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## Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights

Robert D. Sloane

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# Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights

Robert D. Sloane\*

## ABSTRACT

*This Article seeks to provide a new framework, rooted in classical liberalism, for understanding and defending the universality of international human rights. After reviewing the philosophical and historical development of the idea of universality, Part II argues that none of the traditional justifications for conceiving of international human rights as universal succeed. Cultural pluralism therefore must be accepted as a descriptive truth. But to acknowledge the cultural contingency of values as a descriptive claim does not, by itself, undermine the normative claim that human rights are, or should be, universal. Instead, it points to the need to justify universality within a framework that acknowledges the descriptive truth of cultural pluralism.*

*Part III distinguishes two plausible normative claims that a cultural relativist could advance on the basis of the descriptive vindication of cultural pluralism provided in Part II: "narrative relativism" and "crude relativism." Narrative relativism questions whether it is appropriate and desirable to apply the Western liberal conception of rights to cultures whose traditional narrative frameworks—deeply rooted norms, perceptions, and values—may not be able to accommodate them without upsetting societal institutions in potentially dangerous ways. This raises an issue that undoubtedly merits consideration when applying human rights law internationally. But this Article argues that it does not "refute" the universality*

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*of international human rights law any more than acknowledging value pluralism within a nation refutes the uniform application of domestic law to a state's diverse citizenry. This Article then argues that crude relativism—the broader normative claim that it is wrong to impose human rights on cultures that claim to reject them—suffers from several deep logical and empirical flaws that undermine its philosophical coherence as an argument and also call into question the sincerity of its proponents' views.*

*In Part IV, this Article argues that a distinctively liberal conception of autonomy both underlies and, upon analysis, undermines the central normative assertions of cultural relativism. This is because the liberal imperative to respect the value of autonomy originates in a unique conception of the "self," which finds expression, among other places, in Isaiah Berlin's classic essay on "Two Concepts of Liberty." Part IV argue that cultural relativists in fact invoke—and, absent some presently unarticulated alternative, must invoke—the liberal conception of autonomy in any argument that aims to repudiate the universality of international human rights. But because the liberal conception of autonomy is rooted in a distinctive conception of the "self as agent," a state elite cannot, for example, appeal to the liberal values of autonomy to challenge human rights law as "imperialistic"—for failing to extend adequate tolerance to cultural pluralism—but then conveniently reject these very same values when individuals within their polity invoke them in the form of human rights claims.*

*This Article further argues that any assertion that cultural groups or political entities also merit tolerance and respect for their autonomy is necessarily derivative, not independent, of the rationale for respecting individual autonomy. A cultural elite remains free to repudiate this value. It cannot, however, then demand respect for "cultural autonomy" as a rhetorical device to deflect criticism of its human rights practices. By contrast, to embrace this conception of autonomy is necessarily to acknowledge the normative claim to universality that this Article argues international human rights law enjoys. Despite the descriptive truth of cultural pluralism, this Article concludes that there is a compelling philosophical rationale—beyond the political, historical, and legal approaches conventionally invoked in defense of international human rights—for choosing "rights" as the appropriate and universal functional concept to promote human dignity internationally.*

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It is related that at one of the meetings of a UNESCO National Commission where human rights were being discussed, someone expressed astonishment that certain champions of violently opposed ideologies had agreed on a list of those rights. 'Yes,' they said, 'we agree about the rights *but on condition that no one asks us why.*' That 'why' is where the argument begins.

—Jacques Maritain<sup>1</sup>

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1. Jacques Maritain, *Introduction to HUMAN RIGHTS: COMMENTS & INTERPRETATIONS* 9 (UNESCO ed., 1949) [hereinafter *HUMAN RIGHTS*].

## I. INTRODUCTION

In 1993 at the Second World Conference on Human Rights, national delegates from around the globe adopted the Vienna Declaration: "all human rights are universal, indivisible and interdependent and interrelated. . . ."<sup>2</sup> Like most rhetoric—in particular, rhetoric that surrounds human rights discourse—the Declaration's compelling language veils acute problems that emerge the moment one strives to bring its abstract claims to bear upon real world affairs and normative claims.<sup>3</sup> But precisely this aspiration makes the human rights movement worthwhile. Should the discourse of human rights remain in theoretical limbo, solely the subject of armchair philosophy, then the very concept of human rights law becomes quixotic. Only insofar as human rights discourse enacts, or maintains the potential to enact, concrete changes in the behavior of international actors does the human rights movement retain its value. Only insofar as one can articulate what claims this discourse supports can the movement begin to realize the lofty ideals that permeate its rhetoric.

Many conceptual and practical difficulties confront universal human rights: Who has rights? Do individuals alone have rights or can groups—ethnic, religious, racial, or cultural—assert valid human rights claims, and can the claims of each be reconciled?<sup>4</sup> Should civil and political rights remain primary, or do social, economic, and cultural rights warrant equivalent status?<sup>5</sup> How should human

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2. Vienna Declaration and Programme of Action, World Conference on Human Rights, Part I, para. 5, U.N. Doc. A/CONF/157/23 (1993).

3. See Jonathan Mann, *Introduction to Symposium, Universalism and Cultural Relativism: Perspectives on the Human Rights Debate*, in HUMAN RIGHTS AT HARVARD 9 (Apr. 5, 1997) ("[T]he declaration on universal human rights that emerged at the World Conference in Vienna in 1993 was the thinnest possible papering over of the growing gulf in the political discourse on these issues.").

4. For a compelling philosophical defense of the compatibility of certain "group rights" with liberalism's presumptive focus on the autonomous individual subject, see generally WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* (1995).

5. Jack Donnelly, among others, argues that these two categories of rights, traditionally conceived in tension with one another, in fact remain inextricably intertwined. JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY & PRACTICE* 28-34 (1989) (arguing that the dichotomy between civil and political rights, on the one hand, and social, economic and cultural rights, on the other, reflects a crude oversimplification because both forms of rights require positive state action to be genuinely realized, and not, as commonly assumed, mere negative restraint in the case of the former); see also Thomas Pogge, *How Should Human Rights be Conceived?* 11 (manuscript, on file with author), reprinted in *JAHRBUCK FÜR KETCH UND ETHIK* 103-20 (1995); THE PHILOSOPHY OF HUMAN RIGHTS: *READING IN CONTEXT* 187-210 (Patrick Hayden ed., 2001) (proposing a model of human rights that rejects the dichotomy between, on the one hand, "negative" libertarian restraints and, on the other, "positive"

rights be enforced? Which domestic and international arenas constitute the appropriate fora in which to press human rights claims?<sup>6</sup>

This Article brackets these debates—except insofar as they are implicated tangentially—and proposes a new answer to—or, at least, a new way to think about—what arguably remains the most serious challenge to universal human rights: cultural relativism. Simply stated, cultural relativism insists that human rights cannot be universal because, as a matter of social fact, cultures maintain highly divergent mores and conceptualize human rights differently, or not at all, and these mores conflict in intractable ways that belie pretensions to “universality.”

Cultural relativism, then, poses both theoretical and practical challenges. Theoretically, universal human rights imply, at a minimum, some set of “morally weighty” social norms that preempt, under all but the most exigent circumstances, other cultural value priorities.<sup>7</sup> “Rights,” as Jack Donnelly argues, “are ‘interests’ that have been specially entrenched in a system of justifications and thereby substantially transformed, giving them priority, in ordinary circumstances, over, for example, utilitarian calculations, mere interests, or considerations of social policy . . . which otherwise would be not only appropriate, but decisive, reasons for public or private action.”<sup>8</sup> But how can one set of values—international human rights—warrant universal acknowledgment as preemptory norms when, as a matter of social fact, highly divergent practices, morals, goals, and value hierarchies deeply divide the world’s multiple and diverse civilizations?<sup>9</sup> Practically, universal human rights must provide guidance about when and under what conditions international actors may intervene justifiably in the affairs of sovereign states to deter, terminate, or redress human rights

duties, in favor of an “institutional understanding” whereby “[b]y postulating a person *P*’s right to *X* as a human right we are asserting that *P*’s society ought to be (re)organized in such a way that *P* has secure access to *X* and, in particular, so that *P* is secure against being denied *X* or deprived of *X* officially: by the government or its agents or officials”). These views repudiate the standard objection that, properly speaking, social, economic and cultural rights cannot—or should not—be considered true “rights.” *E.g.*, *Controversies and Culture, A Survey of Human-Rights Law*, *ECONOMIST*, Dec. 5, 1998, at 9 [hereinafter *Controversies and Culture*].

6. For an overview of the legal institutions and processes available to implement international human rights law, see generally HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* (1996).

7. Human rights denote “a special class of moral concerns, namely ones that are among the most weighty of all as well as unrestricted and broadly sharable.” Pogge, *supra* note 5, at 1.

8. JACK DONNELLY, *THE CONCEPT OF HUMAN RIGHTS* 5 (1985).

9. Kymlicka observes that “the world’s 184 states contain over 600 living language groups, and 5,000 ethnic groups.” KYMLICKA, *supra* note 4, at 1.

violations. If, however, certain cultural traditions permit—perhaps even encourage—practices deemed morally abhorrent by other societies,<sup>10</sup> by what criteria do we decide whether they violate “universal” standards that warrant international intervention?

For public international law, this question presents a serious difficulty. Traditional state sovereignty—the idea that what occurs exclusively within the territory of a state remains solely within its domestic competence—no longer constitutes the paramount principle of international law; it has been weakened, in fact, precisely by the post-World War II international human rights movement.<sup>11</sup> But by no means has the primacy of state sovereignty been abandoned. The UN Charter affirms that “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.”<sup>12</sup> Furthermore, nations continue to object vociferously to international interference with, or even judgment of, their domestic affairs on the basis of alleged “universal” human rights standards.<sup>13</sup>

Those affairs, however, no longer remain wholly exempt from international scrutiny. Most nations acknowledge, at least in theory, that certain categories of state action are not “matters which are

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10. Bernard Williams, for instance, recalls an incident from Bernal de Diaz’s account of Cortez’s initial encounter with the Aztecs. Recounting the horror expressed by the Spanish upon observing Aztec sacrificial practices, he writes, “It would surely be absurd to regard this reaction as merely parochial or self-righteous. It rather indicated something which their conduct did not indicate, that they regarded the Indians as men rather than as wild animals.” Bernard Williams, *An Inconsistent Form of Relativism*, in *RELATIVISM: COGNITIVE & MORAL* 173 (Jack W. Meiland & Michael Krausz eds., 1982). William’s anecdote does not demonstrate that the Spanish were more “humane” than the Aztecs. Indeed, contemporaneously, leaders of the Spanish Inquisition were committing atrocities equally, if not more, abhorrent by reference to contemporary morals. It indicates, however, the ubiquitous tendency of cultures to ascribe universality to their understanding of what constitutes genuinely “human” behavior.

11. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 557 (5th ed. 1998); see also SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 35 (1996) (“While states remain the primary actors in world affairs, they also are suffering losses in sovereignty, functions, and power. International institutions now assert the right to judge and to constrain what states do in their own territory.”).

12. U.N. CHARTER art. 2, para. 7.

13. See Louis Henkin, *Human Rights: Reappraisal and Readjustment*, in *ESSAYS ON HUMAN RIGHTS: CONTEMPORARY ISSUES AND JEWISH PERSPECTIVES* 70 (David Sidorsky ed., 1979) [hereinafter *ESSAYS ON HUMAN RIGHTS*] (“Even states substantially committed to human rights resist having their behavior scrutinized by others who may have political or other ulterior motives for criticizing them.”). The People’s Republic of China frequently objects to international human rights scrutiny on this basis. E.g., *China: Another U.S. Attempt to Use Human Rights to Create Confrontation: Comments on U.S. State Department 1996 Human Rights Report on China Information Office, State Council*, *BEIJING REV.*, Apr. 7, 1997, at 14, 1997 WL 10062717; see also James O. Goldsborough, *The U.S. Can’t Punish China for Not Being More Like America*, *SAN DIEGO UNION TRIB.*, May 26, 1994, 1994 WL 5451178.

essentially within the domestic jurisdiction of any state”—international human rights violations. What counts as a human rights violation, then, assumes tremendous significance. For to concede that some state practice violates universal human rights standards implies that the international community may justifiably interfere in the internal affairs of that state to deter, terminate, or redress the practice. States, therefore, maintain a significant stake in delimiting the scope of international human rights and, in particular, in ensuring that social, cultural, and political practices embedded in the fabric of the society or societies within their territory remain outside the class of universal norms that vindicate international interference.

This article pursues two related objectives. First, it seeks to defend a conception of universal human rights that does not deny the empirical validity of cultural relativism—nor does it concede the normative assertions that many cultural relativists assume follow from this concession. Second, it argues that, given this conception of universality, most human rights critiques that rely upon relativism fail to establish their objective—in particular, they do not undermine the legitimacy of imposing certain human rights norms on states that purport to reject them for cultural relativist reasons.

