and African emphasis on group rights over individual rights, and the justification of repressive governments to achieve political stability are referred to as the "Southernization" of human rights.¹⁷³ Also, indigenous peoples have secured recognition in the positive human rights regime in various treaties and the 2007 U.N. Declaration on the Rights of Indigenous Peoples.¹⁷⁴

Third World nations assert that claims of universality are inconsistent with a true respect for diversity.¹⁷⁵ The West is seen as exporting markets, culture, and human rights that promise freedom and prosperity but, in reality, these are deeply exploitative systems, claiming universality in the name of economic and cultural globalization.¹⁷⁶ Liberal democracy is presented as the savior and redeemer of cultures that are thousands of years old.¹⁷⁷ Likewise, claims for religious freedom are seen as an attempt by Christianity to protect missionary efforts to proselytize the world and to marginalize non-Western spiritual traditions by preventing countries, such as China or India, from protecting their spiritual heritages.¹⁷⁸

The Third World wants "the construction of a cross-culturally legitimate and genuinely universal creed of human dignity" that

172. UDHR, *supra* note 1, at arts. 22, 26.2, 29.1; Osiatynski, *supra* note 164, at 42.

173. See Brems, *supra* note 159, at 216, 218–21.

174. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/G/295 (Sept. 13, 2007).

175. Makau Mutua, *The Complexity of Universalism in Human Rights*, in HUMAN RIGHTS WITH MODESTY, *supra* note 31, at 56.

176. See *id.* at 61.

177. Mutua states:

International human rights fall within the historical continuum of the European colonial project in which whites pose as the saviors of a benighted and savage non-European world. The white human rights zealot joins the unbroken chain that connects her to the colonial administrator, the Bible-wielding missionary, and the merchant of free enterprise. Salvation in the modern world is presented as only possible through the holy trinity of human rights, political democracy, and free markets.

Thus human rights reject the cross-fertilization of cultures and instead seek the transformation of non-Western cultures by Western cultures.

Id.

178. *Id.* at 62.

can reformulate human rights to reflect local cultures.¹⁷⁹ The complexity of these claims is such that some commentators believe the human rights regime incapable of addressing the crisis created by economic and cultural globalization.¹⁸⁰

Compounding the problem of universality is that, while human rights are criticized as Western, the Western intellectual foundations for human rights, such as “enlightened rationalism, religion-inspired dignity, and secular or religious natural law,” have been eroded, and even reason itself has served as disguised oppression, as demonstrated by the Holocaust.¹⁸¹ Without metaphysical foundations, “universalism (and foundations in general) become problematic.”¹⁸² Further, after undermining the metaphysical foundations, the modernists’ real-world (“materialistic”) foundations reject all non-material foundations (“such as normative values”).¹⁸³ Additionally, the modernists’ rational justification, which is based on logic, formalism, and direct sense-experience, is itself seen as an inadequate basis for human rights.¹⁸⁴

While the philosophical foundation of a shared human identity seems unsustainable in the face of cultural difference, there are numerous attempts to provide a sufficient justification for the human rights regime.¹⁸⁵ Some commentators see hope for universality in the widespread rhetoric of human rights, the political search for pragmatic solutions, and the use of ethical discourse through procedures to produce legal and factual equality.¹⁸⁶ They

179. *Id.* at 63.

180. Mutua states:

Ruthless, hedonistic, and relentlessly individualistic and deeply exploitative beliefs and systems have in the last decade been given universal legitimacy by economic and cultural globalization. The current official human rights corpus does not have the analytical or normative tools—or even the desire and gumption—to unpack the complex oppressions which globalization now wreaks on individuals and communities. Constructed primarily as the moral guardian of global capitalism and liberal internationalism, the human rights corpus is simply unable to confront structurally and in a meaningful way the deep-seated imbalances of power and privilege which bedevil our world.

Id. at 63.

181. Andrés Sajó, *Introduction to HUMAN RIGHTS WITH MODESTY*, *supra* note 31, at 8.

182. *Id.* at 10.

183. Richard A. Shweder, *Moral Realism Without the Ethnocentrism: Is It Just a List of Empty Truisms?*, in *HUMAN RIGHTS WITH MODESTY*, *supra* note 31, at 65, 67.

184. *Id.*

185. See Stacy, *supra* note 36, at 170–82.

186. See *id.*

see a shared feature in the desire to attribute authentic agency to a claimant and to respond, as much as possible, to "the claimant's subjectively experienced human rights transgression."¹⁸⁷ They propose that "a fuller sense of the world is found in the expanse of local narratives rather than in a single grand narrative," in the ethic of alterity that requires committed listening to understand a different culture, and in a procedure for the operation of this moral obligation and allowance of "human rights judgments to evolve in step with political sensibilities."¹⁸⁸ Others see human rights as the result of a long term historical/theological development.¹⁸⁹

Max L. Stackhouse, a Christian ethicist at Princeton Theological Seminary, sees the human rights regime as uniquely Western and undeniably religious.¹⁹⁰ He sees it as an "attempt to reclaim a firm foundation for social ethics" that is widely accepted in the West because it reflects common roots that go back thousands of years and are not always acknowledged.¹⁹¹ It is the result of a historic development of politics and theology that is a synthesis of early Christian thought with universalistic categories of Plato, Aristotle, and the Stoics that produced a public theology in the thought of St. Augustine in the fourth century.¹⁹² After the fall of Rome, it was the church that carried on the tradition:

[T]he Church remained, preserving the universalistic values of both Greco-Roman and Hebraic belief, without which modern discussion of human rights would have been impossible. . . . More importantly, it preserved a distinction between family, state, and church, sustained by an organized constituency that manifests a continuing universal concern for all members of humanity, guided by a powerful sense of duty to a universal moral law.¹⁹³

During the Middle Ages, challenges from Islam, the monastic movement, and the free cities movement tested basic values and the church's position of primacy over civil authorities.¹⁹⁴ The con-

187. *Id.* at 179.

188. *Id.* at 180.

189. CREEDS, *supra* note 153, at 6-7.

190. *Id.* at 6-9, 28.

191. *Id.* at 28.

192. *Id.* at 38-40.

193. *Id.* at 39 & n.14 (citing MAX STACKHOUSE, ETHICS AND THE URBAN ETHOS 108-41 (1972)).

194. *Id.* at 40-44.

flict between popes and emperors,¹⁹⁵ epitomized by the Investiture Controversy and the Conciliar Movement, kept alive the ideal of "a universalistic community which could be a witness for justice and righteousness without being crushed," and the concept of a right of resistance to tyrannical authority developed.¹⁹⁶ It is claimed that the issue discussed at the Council of Constance (1415) was

... an issue which haunts all discussion of human rights: are claims about universals fundamentally to be decided by an appeal to an objective order of things, which presumably only some can know with clarity, or are they to be derived from a consensus formed in dialogue? The former stresses the question of truth, whether all agree or not; the later stresses procedures whereby people can come to agreement about the truth. One asks "What is?"; the other asks, "Who says?"¹⁹⁷

The failure of the Conciliar Movement to establish that universal moral order eclipsed the ideal of a universal moral order until the advent of the UDHR.¹⁹⁸ The key to this advent, according to Stackhouse, was the development in the West of a split between secular and ecclesiastical authority.¹⁹⁹ This split opened a social space (in which public dialogue could occur and intermediate private agencies could develop) that criticized authority with impunity.²⁰⁰ Such agencies acted without official governmental authority, but freely asserted government's responsibility to conform to a common ethic in dealing with their own citizens, as well as with foreign governments.²⁰¹ The roots also reflect the biblical concept of the covenantal relationship, constituting responsibility to God and the Old Testament tradition that saw prophets in Israel rise up to challenge the people and government to live by a higher standard to fulfill their covenantal obligation.²⁰²

195. These conflicts were not seen as conflicts between church and state, but as conflicts between officers of the same society. JOHN NEVILLE FIGGIS, *POLITICAL THOUGHT FROM GERSON TO GROTIUS: 1414-1625* 57 (2d ed. 1916).

196. CREEDS, *supra* note 153, at 41-42.

197. *Id.* at 46 (citing OTTO GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* vii-xlv (Frederic William Maitland trans., 1960)).

198. *See id.* at 26-27.

199. *See id.* at 27-28.

200. *See id.* at 28-30.

201. *See id.*

202. *See id.* at 33.

It was during the Reformation period that "Free Church Calvinists" developed covenantal ideas of community, which included agreements between God and each member of the community, with responsibility to establish a moral community with institutions of accountability.²⁰³ The Calvinist tradition was critiqued by Thomas Hobbes, John Locke, and John Stuart Mill.²⁰⁴ Hobbes argued for human rights constructed from human will that freed man from theological obligations.²⁰⁵ Locke rebelled against the religious strife of Puritan ("Cromwellian") England and sought a development of natural law from reason and experience with the recognition of the worth and dignity of all people.²⁰⁶ Mill argued that laws should be judged by their ability "to produce pleasure or inhibit pain."²⁰⁷ The synthesis of these ideas moved Liberals and Calvinists to value "property, one's body, family, work, the university, and religious expression" and produced the cradle in which human rights could be discussed in the twentieth century.²⁰⁸

Building on his description of the religious impact on human rights development, Stackhouse claims a special role for all religions to play in the dialogue on human rights, with each bringing its unique contribution.²⁰⁹ To this end, Stackhouse calls on all religions, and Christianity in particular, to develop a "public theology" that can support a universal ethic.²¹⁰

Non-religious attempts to achieve widespread consensus in diverse societies have also been proposed. These include theories such as "multiplicity of justifications," "overlapping consensus," and "incompletely theorized agreements," which will now be discussed.

203. WILLIAM H. BRACKNEY, 2 HUMAN RIGHTS AND THE WORLD'S RELIGIONS: THE CHRISTIAN TRADITION 9-10 (2005).

204. *Id.* at 10.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 10-11.

209. See generally Max L. STACKHOUSE, 4 GOD AND GLOBALIZATION: GLOBALIZATION AND GRACE (2007).

210. *Id.* at 77.