Part II considers briefly the philosophical and historical pedigree of universal human rights. It offers some historical background regarding the Western liberal traditions that relativist critiques often target, and it discusses the genesis of universal human rights—as manifested in the drafting of the Universal Declaration of Human Rights (UDHR)<sup>14</sup>—in the aftermath of World War II. Finally, it sets forth several alternative grounds upon which the universality of human rights might plausibly be claimed. Each, for reasons elaborated below, is ultimately rejected. Part II therefore concludes by embracing cultural relativism as a descriptive truth: All norms and standards—including those that comprise universal human rights—reflect historically and culturally contingent values. It remains to determine, however, what normative consequences this concession compels.

Part III restates the normative challenge that cultural relativism—henceforth presumed to be descriptively unassailable—poses for international human rights. In particular, it appears to suggest that, under some circumstances, interference in the affairs of a sovereign state in the guise of protecting or enforcing universal human rights amounts to “cultural imperialism”—the unjustified or inappropriate imposition of one set of contingent norms on a culture

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14. G.A. Res. 217A, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).



that does not share them.<sup>15</sup> Part III distinguishes two plausible normative claims that might be advanced on the basis of this assertion. The first, labeled “narrative relativism,”<sup>16</sup> does not necessarily reject universal human rights wholesale or suggest that imposing foreign cultural values is morally wrong. Instead, narrative relativism calls attention to the failure of universal human rights to acknowledge the critical reliance of cultures on implicit narratives that inform their normative framework. As Robert Cover succinctly puts it, “[N]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.”<sup>17</sup> Universal human rights law—from this perspective—might be dangerous; well-intentioned legal norms may upset key features of a community’s sociopolitical order, causing local dissonance that outweighs the alleged benefits of an overarching regime structured by respect for international human rights. Alternatively, international human rights law, in the narrative relativist’s view, may prove misguided; alleged universal norms may fail to comprehend adequately the positive roles served by cultural narratives that fail to conform to its, perhaps myopic, prescriptions.<sup>18</sup>

Narrative relativism, under some circumstances, states a legitimate concern for universal human rights. It invites a consideration of the relative desirability of certain kinds of human rights activism that threaten to upset indigenous cultural mores. But narrative relativism, Part III(A) argues, fails to provide reason to abandon the project of universal human rights. First, as some

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15. HUNTINGTON, *supra* note 11, at 21, 28 (arguing that “[a]s their power and self-confidence increase, non-Western societies increasingly assert their own cultural values and reject those ‘imposed’ on them by the West”).

16. Robert Cover, *Nomos & Narrative*, 97 HARV. L. REV. 4 (1983). Narrative relativism corresponds roughly to the non-self-refuting alternative form of moral relativism that Bernard Williams calls “appraisal relativism.” Williams argues that an individual rooted in one historically and culturally contingent “nomos”—to adopt Cover’s terminology—cannot appraise another by means of neutral criteria. Appraisal relativism suggests, then, that the conceptual apparatus—vocabulary, beliefs, and modes of thought—available in one nomos does not overlap sufficiently with another to permit an individual rooted in the former meaningfully to appraise the latter. See generally Bernard Williams, *The Truth in Relativism*, in RELATIVISM: COGNITIVE & MORAL, *supra* note 10, at 175.

17. Cover, *supra* note 16, at 4.

18. The northern African practice of female genital mutilation (FGM) provides a paradigmatic example. Responding to a *New York Times* editorial, one woman wrote, “A.M. Rosenthal condemns female circumcision, a traditional practice common to many African and Arabic peoples, as ‘female mutilation’ . . . . From the Western liberal tradition, and certainly from the feminist perspective, Mr. Rosenthal is correct. However, from the African viewpoint the practice can serve as an affirmation of the value of woman in traditional society . . . . A better approach would be for Western peoples to try to understand the importance of these traditions to those who practice them.” *Letter to the Editor*, N.Y. TIMES, Nov. 24, 1993, at A24, reprinted in STEINER & ALSTON, *supra* note 6, at 253-54.

scholars argue, many of its claims—that certain traditional societies value the well-being of the community above individual rights, or that the devaluation of civil and political rights facilitates economic and social stability in developing nations—prove empirical, and evidence tending to establish these empirical claims remains, at best, inconclusive. Second, and more critically, cultural variations in norms, values, and moral perceptions do not necessarily challenge the idea of an overarching international framework structured around universal human rights; rather, narrative relativism forces one to appraise the extent to which different systems of cultural mores that exist at the level of microlaw remain compatible with a macrolegal system governed by the standards of universal human rights.<sup>19</sup> In the Author's view, however, domestic legal compliance with this component of international law does not demand or even suggest cultural homogenization because values of reasonable tolerance and autonomy form the very foundation of universal human rights law. This observation, standing alone, does not diffuse the relativist challenge. While universal human rights arguably permit diverse cultural communities considerable latitude to subsist within a common international legal order, by no means do all cultural values and practices conform to its prescriptions. The question also remains whether the fact of cultural pluralism implies that international human rights law should tolerate those that do not. Narrative relativism therefore invites inquiry into a more foundational question: Why does universal human rights law—as one peculiar mechanism for promoting human dignity—merit acknowledgment as the paramount international standard by which to appraise domestic legal regimes and cultural practices?

Part III(B) takes up this inquiry by analyzing a second, and substantially broader, cultural relativist claim, designated “crude cultural relativism.” Crude cultural relativism insists that to acknowledge cultural pluralism implies that the coercive imposition of one culture's norms onto another that purports to reject them is morally illegitimate.<sup>20</sup> This Article argues that this position frequently proves a disingenuous, or simply unsupported, empirical claim. Moreover, even assuming its empirical respectability and sincerity, crude relativism remains philosophically unsatisfactory in two principal respects. First, it suffers from a foundational error of logic. Crude relativism asserts, at once, that all values are relative—culturally and historically contingent—but that, nonetheless, to

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19. See generally W. MICHAEL REISMAN, *LAW IN BRIEF ENCOUNTERS* 149-76 (1999).

20. Crude cultural relativism corresponds roughly to what Bernard Williams, evaluating moral relativism generally, denotes “vulgar relativism.” Williams, *supra* note 10, at 171.

impose one set of values on an agent or group that rejects them is objectively wrong. It claims, in other words, that one value—the norm against coercive imposition—demands universal respect notwithstanding the descriptive truth of relativism. To embrace crude relativism descriptively, then, requires abandoning the very normative critique of human rights universalism that, ironically, relativists often assume follows from it.<sup>21</sup> Second, crude cultural relativism presumes that a nation-state's government and its objectives may be identified justifiably with the cultural values and desires of its populace. But several considerations militate against this simple identification, particularly in states that lack genuine democratic institutions, a characteristic feature of most chronic human rights violators. Cultural relativist rhetoric thus often proves more a tool of state elites to vindicate control over their citizenry than a genuine reflection of deeply held cultural values of the populace.

None of these arguments refutes cultural relativism as a descriptive proposition. They establish, at best, that we lack non-contingent criteria—which refers to standards independent of specific historical, cultural, and linguistic contexts—to evaluate competing value hierarchies. But the absence of neutral, non-contingent criteria does not repudiate the normative universality of human rights; it demonstrates, more modestly, that “universal” must not be understood in a transcendental or ontological sense—as a scientific claim about the “true” nature of the world and its inhabitants. Indeed, the emphasis throughout this Article is that a non-transcendental conception of universality is not only empirically accurate, but intrinsically desirable. To claim that universal connotes “objectively true” is to deny that reasonable individuals can hold disparate, but equally valid, opinions about ultimate questions of value. But the possibility, indeed, even desirability, of these differing opinions—about politics, ethics, the nature of the “good life,” and so forth—is inextricably intertwined with the very protections that universal human rights law strives to extend to all individuals, such as freedoms of association, speech, and political and religious belief. Thus, somewhat paradoxically, *universal* human rights law derives its greatest virtue—and perhaps its most compelling claim to normative universality—precisely from its emphasis on the traditional liberal tolerance of reasonable value *pluralism*.

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21. Relativism does not establish that human rights comprise a form of “cultural imperialism.” Any relativist argument to this effect necessarily relies on a perhaps tacit, but nonetheless essential, predicate that some universal norm proscribing coercion exists. But the theoretical core of crude relativism denies that any value or norm is universal in this transcendental sense. Crude relativism cannot, therefore, invoke the principle of non-coercion to substantiate its “imperialist” challenge to the universality of human rights. See *infra* text accompanying notes 199-203.

Part IV therefore strives to defend the liberal foundations that form the core of universal human rights. This Part argues that crude cultural relativism in fact invokes—and, absent some presently unarticulated alternative, must invoke—the liberal values of reasonable tolerance and autonomy in any attempt to repudiate international human rights law. But these values cannot be selectively adopted. A state's elite cannot, for example, appeal to the liberal values of reasonable tolerance and autonomy to challenge universal human rights law as "imperialistic"—for failing to extend adequate tolerance to cultural diversity—but then conveniently reject these very same values when individuals within their polity invoke them in the form of human rights claims.

Arguably, this inconsistency can be reconciled. In the former case, it seems, the reference is to the reasonable tolerance owed to groups and to cultural autonomy; in the latter, to individuals and to personal autonomy. Perhaps, then, the former claim need not imply the latter. But Part IV argues that this apparent distinction rests on a mistake: The justification for valuing tolerance and autonomy, as Will Kymlicka has convincingly shown,<sup>22</sup> is inextricably tied to the distinctive liberal conception of the individual or the "self" as agent. Consequently, absent some alternative—non-liberal—justification, any assertion that cultural groups or political entities also merit tolerance and respect for their autonomy is necessarily derivative of—not independent of—the rationale for respecting individual autonomy. Of course, a cultural or state elite remains free to repudiate this value and its concomitant rationale. But it cannot then demand tolerance or respect for "cultural autonomy" as a rhetorical device to deflect criticism of its human rights practices. By contrast, to embrace the values of autonomy and reasonable tolerance is to acknowledge the normative force of universal human rights.

Moreover, because the liberal values that find expression in international human rights law do respect the paramount importance of reasonable tolerance and autonomy, "universal" human rights law proves highly inclusive, accommodating, and tolerant of the diversity of cultural traditions and values that comprise the contemporary international community. This is because international human rights law evolved from a tradition that, far from denying alternative, "culturally relative" conceptions of value, emphasizes the liberal presumption of value pluralism.

Finally, the Article concludes by integrating the above arguments with an idea that Jack Donnelly, Rhoda Howard, and other scholars have advanced. Specifically, the normative universality of human rights must be conceived in the context of a

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22. See KYMLICKA, *supra* note 4, at 152-65.

historically contingent, but no less valid empirical truth: The Western nation-state—and its attendant cultural narratives—has become the principal actor in international law. Human rights, which developed precisely to counterbalance, as Cover writes, “the rise of the national state with its almost unique mastery of violence over extensive territories,”<sup>23</sup> is, consequently, the peculiarly appropriate set of norms to govern contemporary international law. Universal human rights, then, constitute the appropriate concept for responding to abuses by states and state-like actors, such as paramilitary groups, tribal, or other informal authorities. This may imply that other deeply troubling concerns should not be conceived, strictly speaking, as universal human rights violations. This does not detract from the value or validity of universal human rights law. It simply clarifies, not surprisingly, that human rights ought not to be understood as a panacea for all human suffering or as the exclusive mechanism for promoting a world community conducive to human dignity.

## II. UNIVERSAL HUMAN RIGHTS AND THE CHALLENGE OF CULTURAL RELATIVISM

“Human rights” lends itself to multiple rhetorical uses. Like “justice,” “liberty,” and “equality,” the term “human rights” is used to support broad claims and diverse demands. To analyze cultural relativism, however, two basic meanings must be distinguished. First, human rights may be understood philosophically, as the rights that human beings, *qua* human, possess. In this respect Holmes’ dictum that where there is no remedy there is no right must be rejected.<sup>24</sup> It would remain perfectly coherent to suggest that one’s human rights had been violated, even if no institution existed to

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23. Robert Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J. L. & RELIGION 65 (1987), reprinted in STEINER & ALSTON, *supra* note 6, at 181, 183. Jack Donnelly and Rhoda Howard’s writings have championed this strand of this Article’s argument. After surveying non-Western cultural analogues that appear to promote human dignity, Donnelly concludes, “Why were there no human rights in traditional non-Western and Western societies? Because prior to the creation of capitalist market economies and modern nation states, the problems that human rights seek to address, the particular violations of human dignity that they seek to prevent, either did not exist or were not widely perceived to be central social problems.” DONNELLY, *supra* note 5, at 64.