D. *Multiplicity of Justifications*

Another approach to the question of universality is developed by Richard Amesbury and George M. Newlands, who propose a strategy for reconciling universality (at the level of norms) with particularity (at the level of justificatory contexts), using the term “situated universalism.”²¹¹ They recognize that universality can be defined in three ways:²¹² first, universal can mean that human rights purport to apply to every person; second, human rights could be said to apply at all times and in all places; or third, it could be said that they are universal in that they find sufficiently widespread acceptance.²¹³

Amesbury and Newlands describe three concepts common in moral theory.²¹⁴ First, “*moral objectivism*,” in which moral truths hold regardless of “whether or not they are endorsed by oneself or one’s community.”²¹⁵ Second, “*moral relativism*,” in which what is right or wrong is determined by one’s culture and will vary from culture to culture.²¹⁶ Third, “*moral constructivism*,” which seeks a middle ground, sees morality as a human construct but also believes moral norms can be universal—but only if they are universally accepted by all human beings.²¹⁷

Amesbury and Newlands assert that human rights must be justified based on the objectivist model because one’s human rights cannot “depend on popular consensus and cannot be revoked by popular demand.”²¹⁸ They continue by advancing a middle ground, asserting that what is necessary to support a claim of universality is a society that supports “a moral tradition from within which human beings are conceived of in the relevant way—that is, as possessing dignity qua human beings, rather than simply by virtue of their participation in a given community.”²¹⁹ Starting with a concept of universal human dignity, the justification for human rights may vary in different communities,

211. AMESBURY & NEWLANDS, *supra* note 32, at 67.

212. *Id.* at 64.

213. *Id.* at 64–65.

214. *Id.* at 62–63.

215. *Id.* at 62.

216. *Id.* at 62–63.

217. *Id.* at 63.

218. *Id.* at 72.

219. *Id.* at 71.

and the hope is that “members of varying traditions might be able rationally to affirm one another’s mutual dignity and basic rights as persons.”²²⁰ While this plurality of justifications may produce varying ways in which human dignity should be protected, it is likely that certain rights—prohibition of torture or slavery, for example—may be protected by wide agreement.²²¹ Further, at some basic level, human rights are universal in that “no human being wants to be arbitrarily deprived of life, to be tortured, to be exploited or despised.”²²² The challenge may simply be to find the liberal concepts in every religion and culture.

Amesbury and Newlands’s views may produce a minimalist view of human rights. However, if a multiplicity of justifications is possible, then religious justifications can be effective even though they are not universally accepted. Indeed, as they point out, even advocates of human rights “do not necessarily articulate the grounds of their conviction in ‘specific agreed-upon terms.’”²²³

E. *Overlapping Consensus*

Similar minimalist views come from Rawls’s theory of overlapping consensus and Sunstein’s theory of incompletely theorized agreements.²²⁴ Rawls, building on his landmark book, *A Theory of Justice*, with its concept of “justice as fairness,” asks the question, “[H]ow is it possible that there can be a stable and just society whose free and equal citizens are deeply divided by conflicting and even incommensurable religious, philosophical, and moral doctrines?”²²⁵

In *Theory of Justice*, Rawls uses the social contract theory to oppose utilitarianism, rejecting the idea that people seeing themselves as equals “would agree to a principle which may require lesser life prospects for some simply for the sake of a greater sum

220. *Id.* at 76.

221. *Id.*

222. Guy Haarscher, *Can Human Rights Be “Contextualized”?*, in HUMAN RIGHTS WITH MODESTY, *supra* note 31, at 120.

223. AMESBURY & NEWLANDS, *supra* note 32, at 75.

224. See JOHN RAWLS, POLITICAL LIBERALISM 133–72 (2005) [hereinafter POLITICAL LIBERALISM]. See generally Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

225. POLITICAL LIBERALISM, *supra* note 224, at 133.

of advantages enjoyed by others.”²²⁶ To develop his “justice as fairness” theory, Rawls relies on a hypothetical starting point at which society enters into a social contract.²²⁷ He posits a group of rational, unenvious, and disinterested persons that are meeting to decide the basic structure upon which the society will allocate basic rights and duties.²²⁸ Thus, in deciding the principles of social justice, there is an element of rational choice by the participants. The participants, in this hypothetical past, operate under a “veil of ignorance,” not knowing the place they might occupy in the society that will be governed under the principles chosen.²²⁹

Justice as fairness posits two principles, plus a corollary, that are arrived at through procedural justice. The principles are, first, that each person will have maximum feasible liberty, and second, that social and economic inequalities are just only if they benefit the least advantaged members of society.²³⁰ The first principle is aimed at primary social goods, such as the basic rights of freedom to participate in the political process, freedom of speech and assembly, liberty of conscience and freedom of thought, the right to property, freedom to choose one’s occupation, and the freedom from arrest.²³¹ The second principle, the “difference principle,” distributes the primary social goods of wealth, income, power, and authority so as to work to the advantage of the least privileged in society and to attach them to offices and positions open to all under conditions of fair equality of opportunity.²³²

226. JOHN RAWLS, *A THEORY OF JUSTICE* 12-15 (1971) [hereinafter *THEORY OF JUSTICE*].

227. *Id.* at 12.

228. *See id.* at 11.

229. *Id.* at 12. Rawls asserts:

[N]o one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. . . . The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. . . . The original position is . . . appropriate . . . and thus the fundamental agreements reached in it are fair.

Id.

230. HOWARD DAVIES & DAVID HOLDCROFT, *JURISPRUDENCE: TEXTS AND COMMENTARY* 279 (1991).

231. *Id.*

232. *Id.* Rawls develops five constraints on the principles: They must be general and able to serve a well ordered society in perpetuity; they must be universal in that they apply to everyone by virtue of their being moral persons; they must be publishable; they must be adjudicative; and they must be final. *Id.* at 278-79. Rawls suggests that:

The main idea is that a person’s good is determined by what is for him the

Rawls adds self-respect to the list of primary social goods, arguing that it is intuitively included, because without it nothing would seem worth doing.²³³ Rawls's inclusion of self-respect provides a basis to further his analysis, just as human dignity supports the human rights regime without any specific definition.

Rawls describes these primary social goods as "thin" because they represent the minimal definition of social goods that all men acting behind the veil of ignorance would want.²³⁴ Rawls's primary assumption is that people in the original position would consider the worst-off positions in each condition presented and, supposing that each person would want more rather than less of the goods in question, rank the alternatives to maximize primary goods in the minimal positions, for example, "maximizing."²³⁵

On balance, however, Rawls's principles of justice as fairness rest first on the reasoning process of the original position and, second, on strongly held intuitions about justice.²³⁶ In other words, "[w]hat Rawls has done is to show that the conditions of the original position will lead to two principles of justice that we already intuitively accept."²³⁷ Justice as fairness leaves an important question inadequately answered. That question is how a society based on justice as fairness could be a stable society. The

most rational long-term plan of life given reasonably favorable circumstances. A man is happy when he is more or less successfully in the way of carrying out his plan. To put it briefly, the good is the satisfaction of rational desire. . . . Given the alternatives available, a rational plan is one which cannot be improved upon; there is no other plan which, taking everything into account, would be preferable.

THEORY OF JUSTICE, *supra* note 226, at 92-93.

233. *Id.* at 178.

234. *See id.* at 376-77. By self-respect, Rawls's means having a sense of the value of one's plan in life and having confidence in one's ability to carry it out. *Id.* at 178. He assumes three types of facts about human nature: There are broad features of human desires and need; plans must fit the requirements of human capacities and abilities; and the Aristotelian Principle that, all things being equal, humans prefer more complex activities to less complex activities. Rawls believes these facts about human needs and abilities are so clear he that common sense knowledge suffices for purposes of his analysis. *Id.* at 425-26.

235. *See id.* at 152-53, 396-97.

236. DAVIES & HOLDCROFT, *supra* note 230, at 291.

237. *Id.* This is Rawls's concept of "reflective equilibrium" which, along with his belief that the principles would be arrived at freely under the original position, and his concept of "philosophical reflection" in which Kant's autonomous agent unhampered by particular desires, reflects on the situation and applies the principles to everyone would arrive at these two principles. Liberty and freedom in modern thought are external matters and the internal world is left to itself as though all things internal are ordered by the external situation.

answer is Rawls's concept of overlapping consensus which he develops in *Political Liberalism*.²³⁸

To understand overlapping consensus, Rawls points to the Reformation, in which Catholics and Protestants, both of whom had a concept of the "good," rested their views of God and society on either the Church or the Bible—their views did not admit to compromise.²³⁹ Opposing "comprehensive doctrines" can support a constitutional democratic regime, and can occur only when the parties are forced by circumstances, exhaustion, or by equal liberty of conscience and freedom of thought.²⁴⁰ The former leads to a *modus vivendi* (agree to disagree), while the latter may lead to the more hopeful possibilities of a constitution and an eventual overlapping consensus.²⁴¹ The overlapping consensus answers the question, "[W]hether in the circumstances of a plurality of reasonable doctrines, both religious and nonreligious, liberal and nonliberal, a well-ordered and stable democratic government is possible, and indeed even how it is to be conceived as coherent."²⁴²

Rawls's *Theory of Justice* sought to reignite interest on a higher plane of the traditional social contract doctrine as part of a moral philosophy without distinguishing between moral and political philosophy.²⁴³ But moral and political distinctions are important because without them, justice as fairness suffers a serious internal problem of suggesting that it is accepted by society as part of a "comprehensive philosophical doctrine."²⁴⁴ This being an unrealistic assumption, social stability is undermined in a society built on a plurality of comprehensive and incompatible, yet reasonable, religious, philosophical, and moral doctrines. However, Rawls came to realize that in a world filled with incompatible comprehensive doctrines, justice as fairness could not be included as one such doctrine.²⁴⁵ Political liberalism supposes that reasonable

238. POLITICAL LIBERALISM, *supra* note 224, at xxix.

239. *Id.* at xxxviii–xxxix.

240. *Id.* at xxix.

241. *Id.*

242. *Id.*

243. *Id.* at xv.

244. *Id.* at xv–xvi.

245. *See id.* at xvi. Unreasonable and irrational comprehensive doctrines are contained so they do not undermine the unity and justice of society. Rawls further asserts:

A modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines. No one of these

comprehensive doctrines would not reject the essentials of a democratic regime, and permits Rawls to move from a simple to a "reasonable" pluralism and to an idea of a political conception of justice and of overlapping consensus and public reason, rather than a comprehensive doctrine.²⁴⁶

While the so-called "Enlightenment project" sought a comprehensive philosophical secular doctrine to replace religious authority based on the foundering Christian faith, Rawls does not see the need for comprehensive doctrines.²⁴⁷ Rawls's problem was to work out a concept of political justice for a constitutional democratic regime that the plurality of reasonable doctrines that characterize a free democratic regime would endorse.²⁴⁸ The result is that the citizen, in ideal overlapping conceptions, affirms both a comprehensive doctrine as well as the local political conception that is somehow related and is considered "reasonable," rather than "true," or practical rather than theoretical.²⁴⁹

Referring again to the Reformation, Rawls notes that moral and political philosophy began when religions were pitted against one another in the Reformation.²⁵⁰ This plurality of Christian religions eventually led to a working-out of tolerance and religious

doctrines is affirmed by citizens generally. . . . Political liberalism assumes that, for political purposes, a plurality of reasonable yet incompatible comprehensive doctrines is the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime. Political liberalism also supposes that a reasonable comprehensive doctrine does not reject the essentials of a democratic regime.

Id.

246. Rawls states the problem another way:

How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines? Put another way: How is it possible that deeply opposed though reasonable comprehensive doctrines may live together and all affirm the political conception of a constitutional regime? What is the structure and content of a political conception that can gain the support of such an overlapping consensus?

Id. at xviii.

247. *Id.*

248. *Id.*

249. *Id.* at xix–xx. Conceptions of the good and of persons as free and equal must be appropriately political and distinct from the comprehensive views. Thus the search is for these reasonable public justifications on fundamental political questions. The political conception of justice is referred to as "reasonable" rather than "true" so that a limited concept is proposed and the proposal is one of practical reason rather than theoretical reason. *Id.* at xx.

250. *See id.* at xxii.

liberty, as well as a limiting of the power of the newly developing central state.²⁵¹ Over time, a process began which answered the question of how it would be possible to maintain “a stable and just society of free and equal citizens profoundly divided by reasonable religious, philosophical, and moral doctrines.”²⁵² The problem is one of politics and not of the definition of good, since that definition comes within each of the reasonable pluralistic religions.²⁵³

By the eighteenth century, writers were seeking a basis for moral knowledge independent of ecclesiastical authority and available to the ordinary, reasonable, and conscientious person.²⁵⁴ On the nature of moral knowledge, Kant and Hume found it in some way in human nature.²⁵⁵ Rawls looks at Kant and Hume as expressing a comprehensive liberalism and not the political liberalism that he propounds—although he may come to the same conclusion about human nature.²⁵⁶ Political liberalism’s view of justice deals with basic rights such as religious and political liberties, including freedom of movement, fair and equal opportunity, the right of personal property, the protections of the rule of law, and the justice of social and economic inequalities in a society in which citizens are viewed as free and equal.²⁵⁷ While family and gender issues are not addressed, Rawls feels that they can be explained within the framework and principles of justice as fairness.²⁵⁸

Rawls has merely adjusted his concept of justice as fairness for the fact of *reasonable pluralism*, meaning a plurality of reasonable comprehensive religious, philosophical, and moral doctrines,

251. *See id.* at xxiv.

252. *Id.* at xxv.

253. *See id.*

254. *Id.* at xxvi.

255. *Id.* at xxvii. Rawls asserts that Hume and Kant in their own way suggested:

[T]he moral order arises in some way from human nature itself, as reason or as feeling, and from the conditions of our life in society. They also believe that the knowledge or awareness of how we are to act is directly accessible to every person who is normally reasonable and conscientious. And finally, they believe that we are so constituted that we have in our nature sufficient motives to lead us to act as we ought without the need of external sanctions, at least in the form of rewards and punishments imposed by God or the state.

Id.

256. *See id.*

257. *Id.* at xxviii.

258. *See id.* at xxix.

which is the "normal condition" of a democratic culture given its free institutions.²⁵⁹ Justice as fairness is not a comprehensive doctrine but a social contract that is the best approximation of our judgments about justice, and thus gives the most appropriate moral basis for a democratic society.²⁶⁰ The reasonable conception must accept the political solution as part of a reasonable overlapping consensus.²⁶¹ Because the "religious good of salvation" cannot be the overriding purpose of a democratic society of reasonable pluralism, concepts of liberty and equality can provide the means for citizens to carry out and effectively use their freedoms for their own purposes.²⁶² Political liberalism argues that society is stable because:

the laws of nature and human psychology would lead citizens who grow up as members of that well-ordered society to acquire a sense of justice sufficiently strong to uphold their political and social institutions over generations. . . . As always, stability . . . for the right reasons . . . implies that the reasons from which citizens act include those given by the account of justice they affirm . . . which characterizes their effective sense of justice.²⁶³

Justice is fairness reformulated as a free-standing political conception of justice, not derived from any comprehensive doctrine, in which citizens are reasonable and are willing to offer others free and equal treatment, even at their own expense. This is the criterion of reciprocity under which "our exercise of political power is proper only when we sincerely believe that the reasons we offer for our political action may reasonably be accepted by other citizens as a justification of those actions."²⁶⁴ Moral autonomy, for example, may be part of a comprehensive doctrine, but cannot be part of a political doctrine because it is rejected by many religious comprehensive doctrines.²⁶⁵

A "reasonable overlapping consensus" comes about by formulating a freestanding political conception having its own intrinsic political ideal as expressed by the criterion of reciprocity.²⁶⁶ In this way, reasonable comprehensive doctrines can endorse political

259. *Id.* at xxxvi n.3.

260. *See id.* at xxxvi-xxxvii.

261. *Id.* at xxxvii-xxviii.

262. *Id.* at xxxix.

263. *Id.* at xl.

264. *Id.* at xliv.

265. *See id.* at xliii.

266. *See id.* at xlv.

conceptions for the right reasons and become part of a reasonable overlapping consensus. The political conception will define certain basic rights, prioritize them, and provide the means to effectively use them by the citizens.²⁶⁷ The idea of public reason is that

citizens are to conduct their public political discussions of constitutional essentials and matters of basic justice within the framework of what each sincerely regards as a reasonable political conception of justice, a conception that expresses political values that others as free and equal also might reasonably be expected reasonably to endorse.²⁶⁸

Citizens are to follow the principle of reciprocity in applying public reasons to questions of constitutional essentials and matters of basic justice.²⁶⁹ On questions in which there is a standoff, the outcome will be determined by a vote; in exercising the vote, the outcome will be seen as reasonable provided "all citizens of a reasonably just constitutional regime sincerely vote in accordance with the idea of public reason."²⁷⁰ The losing party will continue to assert its non-public reasons, but will do so within the context of acceptance of the reasonably determined public result.

The criterion for stability with liberty includes institutions such as the following: public financing of elections; fair equality of opportunity in education and training; a decent distribution of income and wealth; a societal employer of last resort; and basic healthcare for all citizens.²⁷¹ Stability also requires that "people who grow up under just institutions (as the political conception defines them) acquire a normally sufficient sense of justice so that they generally comply with those institutions."²⁷²

267. *Id.* at xlvii.

268. *Id.* at xlviii (footnotes omitted). Rawls takes a wide view of public reason, suggesting that "reasonable [comprehensive] doctrines may be introduced in public reason at any time, provided that in due course public reasons, given by a reasonable political conception, are presented sufficient to support whatever the comprehensive doctrines are introduced to support." *Id.* at xlix–l. Rawls states:

The criterion of reciprocity is normally violated whenever basic liberties are denied. For what reasons can both satisfy the criterion of reciprocity and justify denying to some persons religious liberty, holding others as slaves, imposing a property qualification on the right to vote, or denying the right of suffrage to women?

Id. at 447.

269. *See id.* at xlv.

270. *Id.* at liv.

271. *Id.* at lvi–lvii.

272. *Id.* at 141.

Thus, the overlapping consensus is not a compromise, but a position held, and supported by plurality of reasonable comprehensive and conflicting doctrines, that inevitably exists in a democratic society. Rawls sees justice as fairness, making possible an overlapping consensus that completes and expands the movement that began three centuries ago with the "gradual acceptance of the principle of toleration and led to the nonconfessional state and equal liberty of conscience."²⁷³

F. *Incompletely Theorized Agreements*

Cass Sunstein approaches the problem of social pluralism in a democratic society, recognizing Rawls's concept of "overlapping consensus" of reasonable people but suggesting that such a concept is impractical because democracies are populated with people who have strong disagreements and distrust abstract theories altogether.²⁷⁴ Sunstein looks to the judiciary, where disagreements must be resolved under considerable time constraints, and where the result is required to set precedent for solving future conflicts.²⁷⁵ In this setting, the "well-functioning legal systems" tend to adopt a special strategy to produce agreement which Sunstein calls "incompletely theorized agreements on particular outcomes."²⁷⁶ As Sunstein defines the term: "They agree on the result and on relatively narrow or low-level explanations for it. They need not agree on fundamental principle."²⁷⁷ He sees this as a way for diverse people to show mutual respect while simultaneously promoting social stability.²⁷⁸

Sunstein cites examples where the law can reach a result that is agreed upon by various groups for different reasons.²⁷⁹ These examples include protection of endangered species, strict liability in tort cases, and protection of labor unions from employer coercion.²⁸⁰ Resolving conflict is the normal activity of the law, which makes the law well-suited for such a coalition. In each case, it

273. *Id.* at 154.

274. Sunstein, *supra* note 224, at 1734–35.

275. *Id.* at 1749.

276. *Id.* at 1735.

277. *Id.* at 1735–36.

278. *Id.* at 1736.

279. *Id.*

280. *Id.*

may be necessary for judges to offer an opinion or rationale, on a low-level or middle-level principle, and the result is an incompletely theorized agreement.²⁸¹

People often reach incompletely theorized agreements on general principles but disagree on the specific application.²⁸² They may agree that racial discrimination is wrong, but disagree on affirmative action.²⁸³ A second type of incompletely theorized agreement is the mid-level agreement on principle, such as a belief that the government cannot discriminate on the basis of race, but disagreement on the overall theory or on the lower-level question of affirmative action.²⁸⁴ A third type of incompletely theorized agreement occurs when people agree on the outcome and on some low-level principle to support it, but cannot agree on more abstract principles.²⁸⁵

It is the third type of incompletely theorized agreement that is important in formulating legal rules. "A key social function of rules is to allow people to agree on the meaning, authority, and even the soundness of a governing legal provision in the face of disagreements about much else."²⁸⁶ Sunstein expresses concern

281. *Id.* at 1737.

282. *Id.* at 1739.

283. *Id.*

284. *Id.*

285. *See id.* at 1740. A second example is that of abortion. Sunstein asserts that various reasons might be given to support the result of allowing the incompletely theorized agreement:

There is a political point as well. . . . Diverse judges may agree that *Roe v. Wade* should not be overruled, though the reasons that lead each of them to that conclusion sharply diverge. Perhaps the judges have different large-scale theories and can agree only on a low-level principle. Perhaps some of the judges have not developed ambitious accounts of the relevant area of the law at all. Thus some people emphasize that the Court should respect its own precedents; others think that *Roe* was rightly decided as a way of protecting women's equality; others think that the case was rightly decided as a way of protecting privacy; others think that the case has everything to do with state neutrality toward religion; others think that restrictions on abortion are unlikely to protect fetuses, and so the case rightly reflects the fact that any regulation of abortion would be ineffective in promoting its own purposes. We can find incompletely theorized political agreements on particular outcomes in many areas of law and politics—on both sides of the affirmative action controversy, both sides of the dispute over the death penalty, and in all facets of the debate over health care reform.

Id. at 1742–43.