24. OLIVER WENDELL HOLMES, THE COMMON LAW 169 (Mark DeWolfe Howe ed., 1963) (1881) (“A legal right is nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution, or compensation by the aid of the public force. Just so far as the aid of the public force is given a man, he has a legal right, and this right is the same whether his claim is founded in righteousness or iniquity.”).

provide legal redress. As Donnelly clarifies, "*Possession of a right, the respect it receives, and the ease or frequency of enforcement*" are quite separate issues.<sup>25</sup> Needless to say, the mere fact that some human rights are not respected or are inadequately enforced does not, *ipso facto*, refute their universal possession by human beings. To the contrary, were human rights universally enjoyed, we would have no need for them.<sup>26</sup> Second, we might understand human rights in a strictly legal sense: Human rights would then comprise a particular subset of the domain of legal claims that individuals—and arguably, at times, communities<sup>27</sup>—can advance. In this regard, if no institution exists that, at least in theory, could provide a remedy, no legal human right exists.<sup>28</sup>

Some leading proponents of cultural relativism advocate revisions to the UDHR and post-World War II human rights treaties.<sup>29</sup> Yet the critical issue raised by relativist critiques implicates human rights in the philosophical sense: human rights as weighty, often preemptive, cultural values.<sup>30</sup> Cultural relativists do not typically claim that international treaties lack legal validity

25. DONNELLY, *supra* note 5, at 11-12.

26. Donnelly refers to this state of affairs—where an individual has a right but does not enjoy the object of that right—as the "possession paradox," and he observes that "[h]aving a right is therefore of most value precisely when one does not 'have' the object of the right . . ." *Id.* at 11.

27. See generally KYMLICKA, *supra* note 4, at 35-44 (arguing that certain forms of "group-differentiated rights"—namely, "external protections," which insulate a minority people from some consequences of majority rule, as opposed to "internal restrictions," whereby a group limits the rights of its individual members in the service of group solidarity or cultural survival—remain compatible with the fundamental commitments of a liberal society).

28. Legal institutions must exist that, in theory, would recognize a human rights claim as legitimate grounds for remedial action, even if, in practice, these institutions are corrupt, inefficient, or otherwise unable to effectuate this species of legal claim. On October 5, 1998, the People's Republic of China signed the International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 [hereinafter ICCPR]. Should China subsequently ratify the ICCPR, it would become perfectly coherent to assert that a Chinese dissident's legal human rights had been violated, even if, as it unfortunately appears, China's present legal institutions frequently act to subvert the ICCPR's intended due process guarantees. See generally BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEPT OF STATE, CHINA COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1999 (2000), available at <http://www.state.gov/g/drl/rls/hrrpt/1999>.

29. Gillian Triggs, *Confucius and Consensus: International Law in the Asian Pacific*, 21 MELB. U. L. REV. 650, 668-69 (1997).

30. The value debate, of course, at times collapses into a legal debate. As narrative relativism indicates, governments may conclude human rights treaties, and yet, when it comes to practice or implementation, the terms of these treaties may possess vastly different meanings in virtue of their divergent cultural contexts. But properly understood, this challenge, too, is not a legal claim. Two states may agree that the right to free speech articulated by article 19 of the ICCPR must be respected. The dispute persists over what values a "right to free speech" legitimately protects.

because they interfere with sacrosanct cultural traditions. They assert, instead, that the values codified in these treaties and the functional concepts used to enforce them (rights) either (1) impose a value hegemony anathema to their cultural traditions (crude relativism); or (2) often receive interpretations informed by cultural biases that fail to acknowledge alternative, but equally valid, cultural constructions of these legally codified principles (narrative relativism).<sup>31</sup>

Before evaluating these critiques, then, the conceptual framework under attack—roughly, Western liberalism and its concomitant concern with rights—warrants preliminary appraisal. Liberalism does not denote a single, clearly identifiable tradition; to the contrary, “right-wing” libertarians, “left-wing” proponents of a vigorous welfare state, and every permutation along the political spectrum in between at times self-identifies as, or is saddled by others with the description “liberal.” Liberalism must not, therefore, be understood as a monolithic approach to political philosophy.<sup>32</sup> Yet several prominent features ascribed to the Western liberal tradition can be identified that different variants of the cultural relativist critique challenge: the primacy of the individual as the fundamental unit of concern and measure of value; a conception of rights as political “trumps”<sup>33</sup> against the demands of the state or community; a commitment to some measure of democratic participation in government; a concern with preserving autonomy; and finally, some notion of equality.

But even conceding, for the moment, that most forms of Western liberalism embrace these ideas in one way or another, we must take care not to make any simple equation between the human rights movement and Western liberalism. First, international human rights did not develop as an identifiable movement until after World War II; whereas liberalism, in its diverse manifestations, claims a much longer history. Second, although human rights evolved from values and philosophical presumptions closely associated with the Western

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31. For example, some Native American tribes in Canada expressly endorse the Canadian Charter of Rights and Freedoms. Tribal leaders remain concerned, however, “that white judges will impose their own culturally specific form of democracy, without considering whether traditional Indian practices are an equally valid interpretation of democratic principles . . . . They endorse the principles, but object to the particular institutions and procedures that the larger society has established to enforce these principles.” KYMLICKA, *supra* note 4, at 39-40.

32. At the same time, liberal traditions arguably share certain basic precepts. David Johnston suggests that liberal political theories invariably endorse three tenets: (1) only individuals count; (2) everybody counts as one, nobody as more than one; and (3) everybody counts as an agent—a being capable of independently conceiving of and subsequently pursuing personal goals. DAVID JOHNSTON, *THE IDEA OF A LIBERAL THEORY* 17-27 (1994).

33. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1979).

liberal tradition, the modern international human rights movement can embrace certain other substantive cultural values to the extent that they promote human dignity. Finally, no necessary connection exists between being a political liberal and respecting all international human rights.<sup>34</sup> Some liberals—including self-identified human rights advocates—reject economic, social, and cultural rights, half of the so-called “Universal Bill of Human Rights,” as genuine rights.<sup>35</sup> Other liberals—those in the Benthamite utilitarian tradition for example—might regard international human rights as “nonsense on stilts”—though they might be inclined to concede the usefulness of this nonsense.<sup>36</sup> Still others might express support for international human rights while maintaining a deep commitment to Marxist political theory.

Yet we need not engage these debates directly to evaluate cultural relativism. What is at stake is not which liberal values deserve to be included on the substantive “list” of human rights. The crux of the question presented by relativism resides at a distinct level: Does acknowledging the descriptive truth of cultural pluralism require abandoning the idea that human rights—however politicians, international lawyers, philosophers, and others delimit their scope—can, in any meaningful sense, be universal? Does cultural pluralism show that the very objective of international human rights law—to establish rights that operate *erga omnes partes* despite the disparate cultural and political contingencies that characterize different nation-states—is incoherent? Thus, the next section identifies some of the more prominent features of the Western human rights movement as it has developed, philosophically and historically, in the liberal tradition, and subsequently considers whether the descriptive fact of cultural pluralism renders the normative concept of universal human rights misguided.

#### A. *Universal Human Rights in the Western Liberal Tradition: Philosophical Antecedents*

These qualifications aside, the human *rights* tradition remains quintessentially a legacy of Western liberalism. It owes its conceptual origins to a unique Enlightenment-era synthesis of two

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34. This is not to say that there is not, *in fact*, a connection between liberalism and international human rights. See DONNELLY, *supra* note 5, at 67 (asserting that “[i]nternationally recognized human rights require a liberal regime). Donnelly argues—rightly, in the Author’s judgment—that realizing the list of human rights sketched by the UDHR, ICCPR, and ICESCR requires, broadly speaking, some form of liberal state. The point here is simply that, for analytic purposes, the two should not be identified or equated in an overly simplified fashion.

35. *E.g.*, ROBERT NOZICK, *ANARCHY, STATE & UTOPIA* (1971).

36. JEREMY BENTHAM, *ANARCHICAL FALLACIES* 489, 501 (1824).



prominent schools of Western philosophy: natural law and natural rights.<sup>37</sup> The former, which dates to ancient Greek and Hebraic traditions, locates universal moral principles in the order of nature. Aristotle wrote, for instance, that “[o]f political justice part is natural, part legal—*natural, that which everywhere has the same force and does not exist by people’s thinking this or that.*”<sup>38</sup> The idea that certain moral laws exist independently of the human mind because they inhere in the natural order of the universe persisted into the middle ages, at which time Aquinas, among others, linked this notion of natural law to conceptions of a divine will.<sup>39</sup> “[I]t was the fusion of the mythopoeic view that moral values are built into the natural order of things with the doctrine of the immanent operation of divinely revealed moral laws that led to the theory of natural law.”<sup>40</sup> Natural law theory thus postulates that certain norms of conduct possess a non-contingent ontological status in virtue of which they transcend the ephemeral features of particular cultures and historical epochs.

Although frequently conflated with natural rights, natural law theory, by itself, provides an insufficient basis for individual claims—whether moral or legal; it includes no necessary connection to the human subject. “The natural law idiom,” Thomas Pogge clarifies, “need not involve constraints on one’s conduct toward other subjects at all, and even if it does, need not involve the idea that by violating such constraints, one has wronged these subjects—one may rather have wronged God, for example, or disturbed the harmonious order of the cosmos.”<sup>41</sup> Natural rights, by contrast, introduce the human subject as rights-holder, effecting a crucial shift in the locus of universality: from “nature” or “divinity” to “human.” Natural rights theorists, including Enlightenment-era luminaries like Rousseau and Locke, commonly posit, whether as an alleged historical fact or a mere theoretical postulate, a state of nature in which humans enjoy certain rights.<sup>42</sup> These natural rights, the familiar story runs, are

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37. See Pogge, *supra* note 5, at 1.

38. ARISTOTLE, *NICHOMACHEAN ETHICS*, reprinted in *BASIC WORKS OF ARISTOTLE* 1014 (Richard McKeon ed. & W.D. Ross trans., 1941) (emphasis added).

39. See DONNELLY, *supra* note 8, at 45-47.

40. David Sidorsky, *Contemporary Reinterpretations of the Concept of Human Rights*, in *ESSAYS ON HUMAN RIGHTS: CONTEMPORARY ISSUES AND JEWISH PERSPECTIVES*, *supra* note 13, at 91; see also MYRES S. MCDUGAL ET AL., *HUMAN RIGHTS & WORLD PUBLIC ORDER* 68 (1980).

41. Pogge, *supra* note 5, at 2.

42. See JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 8-14 (C.B. Macpherson ed., Hackett Publishing Co. 1980) (1690); JEAN-JACQUES ROUSSEAU, *DISCOURSE ON THE ORIGIN OF INEQUALITY*, in *THE BASIC POLITICAL WRITINGS* (Donald A. Cress trans. & ed., Hackett Publishing Co. 1987) (1754). The source and content of these rights vary among natural rights theorists. Some, like Locke, continue to locate natural rights in the divine will: the rights to life, liberty, and property, according to

then collectively traded by individuals to a state in exchange for some form of security.

A strong nexus exists between natural law and natural rights theories, but the pedigree of human rights resides largely in the shift from the former to the latter.<sup>43</sup> First and foremost, this shift created a class of rights-holders—human beings—empowered to press claims. “To have a right to *x*,” as Donnelly puts it, “is to be specially *entitled* to have and enjoy *x*.”<sup>44</sup> Second, the shift from natural law to natural rights reoriented the locus of universality—from an external focus on the nature of the universe to an internal focus on the nature of humans:

The adjective “human”—unlike “natural”—does not suggest an ontological status independent of any and all human efforts, decisions and (re)cognition. It does not rule out such a status either. Rather, it avoids these metaphysical and metaethical issues by implying nothing about them one way or the other.<sup>45</sup>

Critically, then, while rights theories frequently evolved from ontological claims—about God or nature—they need not, unlike natural law theory, remain committed to these transcendentalist ideas. Finally, by postulating a contractual relationship between the individual-as-rights-holder and the state, natural rights theory laid the foundation for understanding human rights violations as implying official abuse.<sup>46</sup>

Human rights, in sum, imply three interrelated postulates: (1) They are “held” by a certain class of rights-holders who may “exercise” them or press them as claims upon other agents or institutions; (2) this class includes all and only human beings, *qua* human—only humans hold these rights because only humans possess the requisite qualities<sup>47</sup> that make human rights conceptually meaningful; and (3) unlike natural rights generally, susceptible to both public and private violation, only official abuses—those committed, at a minimum, under color of state or communal

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Locke, existed in the state of nature at the time of man’s fall from grace. Locke, *supra*, at 9. Hobbes, by contrast, merely ascribes to man the right to defend his person, “the liberty that each man hath, to use his own power as he will himself, for the preservation of his own nature.” THOMAS HOBBS, *LEVIATHAN* 103 (Michael Oakshott ed., 1962) (1651).

43. *E.g.*, *ESSAYS ON HUMAN RIGHTS*, *supra* note 13, at 93; Pogge, *supra* note 5, at 3-4.