286. *Id.* at 1741.

over efforts to provide overly comprehensive reasons for a given decision.²⁸⁷

Incompletely theorized agreements are seen as "promot[ing] two goals of liberal democracy and a liberal legal system."²⁸⁸ First, these agreements enable people to live together and, second, they permits people to show each other a measure of reciprocity and mutual respect.²⁸⁹ For example, Sunstein believes mutual respect is enhanced if judges reaffirming *Roe v. Wade* would do so "without challenging the belief that the fetus is a human being."²⁹⁰ Thus, incompletely theorized agreements are often necessary when a simple, general theory cannot adequately address the various values at stake in the debate.²⁹¹ They reduce the cost of enduring disagreements (losers do not lose their entire theory); they promote moral evolution; they represent the best approach when time and capacity is limited (e.g. by the use of precedents); and they are well adapted to a system that views precedents as fixed points.²⁹²

For judicial decisions, reluctance to set down overly ambitious reasons can lead to both over- or under-inclusive rules and conflicts with other precedents.²⁹³

Ronald Dworkin objects to the incompletely theorized agreements approach, preferring to assert a high degree of theorization and a more self-conscious adjudication.²⁹⁴ Interpreting law should be considered an effort to make law "the best it can be," consistent with Dworkin's concept of law as integrity.²⁹⁵ Sunstein rejects this approach as impractical given the time constraints on judicial decision-making and in a pluralistic society where judges have differing values.²⁹⁶ Sunstein also sees Dworkin's concept of integrity as an inadequate, court-centered justification of law, whereas in a democratic regime, the theory of authority is con-

287. *See id.* at 1742.

288. *Id.* at 1746.

289. *Id.*

290. *Id.* at 1747.

291. *See id.* at 1748.

292. *Id.* at 1748-50.

293. *Id.* at 1755.

294. *Id.* at 1757.

295. *Id.* (quoting RONALD DWORKIN, *LAW'S EMPIRE* 229 (1986)) (internal quotation marks omitted).

296. *Id.* at 1758-59.

strained by democratic considerations.²⁹⁷ Sunstein sees development of large-scale theories as a more democratic task than a judicial one, and thus Sunstein's incompletely theorized agreements are more broadly suited for this diverse task than Dworkin's law as integrity.²⁹⁸

Finally, Sunstein admits that his approach is partial and that, when appropriate, a large-scale theory might be preferable.²⁹⁹ Nevertheless, through incompletely theorized agreements, the door sometimes opens into areas that would otherwise have been left undiscovered.³⁰⁰ Disagreements may have value, and incompletely theorized agreements may be mistaken.³⁰¹ However, for Sunstein, if everyone having a reasonable view finds agreement on a judgment, then "nothing is amiss."³⁰² Nevertheless, judgments need to be scrutinized over time to correct mistaken outcomes.³⁰³

Sunstein concludes that judicial reasoning should be presumptively narrow and consistent with incompletely theorized agreements, but no such presumption should apply outside the judiciary.³⁰⁴ The only general theory that Sunstein suggests for everyone is the theory of incompletely theorized agreements, which usually is accepted within the constrictions of another general theory.³⁰⁵ While people may disagree with Sunstein's theory, he concludes with the observation that, in practice, it is followed on a wide scale.³⁰⁶

297. *Id.* at 1763.

298. *See id.*

299. *Id.* at 1764.

300. *See id.* at 1740-41.

301. *Id.* at 1764.

302. *Id.* at 1769.

303. *Id.*

304. *Id.* at 1771.

305. *Id.* at 1771-72.

306. *Id.* at 1772.

G. *Third World Objections*

The Third World's plea for dialogue³⁰⁷ and the accommodation of human rights to local conditions, which occurs when universalistic aspirations conflict with local conditions, may be answered with a multiplicity of justifications, overlapping consensus, or incompletely theorized agreements.³⁰⁸ Local resistance to the imposition of a "universal" value may come from political elites seeking to maintain their grip on society,³⁰⁹ but it may also come from the local population seeking to protect a conflicting local cultural value.³¹⁰ When resistance comes from both constituencies, the imposition of the "universal" value may be viewed as either intolerant or paternalistic.³¹¹

Even assuming that the imposition of human rights is paternalistic, local circumstances may demand that limitations be placed on the application of particular rights.³¹² These limitations may

307. Critics believe that a truly genuine dialogue between advocates of human rights and the Third World is necessary to formulate a universal human rights regime. See Mutua, *supra* note 175, at 56. It is not possible to construct a post liberal world by freezing liberalism. *Id.* at 57.

308. In a given situation, cultural particularism may demand that the human rights norms be adapted to the culture, and, in others, the cultural norm should be adapted to the human rights norm. Brems, *supra* note 159, at 227. Determining which should adapt may depend on who is calling for the adaption, what specific right is being adapted, and the impact of making the adaption. *Id.* at 227-28.

309. Wojciech Sadurski, *Universalism, Localism and Paternalism in Human Rights Discourse*, in HUMAN RIGHTS WITH MODESTY, *supra* note 31, at 143 (noting that "Asian values" can be viewed as "part of the legitimation strategy of authoritarian regimes").

310. See, e.g., Richard Shweder, *Moral Realism Without the Ethnocentrism: Is It Just a List of Empty Truisms?*, in HUMAN RIGHTS WITH MODESTY, *supra* note 31, at 65, 77 (discussing female genital mutilation in Africa).

311. Intolerance is "an interference with other people's behavior based on our moral disagreement with their values" whereas paternalism is "an interference with other people's behavior on the basis that their values, when pursued, are (in the opinion of the interferer) harmful to them, and that the overall consequences of the interference will be to their benefit." Sadurski, *supra* note 309, at 145-46. In general, human rights imposition is paternalistic, in that the interferer sees the result as beneficial for the person, and not intolerant, where the benefit is seen as irrelevant. *Id.* at 146.

312. Take, for example, the imposition of "gender equality" on a Muslim society in which women in the society resist such an imposition. *Id.* at 146. Is the resistance the result of ignorance, fear, or satisfaction with the existing order? *Id.* at 146-47. Should the position of men in the society be considered? *Id.* at 147-48. Are there limits on the imposition of universalism in this and similar cases? Sadurski's proposal is:

... [I]n the very structure of human rights there are some clear limits to the feasibility of universalism: not because of any "external" reasons, such as our possible concern about tolerance and avoidance of arrogance, but rather for "internal" reasons—because, at a certain point, universalism ceases to make

be necessary to justify the rights rationally or empirically. For example, the right not to be discriminated against is justified by identifying a “non-discriminatory classification” that may be formulated differently from community to community depending on differing factors within each community.³¹³ A second example is that freedom of expression may be limited when used to justify outrageous speech, such as Holocaust denial speech, which is often “anti-Semitism masquerading as a historical theory.”³¹⁴ Such speech may be restricted in Germany, where it threatens democratic stability, while it may be tolerated in the United States, where no state interest would be undermined.³¹⁵ Thus, empirical factors may determine whether a restriction is justified.³¹⁶

H. *Human Rights as a New Religion*

Political theorists have long sought a formula for the establishment of civil government.³¹⁷ Hobbes, for example, envisions an

good moral sense. “At a certain point” is a crucial proviso”

Id. at 149.

313. *Id.* at 149–50. Sadurski thoroughly develops this argument using three criteria, which require consideration of a local factual situation. *See id.* at 152–54.

314. *Id.* at 158.

315. *Id.* at 157–58.

316. This does not mean

that we *should* not be universalistic in our human rights aspirations; rather, . . . to a certain degree, we *cannot* be so. There is a point at which it is necessary to blend . . . some local justificatory or empirical factors with universal human rights, and the results will be different in different societies. One and the same right will manifest differently in different societies, or its concrete articulation will or will not be justified in different societies, or its institutional articulation will have to take different forms.

Id. 149. Sadurski further notes:

Perhaps the most important “universal” human right is the right not to be discriminated against: a right to equality. It is tempting to say that criteria of “discrimination” differ from culture to culture but this would be glib—to state that there is a right not to be discriminated against and then suggest that the criteria of discrimination are supplied by local cultures would be to render the whole principle of non-discrimination meaningless.

Id. at 149–50. To satisfy the criteria of non-discrimination, Sadurski uses Rawls’s “reflective equilibrium,” under which criteria for intuitively known discrimination (e.g. refusing voting rights for women) is applied to the alleged discrimination (e.g., banning of women in combat) to determine whether the discrimination is also banned. *Id.* at 152 (citing THEORY OF JUSTICE, *supra* note 226, at 20). Sadurski uses three criteria of contempt, including whether the legislation adds to existing burdens; whether it involves imposition of burdens by those who are not under the burden; and whether the burden stigmatizes the bearer. *Id.* at 152–53. While these may be acceptable criteria, they are not “universal” but are dependent on the “local” factual situation. *Id.* at 153.

317. *See, e.g.,* THOMAS HOBBS, LEVIATHAN (1651), *reprinted in* LEVIATHAN 5 (Richard

agreement bringing men out of the violence of nature to assemble together for protection and order.³¹⁸ Others, such as Rousseau, suggest a social contract bringing men out of natural happiness (freedom) into social bondage.³¹⁹ These are speculations about a hypothetical and non-existent past. In fact, as Locke recognized, man was never free in the sense that he was not under obligation to God and his neighbor.³²⁰ Man was born into civil obligations in the same manner that he is born into filial obligations. But in that there is a formal equality; each thinker begins their myth with an assumption of the original and “essential individuality” of the human race.³²¹

Speculating on a “common” beginning point creates a foundation upon which to compare the proposed solution and justifies a claim that the solution is universal. The human rights regime has a common starting point in man’s inhumanity to man, as witnessed by the inhumanity of the German people towards the Jews and other minority peoples during the World War II. This inhumanity was particularly egregious because Germany had the advantage of being among the best educated, most civilized, and highly enlightened nations in the world. Since man’s inhumanity to man can be observed to some degree in the actions of all nations, it can be said that this beginning is universal.

From this beginning one could establish a new religion, and the facts surrounding the development of the UDHR form a perfect core. First, we have an intense tragedy—the Holocaust—that gives birth to a new regime—the United Nations. The new regime births the new universal principle of the protection of human rights. The universal principle is based on a universal concept: the “inherent dignity” and “equal and inalienable rights of all members of the human family.”³²² The instrument of fulfillment of

E. Flathman & David Johnston eds., 1997); JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* (1690), *reprinted in THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE* 17 (Paul E. Sigmund ed., 2005); JEAN JACQUES ROUSSEAU, *ON SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT* (1762), *reprinted in ROUSSEAU'S POLITICAL WRITINGS* 84 (Alan Ritter & Julian Conaway Bondanella eds., Julie Conway Bondanella trans., 1988).