44. DONNELLY, *supra* note 5, at 9.

45. Pogge, *supra* note 5, at 2-3.

46. *See id.*

47. These qualities could be metaphysical—all humans possess a divine nature—or “merely” contingent—only humans, as moral beings, possess the relevant capacities—free will and agency, that make rights meaningful.

authority—count as human rights violations.<sup>48</sup> From the standpoint of the history of philosophy, then, the universality of human rights resides in either transcendental features of the natural world, or alternatively, in some essential, peculiar features of human beings, *qua* human.

B. *Universal Human Rights in the Western Liberal Tradition: Historical Antecedents*

From a political-historical perspective, universal human rights emerged in the wake of World War II. The unique atmosphere prevailing in the post-World War II era, shaped, in particular, by reactions to the atrocities of Nazi Germany, facilitated the extraordinarily rapid success and expansion of the international human rights movement. Indeed, as Louis Henkin observed, only these circumstances made the “creation and adoption [of the Universal Declaration of Human Rights] without dissent” possible; it embodied one of the “marvels of postwar international life.”<sup>49</sup> Yet the post-WWII instantiation of human rights in multilateral treaties and declarations<sup>50</sup> represented the merger, expansion, and modification of several trends in international law that predate the birth of the human rights movement. Steiner and Alston cite four core precedents: first, the laws of war—international humanitarian law; second, the protection afforded aliens by international law, which at times motivated state “humanitarian intervention” to protect nationals residing in foreign states; third, the attribution of individual criminal liability to Nazi war criminals; and fourth, the

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48. Thomas Pogge provides the following example: if a street thug steals my car, my rights have been violated. But we would not describe this situation as a human rights abuse. By contrast, the arbitrary confiscation of my car by the government might appropriately be called a human rights violation. See Pogge, *supra* note 5, at 4.

49. Louis Henkin, *Human Rights: Reappraisal and Readjustment*, in *ESSAYS ON HUMAN RIGHTS*, *supra* note 13, at 69.

50. *E.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, G.A. Res. 260A, U.N. GAOR, 3d Sess., 179th Plen. Mtg. (1948), *reprinted in* 78 U.N.T.S. 277; Universal Declaration of Human Rights, G.A. Res. 217A, *supra* note 14, at 71; International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52 (1976), *reprinted in* 999 U.N.T.S. 302; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1976), *reprinted in* 999 U.N.T.S. 3; Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, annex, at 197, U.N. Doc. A/39/51 (1984), *reprinted in* 23 I.L.M. 1027 (1984), *modified in* 24 I.L.M. 535 (1985).

development of minority rights treaty regimes to protect national minorities during the League of Nations era.<sup>51</sup>

To appreciate the significance of minority rights regimes in the context of the relativist-universalist debate, two ideologies must be distinguished. Value pluralism, the proposition that, within a political community, individual citizens will inevitably disagree about the fundamental goals of life,<sup>52</sup> must be distinguished from cultural pluralism, the coexistence within a polity of two or more distinct peoples, where a people signifies "an intergenerational community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and history."<sup>53</sup> The former concept, though not so-called, informed the political thought of classical liberals such as John Stuart Mill.<sup>54</sup> It also motivated the concern with factions that preoccupied some of the drafters of the U.S. Constitution. Madison, for instance, remarked that "[t]he latent causes of faction are thus sown in the nature of man . . . . A zeal for different opinions concerning religion, concerning Government and many other points . . . ."<sup>55</sup> In general, liberals do not deny the fact of value pluralism; to the contrary, a great deal of Western political thought invokes value pluralism as the basic problem that motivates some emphasis on individual rights.

But the historical relationship between liberalism and cultural pluralism is ambiguous. Kymlicka argues forcefully that the contemporary notion that states should treat cultures within their territorial boundaries with "benign neglect" is comparatively recent.<sup>56</sup> Historically, far from endorsing the idea that "the state should treat cultural membership as a purely private matter,"<sup>57</sup> Western liberals were attentive to the problems posed by cultural pluralism—not least of which was that its existence threatened the political stability of

51. For an overview of these antecedents, see STEINER & ALSTON, *supra* note 6, at 59-116.

52. The fact of value pluralism, famously elaborated by Isaiah Berlin in his seminal essay *Two Concepts of Liberty*, is often deemed a fundamental tenet of liberalism. Simply stated, value pluralism is the claim that individuals disagree, and will inevitably disagree, about which ultimate values merit pursuit. Recognition of this social fact, in turn, requires a state that, at a minimum, establishes an inalienable sphere of action within which individuals—provided they refrain from infringing the liberty of others—may pursue their particular projects and ends without fear of coercive interference by other individuals or the state. See Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118-72 (1969).

53. KYMLICKA, *supra* note 4, at 18.

54. *E.g.*, J.S. MILL, ON LIBERTY 12 (Elizabeth Rapaport ed., Hackett Publishing Co. 1978) (1859) ("The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it.").

55. THE FEDERALIST NO. 10, at 58 (James Madison) (Jacob E. Cooke ed., 1961).

56. KYMLICKA, *supra* note 4, at 50.

57. *Id.* at 53.

nation-states. This concern, which first emerged in the seventeenth century when certain religious minorities were afforded interstate protection,<sup>58</sup> grew more prominent in the nineteenth-century due to the predominance of multination—the Hapsburg, Ottoman and Russian tsarist—and colonial empires—Great Britain and France:

It was commonplace in nineteenth-century thought to distinguish the 'great nations', such as France, Italy, Poland, Germany, Hungary, Spain, England, and Russia, from smaller 'nationalities', such as the Czechs, Slovaks, Croats, Basques, Welsh, Scots, Serbians, Bulgarians, Romanians, and Slovenes. The great nations were seen as civilized . . . the carriers of historical development.<sup>59</sup>

Needless to say, a similar relationship obtained between the European colonial powers and the diverse peoples of Asia, Africa, and the Middle East that suffered colonization during and prior to the mid-twentieth century.<sup>60</sup> According to Kymlicka, liberals responded to the related difficulties raised by multination empires and colonization in one of two ways: Either they advocated coercive assimilation of the subjugated nationality or colonized people, or they endorsed the idea of certain protections for minority cultures subsumed by these empires.<sup>61</sup> Pre-twentieth-century liberals did not, however, advance the view that states should ignore cultural membership as an irrelevant, "incidental" feature; rather, "liberals either endorsed the legal recognition of minority cultures, or rejected minority rights not because they rejected the idea of an official culture, but precisely because they believed there should be *one* official culture."<sup>62</sup> It was only after World War II that the idea that states should treat cultural disparities with "benign neglect"<sup>63</sup>—that the state's exclusive concern ought to be with treatment of the individual human subject, *qua* human—became the predominant approach in liberal political thought.<sup>64</sup>

Thus, in the aftermath of World War I—with the collapse of the multination Austro-Hungarian and Ottoman Empires and the upheaval wrought by the Bolshevik revolution—the League of Nations sought to create regimes for the protection of cultural minorities by imposing "Minorities Treaties . . . on the new or

58. See Elizabeth F. Dedeis, *Minority Protections and Bilateral Agreements: An Effective Mechanism*, 22 HASTINGS INT'L & COMP. L. REV. 291, 293 (1999) (observing that religious minorities, after the Peace of Westphalia, were the first to receive international protection through the peace treaties of Munster and Osnabruck concluded between France, the Holy Roman Empire and their respective allies).

59. KYMLICKA, *supra* note 4, at 53.

60. See generally ALBERT MEMMI, *THE COLONIZER & THE COLONIZED* (1965).

61. See KYMLICKA, *supra* note 4, at 50-57.

62. *Id.* at 53-54.

63. Kymlicka borrows this phrase from NATHAN GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* 25 (1975). *Id.* at 3.

64. *Id.* at 49-50.

reconfigured states of Central-East Europe and the Balkans.”<sup>65</sup> Far from ignoring cultural membership, these treaties—influenced in no small part by Woodrow Wilson’s emphasis on the “self-determination of peoples”<sup>66</sup>—demanded precisely the opposite: The newly constituted governments were compelled to guarantee certain group-differentiated rights—language, religion, and education—to minority cultures subsisting within nation-states dominated by other, majority nationalities. In its advisory opinion on *Minority Schools in Albania*, for example, the Permanent Court of International Justice rejected the Albanian Government’s position that the Albanian Declaration required only that it “grant to its nationals belonging to racial, religious or linguistic minorities a right equal to that possessed by other Albanian nationals.”<sup>67</sup> To the contrary, the Permanent Court of International Justice (P.C.I.J.) held:

The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.<sup>68</sup>

Here again, consistent with Kymlicka’s argument, cultural pluralism receives acknowledgment and appears to require some forms of differential treatment of cultural groups to ensure their protection against the politically predominant culture. Liberalism’s purported fixation on the decontextualized individual to the exclusion of certain potential cultural rights and values thus proves less an essential feature of liberalism than of post-War developments in liberal thought—developments that in substantial part motivated the rhetoric of universality that permeates subsequent human rights instruments.

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65. STEINER & ALSTON, *supra* note 6, at 88.

66. *E.g.*, Speech of Woodrow Wilson (Feb. 11, 1918), *reprinted in* 1 THE PUBLIC PAPERS OF WOODROW WILSON: WAR & RACE 180 (R. Baker & W. Dodd eds., 1927). *See generally* Michla Pomerance, *The United States and Self-Determination: Perspectives of the Wilsonian Conception*, 70 AM. J. INT’L L. 1 (1976).

67. *Minority Schools in Albania*, 1935 P.C.I.J. (ser. A/B) No. 64 (Apr. 6), *reprinted in* STEINER & ALSTON, *supra* note 6, at 90.

68. STEINER & ALSTON, *supra* note 6, at 91; *see also* Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland, 1923 P.C.I.J. (ser. B) No. 6 (Sept. 10); Certain Questions Arising out of the Application of Article 4 of the Polish Minorities Treaty, 1923 P.C.I.J. (ser. B) No. 7 (Sept. 15).

### C. *The Genesis of "Universal" International Human Rights*

It is not immediately apparent, then, why "universality," though by no means novel to the Western rights tradition,<sup>69</sup> assumed such prominence in the post-War international public order. Nor is it apparent why concern with ethno-cultural differences and the insulation of minority rights more or less dropped out of the picture after World War II. Several factors, however, help to explain this theoretical shift. First, as Rita Hauser notes:

[The] universal approach, which looks beyond the boundaries of the sovereign state, was the result both of the horror of the Western world at the scope of Hitler's atrocities and the determined lobbying of interested organizations which made their views known long before San Francisco was selected as the Charter drafting site. Numerous Jewish groups, in particular, promoted the idea of an International Bill of Rights, believing, as they did, that Jews would be protected in the enjoyment of their rights to the extent the rights of others everywhere were similarly respected.<sup>70</sup>

But universality owed its theoretical appeal to more than the desire to affirm certain inalienable rights of man after the horrors of Nazi Germany. It also reflected an acknowledgment that the culturally-based minority rights regimes had failed catastrophically. While these treaty-based rights for the protection of ethno-cultural minorities enjoyed some early successes, Hitler later exploited their existence to vindicate German aggression in the late 1930s. "[T]he issue of German minorities in Poland and Czechoslovakia became a significant, albeit pretextual, precipitating factor for German aggression and World War II."<sup>71</sup> Consequently, in the aftermath of World War II, the idea of human rights, as inalienable and undifferentiated rights that attach to the individual without regard to cultural identity, found widespread support. Cultural rights were "subsum[ed] . . . under the broader problem of ensuring basic individual rights to all human beings, without reference to membership in ethnic groups."<sup>72</sup> Universality, then, developed as both a positive affirmation of the naturalistic idea of the inherent "rights of man" after the atrocities of Nazi Germany, as well as a negative reaction against the apparent failure of minority-rights regimes created during the League of Nations era.

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69. See generally *The Declaration of Independence (U.S. 1776)*; *French Declaration on the Rights of Man and the Citizen (1789)*.

70. Rita Hauser, *International Human-Rights Protection: The Dream and the Deceptions*, in *ESSAYS ON HUMAN RIGHTS*, *supra* note 13, at 22.