318. See HOBBS, *supra* note 317, 72–73.

319. See ROUSSEAU, *supra* note 317, at 92–93.

320. See LOCKE, *supra* note 317, at 19.

321. William T. Cavanaugh, *The City: Beyond Secular Parodies*, in JOHN MILBANK, CATHERINE PINKSTOCK & GRAHAM WARD, *RADICAL ORTHODOXY: A NEW THEOLOGY* 186 (1999).

322. UDHR, *supra* note 1, at pmb1.

the universal concept is the rule of law, which is spread by means of the creation of a universal educational system.³²³ Finally, there is the eschatological hope—the building of a foundation for freedom, justice, and peace in the world, and the avoidance of the need to resort to “rebellion against tyranny and oppression.”³²⁴

Human rights, of course, go further than most religions and call for legal, political, and moral support from government.³²⁵ Initially, the UDHR did not provide enforcement, but relied on its strong emphasis that education should be directed toward “strengthening of respect for human rights and fundamental freedoms.”³²⁶ Human rights became enforceable through the two Universal Covenants adopted in 1966, as well as under specialized and regional conventions that are binding as treaty law.³²⁷ Indeed, human rights generally override religious claims and require the “legal fiat of the nation-states or groups of states.”³²⁸ Convinced of the efficacy of this new formula, advocates of human rights call on the religions of the world to search their doctrines and principles to find areas that can be used to support the new human rights regime.

When addressing the relationship between religions and human rights, it is important to recognize that both sides of the re-

323. The proclamation itself has a religious character in that it advocates standards of “right conduct” for all peoples and a commitment to keeping the declaration constantly in mind and to strive through education to promote and obtain observance by all peoples. *Id.*

324. *Id.*

325. Stacy, *supra* note 36, at 161–62.

326. Osiatynski, *supra* note 162, at 45–46 (citing UDHR, *supra* note 1, at art. 26.2). Osiatynski distinguishes (1) individual rights, which were conceived by philosophers, flow from contract, and protect individual autonomy, and (2) human rights, which are based on dignity and are written by politicians. *Id.* Human rights are “inherent rather than inalienable.” *Id.* at 47. Accordingly, human rights protect against rebellion rather than tyranny and create duties that individuals have toward others and society, thereby creating a new role for the state. *Id.* Further, the right of rebellion against tyranny is not recognized (as used by Morney in *Vindiciae* and Jefferson in the Declaration of Independence), but deals with state sovereignty as the basic principle. *Id.* at 48. Osiatynski states that the twentieth-century concept of human rights “accepts the principle of state sovereignty over its citizens and the resulting international relevance of human rights. Human rights form a code of conduct for states and imply that when a given state violates this code, other states will exert pressure to bring the perpetrators to order.” *Id.* at 48.

327. Haarscher, *supra* note 222, at 104. It is important to see human rights as legally enforceable rights, and in that regard, the European Court of Human Rights is considered the “most efficient guarantor” of those rights. *Id.* at 118. Even that court distorts the word “tolerance” by using it to refer to “respect of values and collective practices” rather than “individual liberty.” *Id.* (citing Guy Haarscher, *Tolerance of the Intolerant?*, 10 *RATIO JURIS* 236–46 (1997)).

328. Stacy, *supra* note 36, at 179.

relationship claim universal values. Thus, the challenge is to harmonize the provisions of religion with the goals of human rights. With Christianity, this harmonization is not as difficult as with other religions, because much of the human rights regime is the result of state/religious conflict over the past 1,000 years. The Muslim belief, on the other hand, sees no state/religious conflict and is thus more difficult to harmonize.³²⁹ In regards to Judaism, a centuries-old religion/ethnicity, it has only recently emerged in the form of a state.³³⁰ Nevertheless, these three religions share much of a common heritage and will be discussed in this article. But to understand the interaction of the human rights regime with these religions, it is important to appreciate the common religious heritage and history as well as the historic development that led to freedom of religion.

IV. A RELIGIOUS CRITIQUE

The foregoing discussion demonstrates an effort to ground human rights in a secular structure, free from religious foundations, under the belief that recognition of religious foundations would render the human rights norms unacceptable to other religions.³³¹ But religion has been the glue holding the state together, and one wonders whether "a democratic government [can] be maintained without the support of a commonly acknowledged religious value system?"³³² One is hard-pressed to find a viable society in history that has not had such a value system.³³³ Someone reflecting on

329. See Avineri, *supra* note 165, at 322–23.

330. See BRIAN OREND, HUMAN RIGHTS: CONCEPT AND CONTEXT 225–26 (2002) (discussing the human rights predicament of Israel); Richard W.J. Clarke, *Voices from the Margins: Knowledge and Interpretation in Israeli Human Rights Protests*, in HUMAN RIGHTS IN GLOBAL PERSPECTIVE 118 (Richard Ashby Wilson & Jon P. Mitchell eds., 2003) (discussing the human rights implications of the Arab-Israeli conflict).

331. CREEDS, *supra* note 153, at 8–9.

332. Gordon Butler, *Cometh the Revolution: The Case for Overruling McCollum v. Board of Education*, 99 DICK. L. REV. 843, 853 (1995).

333. Max Stackhouse of Princeton University notes, "No enduring society . . . has developed without a dominant religion at its core, and it is unlikely that a globalized civilization, or the structures of civil society likely to populate it, can develop in creative directions without one either." MAX L. STACKHOUSE, *General Introduction to 1 GOD AND GLOBALIZATION: RELIGION AND THE POWERS OF THE COMMON LIFE* 52 (Max L. Stackhouse & Peter J. Paris eds., 2000). The categories set out allow society to be viewed through a matrix of values that "allow human life to flourish and constrain tendencies to chaos or exploitation." STACKHOUSE, 4 GOD AND GLOBALIZATION, *supra* note 209, at 40–41 & n.5. Stackhouse further states that "[m]any believe either that modern civilization is imploding sexually, economically, politically and culturally, due to globalization; others, including

the prosperity and freedom in the secular states of Europe and North America can easily overlook the fact that the common ground in both situations has been Christian and European.³³⁴

Modern human rights commentators develop the history of rights theory from Hobbes, Locke, Hume, Rousseau, Kant, Mill and others, without looking at the deeper roots of freedom that preceded these thinkers. As already mentioned, the Enlightenment effort to free man from external standards such as the Bible has left man devoid of any standards, except the goal to achieve freedom, since truth is relative and cannot form a standard of conduct.³³⁵ The point is, by 1650 Reformation theology had formed the political and moral norms upon which the Enlightenment could build the modern state.³³⁶ In fact, few new governmental principles were added by Enlightenment thinkers other than to “secularize” the language of what had been developed from scriptural sources.³³⁷

To mention a few historical developments prior to 1650 will suffice. The seminal event in the separation of sacred and secular authorities³³⁸ is the Investiture Controversy of 1076, in which the

the authors of this series, see the prospect of a larger vision in it, one that could, under certain conditions reconstruct the common life.” *Id.* at 45.

334. CREEDS, *supra* note 153, at 51–53. In rough numbers, the population of the planet is 6 billion people, of which 2 billion are Christians, 1 billion are Muslims, and 15 million are Jews. Of the 2 billion Christians 1 billion are Roman Catholic, 300 million are Protestant, 200 million are Orthodox, and the rest various Christian sects. The other 3 billion people include 830 million Hindu, 340 million Buddhist, and 96 million Native religions. See CIA: The World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html> (last visited Apr. 6, 2009).

335. WILLISTON WALKER, A HISTORY OF THE CHRISTIAN CHURCH 482 (3d ed. 1970) (1918).

336. *See id.* at 425–30.

337. *See id.* at 479–80; HAROLD J. BERMAN, LAW AND REVOLUTION 202–03 (1983).

338. Jesus’s well-known statement, “Render unto Caesar the things that are Caesar’s and to God the things that are God’s,” *Matthew 22:21*, is seen largely responsible for the separation of spiritual and sacred realms in Western Christianity. This saying is reflected in the writings of Augustine in the fifth century, in the Roman Catholic doctrine of the two swords, in Luther’s two kingdom view, and most importantly in the separation of church and state reflected in the U. S. Constitution. Berman attributes the original doctrine to Pope Gelasius I, who, in the fifth century had written to the emperor Anastasius:

Two [swords] there are, august emperor, by which this world is chiefly ruled, the sacred authority of the priesthood and the royal power If the bishops themselves, recognizing that the imperial office was conferred on you by divine disposition, obey your laws so far as the sphere of public order is concerned . . . with what zeal, I ask you, ought you to obey those who have been charged with administering the sacred mysteries [in matters of religion]?

BERMAN, *supra* note 337, at 92.

Roman Catholic Church asserted its independence from secular authorities and claimed the exclusive right to control all ecclesiastical appointments.³³⁹ Because the Church also asserted authority over the civil authorities, a struggle ensued that lasted until the Reformation.³⁴⁰ The Investiture Controversy created a corporate institution separate and apart from the civil authorities.³⁴¹ It was to this "centralized ecclesiastical government to which every person had the right of appeal beyond feudal authority, regional ruler, disobedient clergy, and civic order."³⁴² The controversy created a civil space which, over the long term, allowed organizations to develop free of civil or ecclesiastical control and in promotion of the rule of law.³⁴³

339. Also known as the Gregorian Revolution, the struggle involved a new way of appointing the Pope without the intervention of civil authorities. So strong were the claims of universal power that the dramatic culmination of the effort occurred in 1076 when Pope Gregory VII excommunicated German King Henry IV forcing him eventually to appear barefoot as a penitent before the castle gate at Canossa. This was the triumph of an extreme interpretation of Augustine's *City of God* and resulted in the Roman Pontiff alone being called universal, with power to dispose or reinstate bishops or to dispose of Emperors, but he himself cannot be judged by anyone. WALKER, *supra* note 335, at 204-11; see also Brian Tierney, *Religious Rights: A Historical Perspective*, in NOEL B. REYNOLDS & W. COLE DURHAM JR., *RELIGIOUS LIBERTY IN WESTERN THOUGHT* 29, 35 (1996).

340. BERMAN, *supra* note 337, at 87-88.

341. Legal historian Harold J. Berman rejects the view of many scholars that Western political science originated in classical Greek thought. *Id.* at 275. Berman asserts that the Investiture Controversy was the seminal event in the formation of the Western legal tradition that has survived until the present time. *Id.* Further, from the Twelfth Century on, the church developed its own legal system as well as its own profession of canon lawyers, laying the foundation of the Western legal tradition. *Id.* at 7-10. Berman identifies ten characteristics of the Western legal tradition, six of which came into existence at this time, and four of which we inherited from the Roman legal system. *Id.* at 7-10. He further laments that the separation of religion and law in the current period has undermined the six traditions instituted in the twelfth century. *Id.* at 165.

342. Creeds, *supra* note 153, at 43 (emphasis in original). Commentator E. Rosenstock-Huessy states, with only slight exaggeration, "in western civilization, at least since Gregory VII, two sovereign powers have always balanced each other. This, and this alone, has created European freedom." *Id.* at 44 (citing E. ROSENSTOCK-HUESSY, *OUT OF REVOLUTION* 543 (1938)).

343. BERMAN, *supra* note 337, at 292-94. Berman states:

The idea of the secular state, which was implicit in the Papal Revolution from its inception, and the reality of the secular state, which emerged out of the historical struggle between ecclesiastical and secular forces that constituted the Papal Revolution, were in essence the idea and the reality of the state ruled by law, a "law state."

Id. at 292. Berman further suggests that the modern concept of the rule of law differs from its earlier form in two respects. First, it differs in that the separation of legislative, administrative, and judicial powers replaced the concept of concurrent jurisdictions and mutual respect existing between church law and state law. *Id.* Second, "[i]n the later period, that transcendent reality was found in human rights, democratic values, and other related beliefs. In the earlier period it had been found in divine and natural justice." *Id.* at 294.

Two doctrinal issues summarize the Reformation debate. First, the reformers asserted that scripture alone (“*sola scriptura*”) was the final authority on all issues of faith and practice, while the Roman Catholic Church asserted that the decisions of historic church councils reflected an oral tradition of equal authority with the Bible.³⁴⁴ Second, the reformers asserted that man’s salvation was by faith alone (“*sola fide*”) without any works of penance, while the Roman Catholic Church asserted that certain acts on the part of man were necessary as part of a person’s forgiveness of sins committed after salvation.³⁴⁵ Luther perceived from scripture that man’s heart must be changed before he can come to God, and that God decides whose heart He will change.³⁴⁶ This is the doctrine of “predestination” or “election” and its implications are profound.³⁴⁷

Human dignity, the hallmark of the human rights regime, is almost inconceivable without recognition from biblical sources that man was created in the image of God, and that the descendants of that first man are all entitled to equal dignity.³⁴⁸ The concept that man’s conscience should be free of external control developed out of the doctrine of predestination; if God decides who will be saved, the civil government, with its power of the earthly sword, cannot affect the necessary internal religious acceptance.³⁴⁹ Any such attempt would violate God’s sovereignty.

344. The Westminster Confession of Faith states the principle of *sola scriptura* clearly: “The whole counsel of God, concerning all things necessary for his own glory, man’s salvation, faith, and life, is either expressly set down in scripture or by good and necessary consequence may be deducted from scripture.” THE WESTMINSTER CONFESSION OF FAITH ch. 1.6 (1646), available at http://www.reformed.org/documents/wcf_with_proofs/. This principle recognizes that when man is to determine how to live and govern himself, he should look to the scriptures. Historically, efforts have been made to discern the principles of civil government from the scriptures. See, e.g., PHILIPPE DU PLESSIS-MORNAY, VINDICIAE CONTRA TYRANNOS (1574); MOSES LOWMAN, A DISSERTATION ON THE CIVIL GOVERNMENT OF THE HEBREWS (1743).

345. CREEDS, *supra* note 153, at 54.

346. WALKER, *supra* note 335, at 304.

347. *Id.* Responding to the challenge of Luther that man could not respond to the call of God, the Roman Catholic Church reaffirmed the middle position, in which the doctrine of “prevenient grace” became the pivotal doctrine between a recognition that man was helpless in relation to salvation because of original sin and the position that salvation required the assent of man’s free will. See The Canons and Decrees of the Council of Trent, ch. 5, reprinted in PHILIP SCHAFF, THE CREEDS OF CHRISTENDOM 92 (1877).

348. See CREEDS, *supra* note 153, at 59.

349. See *id.*

Prior to the Reformation, society was conceived as constituting a single Christian commonwealth.³⁵⁰ The Reformation introduced new churches into a world dominated by the Roman Catholic Church, resulting in conflict and persecution.³⁵¹ Persecution of French Protestants (called Huguenots)³⁵² culminated on August 24, 1572 with the infamous St. Bartholomew's Day massacre of many high ranking Protestants.³⁵³ Protestants responded by developing theories of resistance against governments that broke their covenants with the people, i.e., the social contract.³⁵⁴ The

350. Harold J. Laski, *Historical Introduction to JUNIUS BRUTUS, A DEFENCE OF LIBERTY AGAINST TYRANTS: A TRANSLATION OF VINDICIA CONTRA TYRANNOS 2* (Burt Franklin 1972) (1924) ("From the fall of the Roman empire until [Luther's] emergence, political thought was always dominated by the notion of a single Christian commonwealth.").

351. *Id.* at 1-4.

352. Paul Fuhrmann notes:

Historians especially look at French Protestantism as unique. Basically, it rested neither on the princes, as in Germany, nor on kings, as in England, nor on democratic patriotism, as in Switzerland, nor on certain families, nor on racial reasons. It rested on the Bible. It produced thousands of martyrs . . . a king . . . a president of the republic . . . a premier . . . brilliant philosophers . . . theologians, and . . . writers . . .

PAUL T. FUHRMANN, *AN INTRODUCTION TO THE GREAT CREEDS OF THE CHURCH* 103 (1960).

The same author also states:

French Calvinism was no longer a church or society of saints but a party, a Republic, a world of men and women—a new world in formation wherein pagan, Christian, medieval, and Renaissance ideas and ways of life were mixed. From these contradictions of laws and customs, from these disorders of war and hazards of life, an energetic type of man came to light. He was the Huguenot. The Huguenot was a unique combination of opposite qualities held in equilibrium: passion and reason, ardent faith and profound reflection, intense activity and voluntary self-discipline, Stoicism and Christianity.

Paul T. Fuhrmann, *Philip Mornay and the Huguenot Challenge to Absolutism*, in *CALVINISM AND THE POLITICAL ORDER* 46, 61 (George L. Hunt ed., 1965) [hereinafter Fuhrmann, *Huguenot Challenge*].

353. *Id.* at 46; Laski, *supra* note 350, at 13.

354. See John T. McNeill, *John Calvin on Civil Government*, in *CALVINISM AND THE POLITICAL ORDER*, *supra* note 360, at 23, 23. Calvin recognized contradictory duties in the individual who must obey the state authorities, even tyrants, while at the same time tyrants ruled only through the authority of God. JOHN CALVIN, *CALVIN: INSTITUTES OF THE CHRISTIAN RELIGION* 1518 (John T. McNeill ed., Ford Lewis Battles trans., Westminster Press 1960). He resolved this contradiction by finding in the intermediate magistrates representatives of the people charged with responsibility to restrain the higher authority. *Id.* at 1519. In a famous passage in the *Institutes of Christian Religion*, Calvin charges the intermediate magistrates to curb the tyranny of kings and likens them to the Ephori who opposed kings in Sparta, the Demarchs to the senate in Athens, and the Tribunes of the people to consuls among the Romans that had a profound effect on succeeding generations that wished to resist tyranny. *Id.* Calvin may be indebted to Zwingli for the "ephors" analogy. McNeill, *supra*, at 41. That chapter, "Constitutional defenders of the people's freedom," sets forth Calvin's theory of resistance. CALVIN, *supra*, at 1518-19. Calvin's doctrines became influential in France (the Huguenots), Holland (Dutch Reformed), England (Puritans), and in Scotland (Presbyterians). Herbert D. Foster, *The Political Theories of*

name "Monarchomachists," i.e., enemies of the monarchy³⁵⁵ was applied to persons such as Philip Mornay, the reputed author of *Vindiciae contra tyrannos* [Vindication of Liberty Against Tyrants].³⁵⁶ In *Vindiciae*, Mornay sees two pacts ("contracts" or "covenants"): one between God (the king) and the people, and the other between the people and the king.³⁵⁷ The law of the covenant was God's law.³⁵⁸ According to the habit of the Monarchomachists, Mornay makes the king subject to the law, and if the king breaks the law, he becomes a tyrant and must be resisted.³⁵⁹ However, it is not the people who judge when the king breaks the law; rather, it is the lower level magistrates who represent the nation.³⁶⁰ Thus, the right to resist tyranny exists.³⁶¹ Mornay and the Mon-

Calvinists Before the Puritan Exodus to America, 21 AM. HIST. REV. 481, 481–82 (1916).

355. In 1574, Theodore Beza, Calvin's successor in Geneva, anonymously published *De Jure Magistratum*, in which he used the civil covenant to justify resistance to tyrants, arguing that God had a covenant with every nation to obey His laws and the people a covenant with the ruler to obey God's law. Charles J. Butler, *Religious Liberty and Covenant Theology* 19 (Apr. 1979) (unpublished Ph.D. dissertation, Temple University) (on file with author). Monarchomachists summarized that consent makes the king and that kings can be resisted. It was the militant writings of the Monarchomachists (Calvinists) "at the origin of the revolution which from the 18th to the 19th centuries gave birth and growth to the parliamentary democracies of Anglo-Saxon type." Fuhrmann, *Huguenot Challenge*, *supra* note 352, at 50 & 197 n.6 (citing E. JARRY, *LES TEMPS MODERNES* 101 (1959)); see also JOHN WITTE, JR., *THE REFORMATION OF RIGHTS: LAW, RELIGION, AND HUMAN RIGHTS IN EARLY MODERN CALVINISM* 81–141 (2007) (providing an extensive analysis of Beza's impact).

356. Mornay was a French nobleman, theologian, soldier, and statesman, who was widely thought to be Junius Brutus, the author of *Vindiciae contra tyrannos*. Laski, *supra* note 350, at 57–59. Voltaire described Mornay as: "That virtuous support of the party of error! Who, always showing his zeal and his prudence, Served equally his church and his France; Censor of courtisans, but of the court beloved, Bold enemy of Rome and by Rome Esteemed." GEORGE M. READ, *HISTORIC STUDIES IN VAUD, BERNE, AND SAVOY* 306 (1897) (author's translation).

357. Laski, *supra* note 350, at 71.

358. *Id.* at 87–88.

359. *Id.* at 96, 99.

360. *Id.* at 97.

361. The four parts of *Vindiciae* raise and answer the following questions:

(1) Must subjects *obey* a prince when his orders are contrary to the will of God? Answer: Kingship presupposes a contract between God and king and a contract between king and people. The orders of a prince ought not to be preferred to God's will. Duties to God come first.

(2) Is it legitimate to *resist* a prince who violates God's law and ruins the church? Answer: When the prince ruins religion, he ought to be resisted. Magistrates have control over the prince. Private men ought to offer a passive resistance until magistrates call them to arms.