71. Defeis, *supra* note 58, at 295; see also KYMLICKA, *supra* note 4, at 57.

72. INIS CLAUDE, *NATIONAL MINORITIES: AN INTERNATIONAL PROBLEM* 211 (1955), *cited in* KYMLICKA, *supra* note 4, at 3.

Yet the drafters of the UDHR were not blind to the highly precarious empirical status of universal human rights. First, philosophical skepticism about universal rights and natural law enjoys a history as rich as the traditions out of which the contrary ideals developed. Against the Aristotelian natural law tradition of ancient Greece, for instance, stood the moral and cognitive skepticism of the pre-Socratic sophists, famously expressed in the Protagorean maxim that "man is the measure of all things."<sup>73</sup> Liberalism itself embraces not only natural law and natural rights traditions, but also utilitarianism, whose founder, Jeremy Bentham, famously mocked natural rights as mere "nonsense upon stilts."<sup>74</sup> Contemporary rights skeptics, such as Alasdair MacIntyre, echo this complaint, equating human rights with "belief in witches and in unicorns;" he proceeds to quip that:

[I]n the United Nations declaration on human rights in 1949 what has since become the normal UN practice of not giving good reasons for *any* assertions whatsoever is followed with great rigor. And the latest defender of such rights, Ronald Dworkin (*Taking Rights Seriously*, 1976), concedes that the existence of such rights cannot be demonstrated, but remarks on this point simply that it does not follow from the fact that a statement cannot be demonstrated that it is not true (p. 81). Which is true, but could equally be used to defend claims about unicorns and witches. Natural or human rights then are fictions . . . .<sup>75</sup>

But the problem of forging a list of "universal" rights that confronted the drafters of the UDHR was not only—nor primarily—theoretical. It was magnified and exacerbated both by the number of cultures represented at the United Nations and by the ideological split between the Western allies and the Soviet bloc. Thus, at the time of the UDHR's drafting, as Mary Ann Glendon wrote recently in her commemorative analysis, "the problem of universality loomed large . . . ."<sup>76</sup>

In 1947, in an effort to lay the groundwork for the drafting of a universal declaration of human rights, the UN Economic and Social Council (UNESCO) circulated a questionnaire to prominent scholars and cultural figures worldwide, requesting their views on the extent, nature, and theoretical grounds of human rights.<sup>77</sup> Responses to the questionnaire, as expected, reflected divergent cultural and ideological perspectives; nonetheless, "[t]o the Committee's surprise,

73. See RELATIVISM: COGNITIVE & MORAL, *supra* note 10, at 6.

74. BENTHAM, *supra* note 36, at 489, 501.

75. ALASDAIR MACINTYRE, *AFTER VIRTUE* 69-70 (2d ed. 1984).

76. Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153, 1155 (1998).

77. Memorandum and Questionnaire Circulated by UNESCO on the Theoretical Bases of the Rights of Man, *reprinted in* HUMAN RIGHTS, *supra* note 1, app. I, at 251.



the lists of basic rights and values they received from their far-flung sources were essentially similar. [Committee Rapporteur] McKeon's final report recorded their conclusion that it was indeed possible to achieve agreement across cultures concerning certain rights that 'may be viewed as implicit in man's nature as an individual and as a member of society.'<sup>78</sup> Yet this consensus, as the Committee readily acknowledged, was tenuous at best, a superficial agreement upon nominal "rights" that masked deep, intractable disagreements regarding their rationale, meaning, and application.<sup>79</sup> Jacques Maritain, French philosopher and member of the UNESCO Committee, noted that no consensus proved possible on what he termed a common "*speculative ideology*," but that, nonetheless, "we find [principles] that . . . constitute *grosso modo* a sort of common denominator, a sort of unwritten common law, at the point where in practice the most widely separated theoretical ideologies and mental traditions converge."<sup>80</sup>

Yet even Maritain's carefully qualified language overstates the degree of this consensus. What the Committee managed to procure for the Human Rights Commission that drafted the UDHR amounted to little more than a short list articulated at a level of generality that rendered the terms susceptible to, not merely different, but at times wholly antithetical interpretations. The Committee concluded, for instance, that "[e]very man has an equal right to justice,"<sup>81</sup> without, however, providing any definitional content to this notoriously controversial ideal. Indeed, the vacuity of this "universal right" becomes amusingly apparent in a sentence that shortly follows, which stipulates tautologically that every man has a "right to be protected by law from illegal arrest."<sup>82</sup> Likewise, the Committee included, under the heading of a "Right to Political Action," the freedom to express ideas and to form associations "provided that such expressions and such associations are not incompatible with the principles of democracy or with the rights of man."<sup>83</sup> Here again, the qualifier eviscerates any content that such a right might *prima facie* appear to bestow. John L. Lewis, for example, one of the respondents to the Committee's survey, affirmed the right to democratic association but noted that it requires eradication of "those sections of the community whose interests unquestionably conflict with those of

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78. Glendon, *supra* note 76, at 1155-56 (quoting Richard McKeon, *The Philosophic Bases and Material Circumstances of the Rights of Man*, in HUMAN RIGHTS, *supra* note 1, at 45).

79. See Glendon, *supra* note 76, at 1156-67.

80. Jacques Maritain, *supra* note 1, at 10.

81. *The Grounds of an International Declaration of Human Rights*, in HUMAN RIGHTS, *supra* note 1, app. II, at 270.

82. *Id.*

83. *Id.*

the community [and] are inconsistent with democratic purposes and therefore implacably hostile to real democracy . . . [T]he crisis can only be solved with full democracy; that is, with the final release of popular power to control economic resources and to accomplish human ends."<sup>84</sup> Whatever the merits of Lewis' remarks, this definition of democracy would hardly resonate with most Western liberal understandings of the word.

Given the constitutional makeup of the United Nations in the immediate post-War era, it is unsurprising that the deepest ideological rift that emerged reflected the antithetical ideologies of, broadly speaking, liberal democracies and communist states—joined by their respective spheres of influence. Respondents thus repeatedly affirmed the importance of liberty as a basic human right but expressed radically different views about the circumstances under which liberty truly exists. Members of the Soviet bloc emphasized that genuine liberty requires man to be in full control of his economic and social circumstances, free from capitalist exploitation,<sup>85</sup> while Western liberals tended to emphasize the extent to which liberty demands limits on state action.<sup>86</sup> The UNESCO Committee was not, of course, unaware of these tensions nor of the precarious nature of the alleged consensus it had achieved. The Committee's chairman, Professor Richard McKeon, concluded that:

The fundamental problem is not found in compiling a list of human rights . . . [T]he declarations that have been submitted to the Commission on Human Rights are surprisingly similar . . . . [T]he differences are found rather in what is meant by these rights, and these differences of meaning depend on divergent basic assumptions, which, in turn, lend plausibility to and are justified by contradictory interpretations of the economic and social situation, and, finally, lead to opposed recommendations concerning the implementation required for a world declaration of human rights.<sup>87</sup>

The Committee's final report to the Human Rights Commission conceded as much.<sup>88</sup> Yet it suggested, somewhat paradoxically, that the problem faced in drafting a universal declaration of human rights resides not in "doctrinal consensus" but merely in consensus "concerning rights, and also concerning action in the realisation and defence of those rights, which may be justified on highly divergent

84. John Lewis, *On Human Rights*, in HUMAN RIGHTS, *supra* note 1, at 68-69.

85. *See id.* at 61.

86. *See id.* at 63.

87. Richard McKeon, *The Philosophic Bases and Material Circumstances of the Rights of Man*, in HUMAN RIGHTS, *supra* note 1, at 35.

88. *See* THE GROUNDS OF AN INTERNATIONAL DECLARATION OF HUMAN RIGHTS, in HUMAN RIGHTS, *supra* note 1, app. II, at 263 (emphasizing that the Committee is "fully aware that these working definitions are susceptible of highly diverse particularisations").

grounds.”<sup>89</sup> If we interpret this statement charitably, as merely expressing the conditions under which the drafting of the UDHR’s language is a feasible project, then it retains some plausibility.

Yet the suggestion that “action in the realisation and defence of those rights”<sup>90</sup> might also proceed from such a consensus remains dubious. This difficulty achieving consensus, moreover, increases exponentially when we recognize that, since the adoption of the UDHR in 1948, the membership of the United Nations has increased from 56 to 185 states.<sup>91</sup> The United Nations today embraces societies that manifest cultural divergences potentially far more varied and severe than the already intractable Cold War ideological rift that preoccupied the drafters. Indeed, despite the rhetoric of universality, interdivisibility, and interdependency, which forty-five years later found its way into the Vienna Declaration, the actual 1993 Conference revealed similarly profound disagreements regarding the nature, interpretation, and priority of human rights.<sup>92</sup> In short, genuine consensus sufficient to be termed “universal”—now, as in 1948—exists, if at all, only at a level of rhetorical and linguistic abstraction that provides little guidance as to the practical implementation of human rights.

#### D. *Alternative Conceptions of the Locus of Universality*

In 1947 the American Anthropological Association, which was likewise consulted by the Human Rights Commission prior to the UDHR’s drafting, affirmed, almost unequivocally, the descriptive fact of cultural relativism: “Standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole.”<sup>93</sup> Since then, of course, the international community has undergone and continues to experience what has been termed “globalization.” The exponential increase in technology, particularly methods of communication, has facilitated a remarkable growth in economic and cultural exchanges between states,<sup>94</sup> and it seems logical to assume that this increase in cultural exchange promotes an attendant increase in shared values. To some

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89. *Id.*

90. *Id.*

91. See STEINER & ALSTON, *supra* note 6, at 120.

92. See HUNTINGTON, *supra* note 11, at 195-96.

93. American Anthropological Association, *Statement on Human Rights*, 49 AMER. ANTHROPOLOGIST 539 (1947), *reprinted in* STEINER & ALSTON, *supra* note 6, at 199.

94. *E.g.*, Jeffrey D. Sachs, *Globalization and the Rule of Law* (Yale Law School Occasional Papers, Second Series, 1998).

extent, and in certain spheres more than others—economics, for example—there is undoubtedly a degree of truth to this presumption. Yet, perhaps paradoxically, we have witnessed more, not fewer, assertions of cultural and ethnic identification in the post-World War II era, particularly since the end of the Cold War. Francis Fukuyama's "end of history"<sup>95</sup>—brought about by a "universalization of Western liberal democracy"—has decisively failed to materialize.<sup>96</sup> To the contrary, "[m]odern societies are increasingly confronted with minority groups demanding recognition of their identity, and accommodation of their cultural differences."<sup>97</sup> Even more troubling from the perspective of "universal human rights," these cherished assertions of cultural distinction appear to have at least contributed to, or even played a significant causal role in, some of the most egregious human rights catastrophes since World War II. The hope that global interdependence itself would impel a new era of universal adherence to international human rights norms now seems quixotic.

Empirically, then, the universality of human rights—where "universal" denotes a high degree of consensus among the cultures and nation-states that comprise the international community—emerges as, at best, a useful fiction. "Cultural relativity," as even proponent of universality Jack Donnelly acknowledges, "is an undeniable fact; moral rules and social institutions evidence an astonishing cultural and historical variability."<sup>98</sup> Yet the normative universality of human rights need not be based on empirical claims about an actual cultural consensus, although it seems apparent that the existence of such a consensus would provide some of the strongest *prima facie* support for a claim to universality. Universal human rights could be vindicated on several alternative grounds that bear appraisal before examining what consequences flow from acknowledging the descriptive truth of cultural pluralism.

### 1. The Human Needs Approach

Intuitively, as Donnelly notes, "[h]uman rights are . . . the rights one has simply because one is a human being."<sup>99</sup> An initially attractive approach, then, would be to locate the source of universality in that which remains definitionally human about us—in natural facts about human beings that do not vary from culture to culture. Thus, one might assert that our need for nutritional

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95. See generally FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

96. See HUNTINGTON, *supra* note 11, at 31.

97. KYMLICKA, *supra* note 4, at 10.

98. DONNELLY, *supra* note 5, at 109.

99. *Id.* at 9.

sustenance gives rise to a "right to food" and that our need for security gives rise to a "right to physical integrity," which may, in turn, generate certain negative rights, such as the prohibition against torture. Depending upon how much elasticity we permit the term "need" to assume, one might also suggest that all human beings evince a need for what Rawls refers to as the social bases of self-respect,<sup>100</sup> those traits that permit us to sustain a level of psychological as well as physical health within the context of a cultural community. Rights against enslavement, due process rights, anti-discrimination rights, and others might thereby be drawn within the domain of human rights. Postulating a need for the "social bases of self-respect" disturbs the relatively concrete notion of biological need from which this conception of universal human rights initially appears to derive its attractiveness. Rawls' concept, however, does retain the virtue of being, at least superficially, neutral as between cultures: The specific social bases needed for self-respect could vary among cultures; yet each could, in its own peculiar manner, satisfy this need. The human needs approach thus appears to promise some conception of universality that does not contravene the descriptive fact of cultural pluralism.

Yet a needs-based approach suffers from several, probably fatal, flaws. First, the range of scientifically verifiable human needs remains quite narrow: "If we turn to science, we find an extraordinarily limited set of needs. Even Christian Bay, probably the best-known advocate of a needs theory of human rights, admits that 'it is premature to speak of *any* empirically established needs beyond sustenance and safety.'<sup>101</sup> If we introduce needs beyond the physiological, we beg the question of universality, for cultures construct these social needs. While they perhaps remain matters of necessity given the specific mores of a cultural community, these needs also, by definition, emerge as culturally contingent. The "social bases of self-respect," then, proves far too malleable a concept, under which, for instance, maltreatment of *dalits* (untouchables) in the Hindu caste system might well appear justifiable.<sup>102</sup> Even more fundamentally, however, the needs-based approach to universal human rights suffers from the Humean naturalistic fallacy. It infers certain moral "oughts" from empirical facts that, in themselves, can create no obligations, still less "rights." Finally, while the specific list of human rights that warrant universal status constitutes a distinct inquiry, if we understand the UDHR's language to suggest at least

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100. JOHN RAWLS, A THEORY OF JUSTICE 440-47 (1971).