(3) Does the same apply to purely *secular interests*? Answer: Men have established kingship for security abroad and at home. Kings ought to enforce the law. A first kind of tyrants are usurpers. These are outlaws; any citizen can kill them. A second kind of tyrants are legitimate kings who neglect their du-

archomachists set forth the four great principles of government: "sovereignty of the nation, political contract, representative government, and the separation of powers."³⁶²

Described by von Gierke as a watershed of modern political ideas, Johannes Althusius developed the covenantal views of Mornay and others into a federal theory of society.³⁶³ Recognizing that God has not made man self-sufficient but has infused in man the instinct for society, Althusius builds his system of covenanted associations upon the family as the basic unit of society.³⁶⁴ Individual rights are derived solely through association in the family, which makes up the village or the region.³⁶⁵ The magistrates at

ties. Officers and nobles ought to lead them back to duty even by force. This is the reason why officers and magistrates exist. Their destroying tyranny serves the state.

(4) Ought *neighboring* princes help those who are afflicted for cause of religion or oppressed by tyrants? Answer: There is only one church whose head is Jesus Christ. If a member is stricken, all others ought to help him. As for civic affairs, charity ought to move a prince to defend the oppressed and force tyrants back to reason.

Fuhrmann, *Huguenot Challenge*, *supra* note 352, at 54 & 198 n.24 (citing RAOUL PATRY, PHILIPPE DU PLESSIS-MORNAY—UN HUGUENOT HOMME D'ETAT 277-78 (1933)).

362. *Id.* at 64. Fuhrmann describes Mornay's conviction that truth does not require force to prevail and that force can make hypocrites. *Id.* at 63. The Huguenots built their system of government on the Bible, and their heritage to the Calvinist tradition was self-government. *Id.* at 61-62. Fuhrmann states:

The greatest quality of the Huguenot was indeed the ability to govern himself. And this control of self, this moral sovereignty of the person, brought about an entirely new idea and type of individual, social, and political life. We have here, not an equalitarian and flat democracy, but a varied society, hence a colorful society, hence a free society.

Id. at 62.

363. *See generally* Butler, *supra* note 355, at 167-76 (citing OTTO FRIEDRICH VON GIERKE, THE DEVELOPMENT OF POLITICAL THEORY 20 (Bernard Freyd trans., 1966)). Gierke notes that Althusius adopted the views of the French Monarchomachi on popular sovereignty and on the right to resistance against rulers who violate their contract with the people. VON GIERKE, *supra*, at 17. Further, Althusius develops the theory of the absolute inalienability of sovereign rights by the people in language later picked up by Jean Jacques Rousseau. *Id.* Althusius was accused of supporting the Presbyterian error of popular sovereignty and of having been seduced by Junius Brutus in his youth. *Id.* at 17.

364. *See* JOHANNES ALTRUSIUS, THE POLITICS OF JOHANNES ALTRUSIUS 22-27 (Frederick S. Carney trans., 1964).

365. Althusius states:

Certain political writers eliminate, wrongly in my judgment, the doctrine of the conjugal and kinship private association from the field of politics and assign it to economics. Now these associations are the seedbed of all private and public associational life. The knowledge of other associations is therefore incomplete and defective without this doctrine of conjugal and kinship association, and cannot be rightly understood without it.

Id. at 26.

each level are bound by limits set by God's decalogue and public opinion.³⁶⁶ Because of the diversity of religious views in society, Althusius would avoid conflict by being tolerant of minority views.³⁶⁷

The work of Samuel Rutherford, author of *Lex Rex*, was particularly influential³⁶⁸ in asserting covenant ideas in Scotland.³⁶⁹ *Lex Rex* adopts Mornay's treatment in *Vindiciae* of three parties to the covenant and asserts that God supersedes all political authority.³⁷⁰ He recognizes the right of the people to choose the form of

366. Althusius notes:

The precepts of the Decalogue are included to the extent that they infuse a vital spirit into the association and symbiotic life that we teach, they carry a torch before the social life that we seek, and that they prescribe and constitute a way, rule, guiding star, and boundary for human society. If anyone would take them out of politics, he would destroy it; indeed, he would destroy all symbiosis and social life among men. For what would human life be without the piety of the first table of the Decalogue, and without the justice of the second?

Id. at 8.

367. Althusius would have the commonwealth procure the community's religious health by forming a religious covenant like Israel had in the Old Testament. *See id.* at 61–62, 157–58. However, two factors move Althusius to the position of toleration. First, the various units of society will take on different religious views, making uniformity impossible without damage to the whole. *See id.* at 72–73. Secondly, God may not have produced faith in a large part of the community, and until God acts, the conscience of man must be left free. *See id.* at 167. In his view of predestination, Althusius recognized the limits on government's ability to promote religious belief. *See id.* at 167–69. Butler notes:

A magistrate in whose realm the true worship of God does not thrive should take care that he not claim imperium over that area of the faith and religion of men that exist only in the soul and conscience. God alone has imperium in this area. . . . For this reason, faith is said to be a gift of God, not of Caesar. . . . We are not able to command religion because no one is required to believe against his will. Faith must be persuaded, not commanded, and taught, not ordered.

Butler, *supra* note 363, at 167.

368. J. F. Maclear, *Samuel Rutherford: The Law and the King*, in CALVINISM AND THE POLITICAL ORDER, *supra* note 359, at 65, 165; *see also* SAMUEL RUTHERFORD, A PEACEABLE AND TEMPERATE PLEA FOR PAULS PRESBYTERIE IN SCOTLAND (1642). The notable Scottish commissioners to the Westminster Assembly in 1643 were Rutherford, Baille, Gillespie, and Henderson. Strangely, a recent history of Scotland makes no reference in its index to Samuel Rutherford, author of LEX REX (Sprinkle 1982) (1644) [hereinafter LEX REX], (insisting that the king was subject to the law), or George Gillespie, author of AARON'S ROD BLOSSOMING 4 (LONDON 1864) (1646) (asserting that civil and ecclesiastical bodies were separate in ancient Israel), both of whom attended the Westminster Assembly. *See* JAMES G. LEYBURN, THE SCOTCH-IRISH: A SOCIAL HISTORY 374, 376 (1962).

369. Covenant ideas of being banded to God as a people were readily understood in Scotland as consistent with the Scottish history of "banding," which involved "shared authority, local initiative, voluntary commitment, and mutual contractual obligations often for the common defense. *See* Maclear, *supra* note 368, at 68–70, 72–73.

370. Rutherford asserts:

political authority and acknowledges that all forms are lawful.³⁷¹ Rutherford is credited with establishing in Scotland an "enduring national tradition disposed to challenge oppressive government and refer political decision to moral law."³⁷² Rutherford and the Scots have had an enormous effect on the formation of the modern world.³⁷³ At the time of the American Revolution, Scots were fierce advocates for independence and most feared that King George III would seek to place an Anglican bishop over the colonies.³⁷⁴

[T]he Lord and the people giveth the crown by one and the same action; . . . seeing the People maketh him a King covenant-wise and conditionally, so he rule according to God's law, and the people resigning their power to him for their safety. . . . It is certain God giveth a King that same way by that very same act of the people.

LEX REX, *supra* note 368, at 57.

371. *Id.* at 31.

372. Maclear, *supra* note 368, at 86. The true theme of *Lex Rex* is that "[a]ll rightful authority lies in law, whether it is authority of king, estates, populace, or kirk. The king is truly king only when he identifies himself with the law, and only to the degree that he succeeds in voicing and implementing law." *Id.* at 77; *see also id.* ("*Rex est lex viva, animata, loquens lex*: The king is a living, breathing, and speaking Law."). Maclear quotes Rutherford's great faith in the people as expressed in *Lex Rex*: "The people have a natural throne of policie in their conscience to give warning, and materially sentence against the King as a Tyrant. . . . Where Tyranny is more obscure, . . . the King keepeth possession; but I deny that Tyranny can be obscure long." *Id.*

373. The influence of Scotland on the modern world is extensive. In ranking the 100 most influential persons in history, Michael Hart marvels that five of the top fifty are from Scotland, a country constituting one-eighth of one percent of the world's population. MICHAEL H. HART, *THE 100 A RANKING OF THE MOST INFLUENTIAL PERSONS IN HISTORY* 524 (rev. ed. 1992). Another author, in speaking of the philosophical developments in Scotland, states:

[T]here is no simple explanation for the abundant crop of genius which grew from that proud race of shepherd-warriors in the 18th century. . . . [C]enturies of sophisticated intellectual debates about theology had sharpened the minds of Scotsmen to the nuances of ideas and arguments; but even this does not quite suffice to explain the bold brash ideas which emerged in Edinburgh and Glasgow.

YUVAL LEVIN, *TYRANNY OF REASON: THE ORIGINS AND CONSEQUENCES OF THE SOCIAL SCIENTIFIC OUTLOOK* 152 (2001). Yuval then describes the philosophical contributions of David Hume and Adam Smith. *Id.* at 152-67.

374. *Cf.* LEYBURN, *supra* note 368, at 1060.

The crucial issue was church government. . . . When James fumed that "a Scottish Presbytery was well fitteth with the monarchy as God and the Devil. No bishop, no King!", he was referring to the representative government of the Presbytery and the independence of its ministers. . . . Most of the difficulties of Presbyterians with Independents in the time of Cromwell would have been avoided if the Presbyterian form of government had been given up. Yet this very feature had endeared itself quickly to the Scots, and "persecution" by the Established Church consisted of trying to break down that attachment. . . . The emotionalism connected with the Solemn League and Cove-

During the English Civil War, Rutherford advocated an independent church with a national covenant, permitting the use of the sword to enforce religious uniformity (a position of intolerance).³⁷⁵ Jurist, Hebrew scholar, and legal positivist John Selden argued for tolerance, allowing the state the authority over religious affairs;³⁷⁶ and Henry Vane, close friend of Roger Williams and confidant of Cromwell, advocated for religious liberty, asserting that the doctrine of predestination demanded religious preference be independent of government.³⁷⁷

nant is truly remarkable.

Id. It was in Scotland that the system of Calvinistic Presbyterianism, formed in Geneva by the reformer, John Calvin, took root and thrived. There the church became free of the civil power. Schaff states that it was

wrought into the bone and sinew of the nation which seems to be predestined for such a manly, sturdy, God-fearing, solid, persevering type of Christianity. . . . In no other country and Church do we find such fidelity and tenacity, such unswerving devotion to the genius of the Reformation; such union of metaphysical subtlety with religious fervor and impetuosity; such general interest in ecclesiastical councils and enterprizes; such jealousy for the rights and self-government of the Church, such loyalty to a particular denomination combined with a generous interest in Christ's kingdom at large; such reverence for God's holy Word and holy day, that after the hard and honest toil of the week lights up the poorest man's cottage one Saturday night.

SCHAFF, *supra* note 347, at 695.

375. Maclear, *supra* note 368, at 65.

376. Elisabeth F. Hirsch, *John Cotton and Roger Williams: Their Controversy Concerning Religious Liberty*, 10 CHURCH HIST. 38, 39 (1941). Although not a member of the Westminster Assembly, England's greatest theologian John Owen, chaplain to Cromwell and Dean of Christ Church and Vice-Chancellor of Oxford (William Penn and John Locke were Owen's students), advocated a covenanted toleration. William Warren Sweet, *The American Colonial Environment and Religious Liberty*, 4 CHURCH HIST. 43, 54-55 (1935).

377. Henry Vane was born in England and studied in Geneva and France before traveling to Massachusetts Bay where he was elected governor at the age of 23. WILLIAM M. IRELAND, *THE LIFE OF SIR HENRY VANE: THE YOUNGER* 33, 38, 70 (1971). While there, Vane became familiar with Roger Williams and Anne Hutchinson, both of whom were being persecuted for conscience's sake. *See id.* at 75-78. Vane's efforts on behalf of Hutchinson led to his defeat and return to England. *Id.* at 77-80, 90-91. On his return, he became a member of Parliament, a confidant of Cromwell, and a member of the Westminster Assembly, where he pleaded for religious liberty. *See id.* at 95, 210, 279, 407. By separating the civil covenant from Christ's sovereign predestination over salvation Vane established religious freedom asking:

For why shouldst thou set at naught thy brother in matters of his faith and conscience, and herein intrude into the proper office of Christ, whether governors or governed, . . . [who] by his [Christ's] decision only are capable of being declared with certainty to be in the right or in the wrong?

Butler, *supra* note 355, at 277 (citing HENRY VANE, *HEALING QUESTIONS* 4 (1656)). With the restoration of the Stuart monarchy in 1660, Charles II wanted Vane's head. IRELAND *supra*, at 480-81. Vane had been instrumental in precipitating the Civil War and in supporting Cromwell. *See id.* at 363-64, 383-84. After presenting his defense by proving the King subordinate to God, the Law, and Parliament, Vane was martyred. *Id.* at 494.

In 1644, Roger Williams returned to England from Massachusetts Bay, having been banned from the colony because of conflicts with the church authorities.³⁷⁸ With the help of Henry Vane, Williams secured a Parliamentary charter for Rhode Island that was verified by a royal charter in 1663.³⁷⁹ This charter specifically granted the colony religious liberty.³⁸⁰ Williams's heavy emphasis on predestination as the operative fact in salvation led to a position of religious liberty.³⁸¹ The Rhode Island colony was the first experiment with religious liberty.³⁸²

Williams based his position that the state was prohibited from enforcing religion on *Romans* 13.³⁸³ Still, Williams called on citizens to be subject to lawful authority because there is no authority except from God.³⁸⁴ By admonishing the people to give proper respect to those deserving respect (an expansion of the Fifth

378. EDWIN S. GAUSTAD, *LIBERTY OF CONSCIENCE: ROGER WILLIAMS IN AMERICA* 37–38, 57–58 (1991). While Williams was an assistant to Sir Edward Coke, he learned of the practice in the Star Chamber. William R. Garrett, *Religion, Law, and the Human Condition*, 47 *SOC. ANALYSIS* 1, 2 (1987). He encountered immediate conflict by standing apart from the established church and advocating for reimbursing the Indians for taking their land. *Id.* at 23.

379. GAUSTAD, *supra* note 378, at 61–63, 157–58.

380. *Id.* at 158.

381. *Id.* at 95–97.

382. *Id.* at 157–58.

383. ROGER WILLIAMS, *THE BLOODY TENANT OF PERSECUTION FOR CAUSE OF CONSCIENCE DISCUSSED IN CONFERENCE BETWEEN TRUTH AND PEACE* 90 (2001 reprint of 1644 original). *Romans* 13:1–9 provides:

Let every soul be subject to the governing authorities. For there is no authority except from God, and the authorities that exist are appointed by God. Therefore whoever resists the authority resists the ordinance of God and those who resist will bring judgment on themselves. . . . But if you do evil, be afraid; for he does not bear the sword in vain; for he is God's minister, an avenger to execute wrath on him who practices evil. Therefore you must be subject, not only because of wrath but also for conscience' sake. For because of this you also pay taxes, for they are God's ministers attending continually to this very thing. Render therefore to all their due Owe no one anything except to love one another For the commandments, "You shall not commit adultery," "You shall not murder," "You shall not steal," "You shall not bear false witness," "You shall not covet;" and if there is any other commandment, are all summed up in this saying, namely, "You shall love your neighbor as yourself."

Romans 13:1–9 (New King James).

Jesus recognized the division of the commandments into two tables: in responding to the question, "which is the great commandment," his answer was to love the Lord your God (the first table), which was the first great commandment, and the second, like the first, was to love your neighbor as yourself (the second table). See *Matthew* 22:34–40 (New King James).

384. See WILLIAMS, *supra* note 383, at 136–141.

Commandment: "honor thy mother and father . . .") and admonishing them to love one another because love does not commit adultery, kill, steal, bear false witness, or covet (the Sixth through the Tenth Commandments), *Romans* 13 limits the power of civil authorities to enforce the second table of the Ten Commandments.³⁸⁵ Thus, according to Williams, enforcement of the first table was the exclusive providence of God.³⁸⁶ The civil magistrate had no authority to discern between true and false religion.³⁸⁷

Williams's concept that government has no authority to enter into the area of religion is fundamental to James Madison's concepts of religious liberty, as set forth in his famous Memorial and Remonstrance Against Religious Assessments in Virginia.³⁸⁸ Madison made clear that civil society had no authority over religion, as man's commitment to his Creator precedes his commitment to

385. *Id.* at 89-90; see *Exodus* 20:11.

386. See *id.* WILLIAMS, *supra* note 383, at 3.

[I]t is the will and command of God that, since the coming of his Son the Lord Jesus, a permission of the most paganish, Jewish, Turkish, or anti-Christian consciences and worships be granted to all men in all nations and countries, and they are only to be fought against with that sword which is only, in soul matters, able to conquer, to wit, the sword of God's Spirit, the Word of God.

Id.

387. Williams finds further support for his position in the parable of the tares where he includes "false worshipers, idolaters, and in particular properly, anti-Christians" within the definition of "tares" which must be tolerated in the "world" (that is *outside the church*) until the end of time. *Id.* at 61. Williams sees the tares as "sinners" whose religious transgressions must be tolerated in society generally, but whose second table violations can be prosecuted as any other law breaker. See *id.* at 62-63. Williams notes that the misinterpretation of this parable has caused much bloodshed in the church of Christ. See *id.* at 53-69. Williams states:

I answer that as the civil state keeps itself with a civil guard, in case these tares shall attempt aught against the peace and welfare of it, let such civil offenses be punished; and yet, as tares opposite to Christ's kingdom, let their worship and consciences be tolerated.

Id. at 63. The key to the parable is Christ's interpretation that "[t]he field is the world." *Id.* at 61. Williams also held firmly that the family was the foundation of civil society and that government operates with the consent of the people. Although others had interpreted the field as the church, Williams's interpretation allows that all manner of unbelievers can live within society without fear of persecution for conscience's sake. See *id.* at 59. The church is the proper place to root out false doctrines and punish sinners. See *id.* at 88. But the church's weapons are solely spiritual. See *id.* at 89-90. Furthermore, the civil magistrate is charged with the duty of enforcing all manner of violations of the second table of the commandments, and such enforcement should be sufficient to create a society in which all manner of men can live at peace. Further, he admonishes ministers to avoid stirring up the civil magistrate to up-root the tares in the community. *Id.* at 65; see also *id.* at 62 (acknowledging the duty to punish violators of the civil peace).

388. *Everson v. Bd. of Educ. Of Twp. Of Ewiing*, 330 U.S. 1 app. At 63 (1947).

Civil Society.³⁸⁹ Further, Madison recognizes the right to resist any movement restricting liberties.³⁹⁰ The familiar words are:

Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence." . . . It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society.³⁹¹

The period after 1650 was characterized by scholars such as Hobbes, Locke, Hume, Rousseau, Kant, and Mill, all of whom built on the Reformation foundation.³⁹² Their contributions were in many ways consistent with those Reformation foundations. The English Civil War, American Revolutionary War, and the American Civil War were applications of Mornay's *Vindiciae*. It was not until the post-World War II era that the consistency broke down because the covenant standards, based on the second table of the Ten Commandments, weakened as a governing moral consensus. Society demanded individual moral liberty, and governments assumed ever greater power over economic and social issues.

V. CONCLUSION

Human rights are built on undefined concepts of human dignity, rule of law, and universality. Perhaps the most serious problem with the assertion of the human rights regime on such a shaky intellectual foundation is that the concept of "rights" can expand beyond measure; thus, the power required to enforce them will become greater and greater, and there will be nothing to restrain governmental abuses. Americans see this today as their government continues to grow and expand in such a way as

389. *Id.* at 64.

390. *Id.* at 65.

391. *Id.* at 64; see TIMOTHY L. HALL, SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY 133 (1998).

392. See, e.g., HOBBS, *supra* note 317; DAVID HUME, ESSAYS AND TREATISES ON VARIOUS SUBJECTS (1849); IMMANUEL KANT, CRITIQUE OF PURE REASON (Werner S. Pluhar trans. 1996) (1781); JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, reprinted in THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE, *supra* note 317, at 182 (1690); JOHN STUART MILL, ON LIBERTY, reprinted in ON LIBERTY AND OTHER ESSAYS (John Gray ed., 1991) (1869); JEAN-JACQUES ROUSSEAU, ON SOCIAL CONTRACT, reprinted in ROUSSEAU'S POLITICAL WRITINGS, *supra* note 317, at 84 (1762).

to dominate other countries without any seeming restraint other than economic limitations, which to date have not been an effective restraining force. The answer to this should be the rule of law, but when the law itself can be changed as easily as the budget, it also becomes ineffective.

Mankind needs a standard that is not man-made. That is where Williams's position, derived from *Romans* 13, presents a solution.³⁹³ If government recognized its duty to restrain violations of the second table of the Commandments, it would have a standard that is not man-made. While that standard is stated in the negative, the reformers always asserted the corollary in the form of a positive duty. For example, if the commandment said "thou shall not steal," the corollary would be "thou shall strive to protect the property of others." If anything, the second table of the Ten Commandments is secular in that it pertains only to matters between men, which any good government should enforce. They have nothing to do with religious enforcement in an area where government should have no power to enter. Like the reformers, modern scholars should strive to discover truth, and the inescapable by-product will be freedom. The scriptural call is for religious liberty, which is consistent with governmental enforcement of the second table—a result that may well find common ground in most other societies.

393. WILLIAMS, *supra* note 383, at 89–90.