101. DONNELLY, *supra* note 5, at 17 (quoting Christian Bay, *Human Needs and Political Education*, in HUMAN NEEDS & POLITICS 17 (Ross Fitzgerald ed., 1977)).

102. See generally HUMAN RIGHTS WATCH, BROKEN PEOPLE: CASTE VIOLENCE AGAINST INDIA'S "UNTOUCHABLES" (1999), at <http://www.hrw.org/reports/1999/india>.

the general contours of these rights, then many prominent human rights remain unaccounted for by a needs-based approach. One might attempt to circumvent this difficulty by expanding the idea of "need" to entail social necessities. But as noted, this simply begs the question, because by definition, it reintroduces cultural relativity—in the form of socially-constructed needs—into human rights.

## 2. The Moral Naturalistic Approach

The failure of needs-based approaches to confer universality upon human rights does not, however, exhaust the potential for locating universality in that which is "fundamentally human" about our species. Humans also seem to possess a capacity for moral judgment that distinguishes us from animals. Whether or not we in fact are autonomous agents, to which nebulous concepts like free will—and its corollaries, agency, guilt, responsibility—may properly be attributed, we behave in ways that implicitly assume the validity of these concepts. It therefore may be a *conditio sine qua non* of human civilization that we hold and entertain moral concepts and evaluate each other in terms of these concepts.<sup>103</sup>

Perhaps, then, one can locate the source of universal human rights in man's peculiar capacity for moral judgment and behavior. In part, this is Jack Donnelly's position. "The source of human rights," he writes, "is man's *moral* nature, which is only loosely linked to the 'human nature' defined by scientifically ascertainable needs . . . . We have human rights not to the requisites for health but to those things 'needed' for a life of dignity, for a life *worthy* of a human being, a life that cannot be enjoyed without these rights."<sup>104</sup> Donnelly's conception, as he readily acknowledges, amounts to no more than a moral posit.<sup>105</sup> Yet he believes that universality inheres in man's moral nature, insofar as one accepts the idea that such

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103. This notion finds expression, for instance, in the Second Essay of Nietzsche's *On the Genealogy of Morality*, which suggests that the repression and internalization of an instinctual drive toward cruelty, which leads to the development of a moral conscience, is a prerequisite to the formation of civil society. FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALITY* 36-37 (Maudemarie Clark & Alan J. Swensen trans. & ed., Hackett Publishing Co. 1998). See generally SIGMUND FREUD, *CIVILIZATION & ITS DISCONTENTS* (James Strachey ed., W.W. Norton and Co. 1961) (1930).

104. DONNELLY, *supra* note 5, at 17.

105. *Id.* This posit, however, is not without empirical support. As Elvin Hatch observes, "It is the *content* of moral principles, not their existence, that is variable among human beings. . . . The ubiquity of the moral evaluation of behavior apparently is a feature which sets humanity apart from other organisms . . . ." ELVIN HATCH, *CULTURE & MORALITY: THE RELATIVITY OF VALUES IN ANTHROPOLOGY* 9 (1983), reprinted in STEINER & ALSTON, *supra* note 6, at 194-95; see also Rhoda E. Howard, *Dignity, Community & Human Rights*, in *HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVE: A QUEST FOR CONSENSUS* 81, 91 (Abdullahi A. An-Na'im ed., 1991).

rights inform our understanding of what it means to lead a “truly human” life. Human rights enjoy universality on this account because “[w]ithout the enjoyment of (the objects of) human rights, one is almost certain to be alienated or estranged from one’s moral nature . . . [L]osing these rights is *morally* ‘impossible’: one cannot lose these rights and live a life worthy of a human being.”<sup>106</sup>

Donnelly’s account retains a greater plausibility than the crude human-needs approach. To begin, it resonates with the language of the UDHR and other human rights instruments, which often invoke, at least rhetorically, the “inherent dignity” of the human person as the basis of human rights.<sup>107</sup> Unlike the needs-based approach that purports to ground human rights without reference to their social context, Donnelly’s moral-naturalistic approach concedes that human rights reflect moral and social posits. The problem is with his assertion that, absent these posits, we could not lead “truly human” lives. What could “truly human” mean in this context? Throughout most of mankind’s history, the very concept of human rights<sup>108</sup> was unknown—a fact that Donnelly consistently emphasizes, and yet it would strain credulity to insist that peoples of the vast majority of civilizations that have existed to date have not lived “truly human” lives.

In fairness, it bears emphasis that Donnelly intends his statement about the conditions under which one may lead a “truly human” life to be understood in context—as applicable to the modern social and historical epoch in which the nation-state arguably constitutes the principal threat to human dignity. He concedes, consequently, that “where there is a thriving indigenous cultural tradition and community, arguments of cultural relativism offer a strong defense against outside interference—including disruptions that might be caused by introducing ‘universal’ human rights. Such communities, however, are increasingly the exception rather than the rule,”<sup>109</sup> and Donnelly’s argument for the conceptual appropriateness of human rights to modern international law remains compelling.<sup>110</sup>

The problem is that, by itself, this strategic move proves underinclusive. The Taliban, for instance, might aptly be described as a “thriving cultural tradition.” But far from providing a “strong defense against outside interference,” the Taliban, at least facially, appears to exemplify precisely the kind of situation in the modern world—one in which egregious violations are being perpetrated in the

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106. DONNELLY, *supra* note 5, at 19.

107. *E.g.*, G.A. Res. 217A, *supra* note 14, pmb1.

108. This is not to say that alternative notions of human dignity were absent. See DONNELLY, *supra* note 5, at 49-65.

109. *Id.* at 118-19.

110. See *infra* text accompanying note 242.

service of an extremist ideology—in which interference under the banner of universal human rights would appear justifiable. One might finesse these circumstances by pointing out that individuals harmed by the Taliban do not consent to this “thriving cultural tradition,”<sup>111</sup> thus justifying humanitarian intervention to vindicate their human rights. Indeed, as argued below, this would be an appropriate suggestion. But this step involves a tacit regression to the modern notion that individuals, not cultural groups, are the basic bearers of rights, as well as the fundamental unit of concern and value—or, put differently, it takes for granted one of the liberal presumptions that cultural relativists challenge in the first place.

An additional, though related, difficulty with Donnelly’s account of the source of human rights resides in his distinction between something’s “being right,” which implies a preordained value hierarchy and therefore, cultural relativity, and someone’s “having a right.”<sup>112</sup> The latter, it seems, involves a social state of affairs that obtains “universality” when within different cultural frameworks, each of which internally ranks values in divergent ways, individuals retain the right to choose among different values. Here again, however, this seems to amount, at bottom, to a restatement of the very liberal ideals that cultural relativism calls into question; for this distinction resurrects the classical libertarian claim that individuals must be permitted broad liberty to choose among competing conceptions of the good. A characteristic formulation in Donnelly’s exposition clarifies this problem. Distinguishing something’s “being right” from someone’s “having a right,” he writes,

Simply because *x* is right it does not necessarily follow that anyone has a right to *x*. For example, even if it is right to perform acts of benevolence, such as assisting the needy and hungry, a hungry person does not, *ipso facto*, have a right to receive food from me, or from anyone else. He is not thereby entitled to my food or my money to buy food: it is my food and my money; *I* have a right to it.<sup>113</sup>

Donnelly concedes that, under certain extenuating circumstances—where the scarcity of food is connected in certain ways to state abuse—an individual might “have a right” to another person’s food.<sup>114</sup>

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111. We might also finesse this scenario by suggesting that, while the Taliban is a “thriving cultural tradition,” it is not one with an alternative conception of human dignity. But this would be false. A member of the Taliban would likely assert that human dignity is precisely what their movement attempts to establish in a civilization corrupted by foreign and immoral influences. Destroying stocks of alcoholic beverages, restricting the rights of women, imposing severe punishments for violations of Islamic law, and so forth might all be redescribed as measures to instantiate an (albeit questionable) conception of human dignity that this “thriving cultural tradition” values. See *infra* text accompanying notes 171-75.

112. See DONNELLY, *supra* note 5, at 9.

113. DONNELLY, *supra* note 8, at 6.

114. *Id.* at 6-7.



Yet the problem here runs deeper: the exposition of what it means to “have a right” already presupposes a highly distinct set of cultural values. Why, indeed, is it Donnelly, in the proffered example, and not the hungry person, who “has a right” to his food or to his money? Without recourse to, for instance, the Lockean notion that “[w]hatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*,”<sup>115</sup> it remains difficult to provide a satisfactory categorical answer. Only our culturally specific intellectual heritage—the values and modes of thought it induces—causes this example to seem so intuitively plausible. Donnelly’s philosophical reliance upon a strict distinction between some idea “being right” and someone “having a right” thus remains susceptible to cultural relativist critiques. It proves impossible to say why someone “has a right” without articulating some culturally specific sense of what “is right.” Even in a non-legal sense,<sup>116</sup> then, “having a right” and “being right” turn out not, as Donnelly argues, to be conceptually separable—in practice, this distinction collapses.

### 3. The Transcendentalist Approach

A final possibility would locate the normative universality of human rights in essential or transcendental conceptions of a natural law that operate independently of human society; a view, as noted earlier,<sup>117</sup> that finds classical expression in Aristotle and later in Aquinas’ distinction between positive—man-made—and divine or natural law. Yet it bears emphasis that this manner of thought is not unique to Western traditions. All major religious traditions—Christianity, Islam, Judaism, Hinduism, and Buddhism—manifest concepts analogous to Aquinas’ conception of divine law. They all, that is, assert certain moral precepts as a universal code written into the “true” nature of reality. From the perspective of their proponents, these beliefs, as Diana Eck emphasizes, do not apply merely to a single culture; they lay claim to universal acknowledgment:

When Jewish thinkers speak of the covenant with Noah and the Noachide laws, . . . they are not making a claim that is true only if you are Jewish, but a universal claim about the nature of human responsibility. When Christians speak of human nature as having been dignified by the human incarnation of God in Christ, . . . they are not

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115. LOCKE, *supra* note 42, at 19.

116. It bears emphasis here that Donnelly intends this distinction to capture a moral truth and not simply the relatively uncontroversial legal positivist claim that individuals can have legal rights—entitlements protected by a legal regime— independent of whether these rights conform to what is morally right.

117. See *supra* text accompanying note 38.

making a tribal claim that is true only for those who happen to be Christians. . . . This is also true of Islam in which Muslims speak of submitting to God, or aligning one's life with the godward human nature with which we are born. It is true for Buddhists when they speak of human life as characterized by suffering . . . a noble truth that they claim for all, not just Buddhists.<sup>118</sup>

Transcendentalist approaches render claims of universal human rights coherent because they make strong claims about the ultimate ontological status of the world and its inhabitants. But absent genuine consensus on these issues—needless to say, this is lacking—the fact of cultural pluralism compels the conclusion that these schemes will necessarily conflict. Empirical evidence establishing the descriptive truth of cultural pluralism remains too strong to validate scientifically any one of these esoteric metaphysical claims, and “[t]he dangers of the moral imperialism implied by radical universalism hardly need be emphasized.”<sup>119</sup> Western colonial imperialism, for example, while undoubtedly motivated more by economic than genuine ideological considerations, was in part justified in terms of bringing spiritual salvation—via “universal” Christian law—to the unenlightened peoples of other civilizations.<sup>120</sup> By asserting a transcendental universality for human rights, then, natural law and other ontologically-based theories undermine a central value of human rights itself—the tolerance of reasonable pluralism.

In sum, efforts to locate an actual empirical consensus concerning values “implicit in man’s nature as an individual and as a member of society”<sup>121</sup> fail to produce—both substantively and as a matter of hermeneutics—agreement on human rights sufficient to be termed “universal.” Furthermore, alternative philosophical approaches that might vindicate the normative universality of human rights, notwithstanding the empirical fact of cultural pluralism, prove philosophically unsatisfactory, potentially dangerous, or both.

### III. CULTURAL PLURALISM RECONSIDERED: CULTURAL RELATIVISM IN A RELATIVE PERSPECTIVE

The foregoing discussion betrays a troubling silence in the international human rights movement. Talk of universalism

118. Diana Eck, *Human Rights and Religious “Universalisms,”* Symposium, in HUMAN RIGHTS AT HARVARD, *supra* note 3, at 19.

119. DONNELLY, *supra* note 5, at 110.

120. Chief Justice John Marshall acknowledges this candidly in a famous early Supreme Court decision. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 572-73 (1823).

121. Richard McKeon, *The Philosophic Bases and Material Circumstances of the Rights of Man*, in HUMAN RIGHTS, *supra* note 1, at 45.

pervades human rights discourse. But it finds little support—empirical, historical, philosophical, or otherwise—in the diverse “human rights” practices that characterize the contemporary global community. Recognition of this descriptive fact invites the following question: When human rights lawyers, philosophers, foreign diplomats, advocates, and others speak of human rights as “universal,” are they doing anything more than asserting, for a fifty-year old international political movement, the same dubious transcendentalism that led us to reject religious absolutism? Does the religious extremist’s ideological universalism differ meaningfully from that of the human rights activist? Both advance strong normative claims. Both assert these norms universally; they apply to all human beings, not just to one culture. Not least, both believe, albeit to varying degrees, that, at times, *violence* should be used to deter, terminate, or punish violations of these norms. Holy wars and “humanitarian intervention” rest on common ground in their justification of the use of violence to vindicate norms of human behavior. Can they be meaningfully distinguished?

Conceding the descriptive fact of cultural pluralism permits us to examine more closely what normative implications it indeed supports, and, perhaps as critically, those it does not. To assess the arguments of cultural relativism, then, demands analysis of the normative assertions advanced on behalf of the descriptive fact of cultural pluralism, hereafter presumed unassailable on empirical grounds. The first form of cultural relativism—narrative relativism,—asserts that because every culture has its own distinctive *topos*,<sup>122</sup> or cultural vocabulary, human rights may be an inappropriate or myopic functional concept to promote human dignity in certain cultural communities. According to narrative relativism, alternative conceptions of and mechanisms for promoting human dignity—those rooted in the endogenous features of their cultural group—provide a more legitimate measure for evaluating the propriety of their societal practices. The second form of cultural relativism—crude relativism—insists that because conceptions of ultimate value vary from culture to culture, imposing alleged universal norms of behavior on a group that purports to reject them amounts to illegitimate cultural imperialism.

Analysis of these broad normative challenges proves difficult in the abstract. This Part, consequently, uses concrete examples as a vehicle for examining the respective assertions of each. The first section focuses on one aspect of the “Asian values” debate in an effort to expound narrative relativism. In particular, it briefly assesses the

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122. See Boaventura de Sousa Santos, *Toward a Multicultural Conception of Human Rights*, 18 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 1 (1997).

claim that certain cultural features alleged to characterize Asian societies render Western conceptions of human rights incompatible with their endogenous cultural values. The second section focuses on crude cultural relativism through analysis of human rights violations perpetrated by the Taliban's regime, which achieved effective control of over two-thirds of Afghanistan's territory in 1996.

### A. *Narrative Relativism*

Imagine two men holding a captured puma on a rope. If they want to approach each other, the puma will attack, because the rope will slacken; only if they both pull simultaneously on the rope is the puma equidistant from the two of them. That is why it is so hard for him who reads and him who writes to reach each other: between them lies a mutual thought captured on ropes that they pull in opposite directions. If we were now to ask that puma—in other words, that thought—how it perceived these two men, it might answer that at the ends of the rope those to be eaten are holding someone they cannot eat . . .

—Milorad Pavić<sup>123</sup>

Narrative relativism poses a number of conceptually distinct challenges to universal human rights. In the present context, two of these demand appraisal. First, does profound cultural pluralism and diversity preclude the possibility of cognitive consensus on what human rights mean? This Article endorses Donnelly's view that, even if, as appears to be the case, most cultures lack an indigenous conception of "rights," the internationalization of the Western nation-state model has made rights pertinent to nearly all contemporary societies, and cross-cultural cognitive understandings and appreciation of the value of these rights will continue to develop. This is because human rights involve, at bottom, relations between the individual and the nation-state—or other quasi-state authorities. Second, assuming that certain cultures, though amenable to the idea of human rights, wish to retain their endogenous conceptions of and institutions for promoting human dignity—can the macrolegal framework imposed by international human rights law accommodate these alternative values and practices? This question, the Author suggests, admits of no simple answer. Some cultural practices and values are fully consistent with international human rights law; the two normative frameworks can subsist—indeed, perhaps even complement one another. But others undoubtedly violate universal human rights. This invites the foundational inquiry, to which Part

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123. MILORAD PAVIC, *DICTIONARY OF THE KHAZARS* 14 (Christina Pribicevic-Zoric trans., Alfred A. Knopf 1989) (1691).

IV turns, into *why*, in instances of conflict, international human rights merit precedence.

### 1. Cognitive Dissonance

To return to the first inquiry, suppose that two people, though members of cultures wholly foreign to one another, agree that Article 3 of the UDHR articulates a genuinely universal human right: "Everyone has the right to life, liberty and the security of person."<sup>124</sup> This nominal agreement may nonetheless veil deep reciprocal misunderstandings. For two individuals rooted in different cultural vocabularies, the right to "life, liberty and security of person" could well be, in the language of Milorad Pavič, "a mutual thought captured on ropes that they pull in opposite directions."<sup>125</sup> The world's major cultural traditions manifest a superficial "overlapping consensus:"<sup>126</sup> the human rights tradition—a legacy of Western liberal thought—can to some extent be reconciled with its "homeomorphic equivalents"<sup>127</sup> in other cultures. But this consensus must be articulated at an extremely high level of abstraction—most cultural traditions share some belief in human dignity and an aversion to needless suffering and cruelty. How, if at all, does this help advance the universality of human rights? Not, the Author would argue, very much.<sup>128</sup> It decisively fails to justify the use of human rights as the appropriate functional concept for promoting human dignity, as opposed to, for instance, conceptions of social duty and obligation that arguably

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124. G.A. Res. 217A, *supra* note 14, art. 3.

125. PAVIC, *supra* note 123.

126. See generally JOHN RAWLS, POLITICAL LIBERALISM (1993). Rawls has suggested that his mature conception of principles of justice appropriate to a liberal society might be extended to develop "principles and norms of international law and practice," a project first discussed in his Oxford Amnesty Lecture of February 12, 1993, entitled "The Law of Peoples," and, more recently, developed fully in written form. See generally JOHN RAWLS, THE LAW OF PEOPLES (2001).

127. See Raimundo Panikkar, *Is the Notion of Human Rights a Western Concept?*, 120 DIOGENES 75 (1982), reprinted in STEINER & ALSTON, *supra* note 6, at 202 (defining a "homeomorphic equivalent" as an alternative cultural concept that "satisfies the equivalent need"). While human rights protect human dignity in the West, some argue that human duties fulfill a comparable role in other societies. *E.g.*, Melanne Andromecca Civic, *A Comparative Analysis of International and Chinese Human Rights Law—Universality Versus Cultural Relativism*, 2 BUFF. J. INT'L L. 285, 287 (1996) (arguing that human rights in the Chinese cultural context "refer[s] to the intricate web of social and political duties of citizens owed to the community at large").

128. Samuel Huntington, though overstating the rhetorical force of this critique, aptly captures the superficiality of this cultural consensus: "Most peoples in most societies have a similar 'moral sense,' a 'thin' minimal morality of basic concepts of what is right and wrong. If this is what is meant by universal civilization, it is both profound and profoundly important, but it is also neither new nor relevant." HUNTINGTON, *supra* note 11, at 56.

prevail in some non-Western traditions.<sup>129</sup> It perhaps draws within the domain of universality some of the most uncontroversial human rights, certain *jus cogens* norms of modern international law—the prohibitions against genocide, torture, slavery and arguably a few others.<sup>130</sup> Beyond these “easy cases,” the interpretive challenge posed by narrative relativism stands.

Recall, for instance, the subtextual disagreement about liberty that occupied the drafters of the UDHR: Does genuine liberty only obtain when individuals enjoy full control over their economic and social circumstances? Or does it denote, as Western liberals would emphasize, limits on the domain of legitimate state action? Clearly, different answers to these questions will yield radically different, and probably conflicting, understandings of what the “right to liberty” in fact guarantees. Thus, while crude cultural relativism invokes ethical relativism to challenge universality, narrative relativism makes an argument that, albeit replete with ethical implications, finds its logical foundation in a form of cognitive relativism. Any appraisal of narrative relativist claims will therefore pose acute methodological difficulties. Evaluation demands disengagement from deeply rooted cognitive and linguistic<sup>131</sup> principles that circumscribe our ability to appraise phenomena in the first place.<sup>132</sup> “Observation of others is so difficult,” Michael Reisman notes, “not because other groups . . . are more complex than ours, but because our own so profoundly shape us, at levels of consciousness so deep that we are often unaware of it.”<sup>133</sup> Where the cognitive processes of different cultures do not converge at all, one’s evaluation of the other remains,

129. In certain Native American cultures, for example, human dignity inheres in the critical importance placed on the reciprocal relations between individuals and their network of familial or tribal relations. “Humanity” describes an all-inclusive concept that extends beyond the human species to embrace animals and, at times, inanimate objects. See James W. Zion, *North American Indian Perspectives on Human Rights, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVE: A QUEST FOR CONSENSUS*, *supra* note 105, at 198, 198-207.

130. Even among these—arguably, *jus cogens*—human rights norms, some individuals will continue to claim that their cultural traditions permit the proscribed practices under certain circumstances. The mere existence of an exception does not refute the rule. That certain individuals, political groups, or cultural traditions justify torture or genocide in the service of interests or ideologies does not remove these practices from the corpus of universal human rights violations. Universal, in this context, does not—and need not, according to any standard that is not wholly descriptive—mean “we all agree.” On the other hand, normative universality based upon a factual state of affairs demands an extraordinarily high level of consensus. Otherwise, such claims would reduce to irresolvable—and, in practice, futile—debates about the required degree of cross-cultural consensus.

131. Pertinent, in this regard, is Wittgenstein’s maxim that “[t]he limits of my language are the limits of my world.” LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* § 5.6 (1961).

132. See REISMAN, *supra* note 19, at 153-56.

133. *Id.* at 153.

by definition, impossible; no common reference provides the "Archimedes point" from which to derive criterion for evaluating cultural practices and values.

At the same time, it would be foolish to abandon the project of cross-cultural evaluation merely because we lack a perfect set of shared evaluative criteria. First of all, the appraisal of phenomena in the absence of objective criteria is hardly unique to the social sciences; even physics, the quintessential natural science, emphasizes the critical and, at times, determinative impact that the evaluator's perspective exerts upon the object of evaluation. Second, biological similarity means that humans from different cultures will still share at least some rudimentary cognitive processes. Whatever their culture, different individuals share, for example, similar modes of processing information, capacities for pain and pleasure, and an ability to differentiate rational from irrational chains of thought.<sup>134</sup> Finally, as Bernard Williams emphasizes, core cultural values cannot "merely evaporate because one is confronted with human beings in another society."<sup>135</sup> Cross-cultural human interaction would be impossible if people refrained wholly from appraising foreign cultural practices and values, and from modifying our behavior toward them accordingly. Particularly in an interdependent "globalized" world, international law must strive to develop principles to mediate among the diverse cognitive frameworks that different actors bring to cross-cultural exchanges.

Cross-cultural cognitive relativism, like cultural pluralism, is an empirical fact. This, by itself, is nothing new. Within societies, too, "[p]erception of the same phenomena may vary depending on the culture, class, gender, age, or crisis-experience of the observer."<sup>136</sup> We do not, however, resign ourselves to the nihilistic view that shared perceptions of legal and social norms are impossible. Nor do we abandon attempts at mutual understanding as futile. We acknowledge the difficulties that cognitive disparity generates but strive to ameliorate these problems through the definitional human capacity for communication. Of course, in circumstances of conflict, one or another alternative perception of norms necessarily prevails. We must, consequently, maintain social and legal mechanisms for deciding which perception, in a given instance, should win out. But this is simply to restate a classic question of political theory: How is

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134. This is not to suggest that what is deemed "rational" will be uniform among diverse cultures, to the contrary, but, at least according to many theorists, our capacity for complex rational thought differentiates man from the remainder of the animal world.

135. Williams, *supra* note 10, at 173.

136. REISMAN, *supra* note 19, at 154.

a society of diverse individuals possible?<sup>137</sup> To challenge the universality of human rights on these grounds is to transpose a timeless political inquiry to the international plane, and it is not clear what, exactly, this is intended to prove, save for the relatively uncontroversial proposition that no strong cross-cultural consensus about human rights presently exists.

Cognitive relativism may indeed mean that citizens of states with disparate cultural traditions will at times interpret identical provisions of human rights treaties in incompatible ways—pulling a mutual thought captured on ropes in opposite directions. Perhaps an individual whose values have been shaped by Confucian traditions will be more likely to understand the ICCPR's guarantee of "liberty and security of person" to refer to the state's duty to preserve law and order, while a Western liberal will presumably understand this provision to refer principally to her right to protection from arbitrary state interference. This, however, simply begs the question of which conception, in circumstances of international conflict, should prevail, and this question is normative, not descriptive. Cross-cultural cognitive—narrative—relativism no more repudiates the universal applicability of human rights than intra-societal cognitive relativism repudiates the uniform application of domestic law to a state's diverse citizenry.

## 2. The "Tyranny" of Human Rights

With this background in mind, this section considers briefly one aspect of the so-called "Asian values" debate. This blanket label embraces a number of diverse claims, including: (1) that there is claims including: distinct "Asian" approach to human rights;<sup>138</sup> (2) that this approach, rooted in Confucianism, focuses first and foremost on communal welfare rather than individual rights;<sup>139</sup> (3) that Asians

137. *E.g.*, RAWLS, *supra* note 126, at xviii (arguing that the fundamental "problem of political liberalism is: How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable . . . religious, philosophical and moral doctrines?").

138. *E.g.*, Robert Weatherley, *Introduction to THE DISCOURSE OF HUMAN RIGHTS IN CHINA: HISTORICAL AND IDEOLOGICAL PERSPECTIVES 1-2* (Robert Weatherley ed., 1999) (noting that Beijing challenges "the concept [of human rights] *itself*" as an inappropriate "'model' or 'criterion'" to apply to China in view of its distinctive historical and national background); *see also* Amartya Sen, *Human Rights and Economic Achievements*, in *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS 88, 89-90* (Joanne R. Bauer & Daniel A. Bell eds., 1999) ("The focus on discipline as opposed to rights has received support not merely from the supposed effectiveness of that priority, but also from the importance of being true to Asia's 'own traditions.'").

139. *E.g.*, Bilahari Kausikan, *Asia's Different Standard*, 92 *FOREIGN POLICY* 26 (1993), *reprinted in* STEINER & ALSTON, *supra* note 6, at 226, 230 (distinguishing the "individualist ethos of the West" from the "communitarian traditions of Asia"); Triggs, *supra* note 29, at 669-70 ("[T]he Western emphasis on the individual appears to conflict



prioritize law, social order, and security above individual civil and political rights;<sup>140</sup> and finally (4) that this heavy-handed focus on social order at the expense of civil and political liberties not only resonates with Asian values, but is necessary and appropriate to the process of economic development and modernization.<sup>141</sup>

These claims are in large part empirical, and the debate over their validity forms a subject of continuing academic inquiry and

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with Eastern cultures where individual rights may give way to community interests . . . . There is a fear that international human rights standards are overzealous of the rights of the individual, placing the community itself in jeopardy."); see also HUNTINGTON, *supra* note 11, at 71-72 (citing surveys and empirical data suggesting the prevalence of individualism in the Western world, by contrast to the alleged "collectivism" that prevails in non-Western cultures). For a cogent critique of these claims, see, for example, Inoue Tatsuo, *Liberal Democracy and Asian Orientalism*, in THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS, *supra* note 138, at 27, 54 (observing that "individualist-communitarian tensions run not between the West and Asia but within each of them"). China scholar Wm. Theodore de Bary likewise observes that "[s]pokesmen for what is called an 'Asian' communitarian position are not wrong in supposing that the concept of a radically free-standing, autonomous individual is foreign to Confucianism, but the contrast is more with the modern age than it is with some earlier Western traditions, themselves more communitarian . . . ." WM. THEODORE DE BARY, ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE 22 (1998). Finally, even assuming the validity of an "individualist-communitarian" dichotomy, it requires an additional, and by no means clearly justified, leap in logic to assert that "communitarian Asians," whatever that means, therefore desire authoritarian governance that devalues individual liberties. Indeed, as de Bary emphasizes, Confucian concepts of civility, duty, and social obligation were "achieved by voluntary rites, locally observed, rather than by an overarching (and often over-reaching) state"; hence the irony implicit in Asian values rhetoric to the effect that communitarianism is "readily and directly translatable into a law-and-order society dominated by an authoritarian central government." *Id.* at 13.

140. *E.g.*, Kausikan, *supra* note 139, at 230 ("Good government may well require, among other things, detention without trial to deal with military rebels or religious and other extremists; curbs on press freedoms to avoid fanning racial tensions or exacerbating social divisions; and draconian laws to break the power of entrenched interests in order to, for instance, establish land reforms.").

141. This claim, as Donnelly has noted, is in fact twofold: At times, Asian values proponents preach a "liberty trade-off," which "holds that civil and political rights introduce so many inefficiencies in government that they must be systematically infringed by a state seeking rapid economic development;" but elsewhere, in statements seemingly at war with rhetoric suggesting that Asian countries prioritize economic and social rights for their citizens, adherents of the "Lee thesis" suggest that individual economic rights, too, must defer to the paramount objective of state economic development, a claim that Donnelly denotes the "equity trade-off." Jack Donnelly, *Human Rights and Asian Values: A Defense of "Western" Universalism*, in THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS, *supra* note 138, at 60, 72-76. Both of these claims suffer from a dubious empirical basis. See *id.* at 73; see also Sen, *supra* note 138, at 91. Indeed, as Sen famously argues, "one of the remarkable facts in the terrible history of famines in the world is that no substantial famine has ever occurred in any country with a democratic form of government and a relatively free press." Sen, *supra* note 138, at 92.

critique.<sup>142</sup> But whatever our view of "Asian values," one premise of these theories is indisputable—the descriptive fact of cultural pluralism. Cultural mores, social rules, and legal institutions vary widely, and homogenization of these norms is not likely to obtain in the near future. Nor, most commentators would agree, would this be desirable. While modern rhetoric at times seems excessive in its praise of diversity "for its own sake," legitimate instrumental, aesthetic, and ethical rationales favor cultural, like individual, diversity. The paradox, however, resides in the fact that a significant subset of these diverse cultural traditions do not themselves value or tolerate diversity.

Human rights do not mandate a monolithic set of values. Nor do they ordain a singular "conception of the good." The protections that universal human rights extend to all human beings permit individuals of widely disparate religious, political, and moral beliefs to coexist within a common international order. At the same time, however, universal human rights, *ex hypothesi*, apply with equal force and authority to all human beings. Consequently, cultural practices and values that conflict irreconcilably with international human rights law must yield. In this regard human rights indeed represent a kind of moral and legal "tyranny"—where endogenous cultural practices and international human rights conflict, the former must defer to the latter.

Too often, however, this conflict is portrayed in misleading terms, as a "clash" between diametrically opposed sets of cultural values.<sup>143</sup> Bilahari Kausikan, for example, presents the debate as one between "[t]he individualistic ethos of the West or the communitarian traditions of Asia? The consensus-seeking approach of East and Southeast Asia or the adversarial institutions of the West?"<sup>144</sup> This misconstrues the problem that "universal" human rights poses—to what extent *all* the world's disparate systems of cultural values and practices can be reconciled with the overarching framework of law established by international human rights. Donnelly thus notes correctly, in the context of the "Asian values" debate, that "where traditional practices conflict irreconcilably with internationally recognized human rights, traditional practices usually must give way—just as traditional Western practices such as racial

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142. See generally THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS, *supra* note 138.

143. E.g., HUNTINGTON, *supra* note 11.

144. Kausikan, *supra* note 139, reprinted in STEINER & ALSTON, *supra* note 6, at 230. But see Amartya Sen, *Thinking About Human Rights and Asian Values*, 4 HUMAN RIGHTS DIALOGUE, 2, 2-3 (1996) (arguing that this dichotomy exaggerates and overstates the real differences between Western and Eastern traditions, both of which manifest strands of individualism and communitarianism).

and gender discrimination and the persecution of religious deviants have been required to give way.”

At the same time, he observes that “internationally recognized human rights leave considerable space for distinctively Asian implementations of these rights.”<sup>145</sup> The crucial point here is that within each state, and within each of its constituent cultural groups and peoples, multiple systems of value subsist. To set up a simple dichotomy between “universal human rights,” on the one hand, and “endogenous cultural values,” on the other, misconstrues the real problem—to determine, in each case, what degree of cultural or domestic variation remains consistent with international human rights norms. This notion finds expression in the European human rights system’s doctrine of a “margin of appreciation.” In the *Handyside Case*,<sup>146</sup> the European Court of Human Rights observed that:

[i]t is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. . . . By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements . . . [and] to make the initial assessment of the reality of the pressing social need implied by the notion of ‘necessity’ in this context [of Article 10 § 2 of the European Convention].<sup>147</sup>

The implementation of human rights need not, that is, be wholly indifferent to salient differences in the prevailing moral and social norms within a state. Some variation is permissible—indeed, perhaps even desirable, because the efficacy of international human rights law ultimately depends on a “process of interaction, interpretation, and internalization of international norms.”<sup>148</sup> Progression towards cognitive consensus on the meaning of different human rights may benefit from the flexibility enabled by a “domestic margin of appreciation.” It is clear, for example, that “due process” under international human rights law does not demand the Anglo-Saxon “adversarial” as opposed to the Continental “inquisitorial” model, or vice versa. Functionally equivalent safeguards in each system can independently satisfy its requirements.

145. Jack Donnelly, *Human Rights and Asian Values: A Defense of “Western” Universalism*, in *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS*, *supra* note 138, at 83.

146. *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1976), available at <http://echr.coe.int/eng>.

147. *Id.* at para. 48.

148. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2603 (1997) (reviewing ABRAHAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995) and THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INTERNATIONAL INSTITUTIONS* (1995)).

But it is equally clear that a politically-controlled judiciary—under either model, and whether “Western” or “Asian”—would not conform to international human rights law. To return to the “Asian values” debate, it is clear that nothing about, say, Confucian values of familial obligation, social duty, virtue, and so forth, necessarily conflicts with human rights law. Like all moral systems, Confucianism can promote human dignity and social stability. Yet, again like all moral systems, its norms can suffer manipulation and political abuse, particularly as the cultural context in which Confucianism developed and thrived deteriorates. De Bary notes that:

[t]he very real social problems attributed to the “individualistic West”—violence, crime, drug and sex abuse, and breakdown of family life, to name only the most obvious—attend the modernization process wherever it goes on, in East or West. Thus it is less a question of Asian versus Western values than a problem of how the forces of a runaway economic and technological modernization are eroding traditional values in both Asia and the West.<sup>149</sup>

Perhaps most critically, then, we should appreciate that that there is nothing uniquely “Asian” about the underlying substantive inquiry that the “Asian values” debate presents—to what extent subordinate systems of morality and social values can subsist within an overarching legal framework structured by international human rights. Contemporary societies throughout the globe must confront this question, and scholars rightly devote attention to articulating principled solutions to the diverse problems it generates.<sup>150</sup>

The question, then, that “Asian values” like “Christian values” or any other broadly defined categorization of a group moral code presents is not monolithic. Depending on how we delimit their scope, some Asian values will prove consonant with human rights law, while others will violate or at least be in tension with it. Similarly, were we to denominate a broad class of microlegal norms “Western values,” we would likewise discover that some norms embraced by this crude label conform to human rights standards, while others do not. But note that these case-by-case inquiries presume that the foundational question—*which* international code provides the appropriate criteria

149. DE BARY, *supra* note 139, at 8.

150. *E.g.*, REISMAN, *supra* note 19, at 149-53. Reisman argues that the:

right of group formation and, within the group, the tolerated authority of the group elite over other members, are extended insofar as they are indispensable for the achievement of individual rights. . . . [and] the discovery of deviations will lead to the insistence that practices inconsistent with the international standard be adjusted to come within broad margins of conformity to those standards.

*Id.* at 158; see also KYMLICKA, *supra* note 4, at 152-72.

against which to appraise disparate cultural values and practices—has been answered. Once we agree that international human rights law in fact provides the right common standard, we can appraise value systems in terms of their relative conformity to it. Thus, cultural relativists, including “Asian values” proponents, must deny the former premise—that international human rights law provides the right criteria.

Narrative relativism admittedly presents difficulties for implementing human rights, but, as indicated above, these are neither new nor insurmountable. The crux of any critique based on cultural relativism must therefore reside at a more foundational level. It must challenge the notion that the criteria identified by international human rights should not, normatively, be applicable to all the diverse subordinate value systems that subsist throughout the globe—as much within “Western” as within “Asian” states. To defend the normative universality of human rights, consequently, requires us to articulate why, in circumstances where microlegal values and practices conflict with international human rights, the latter merit our respect as paramount standards.

### B. *Crude Cultural Relativism*

[C]ulture' is never an essentialist and homogenous body of traditions and customs, but a rich resource, usually full of internal contradictions, and a resource which is always used selectively in various ethnic, cultural and religious projects within specific power relations and political discourse.

—Nira Yuval-Davis<sup>151</sup>

On September 27, 1996, Kabul, the capital of Afghanistan, fell to a militant Muslim group known as the Taliban, a name derived from “the Persianized plural form of the Arabic word ‘Talib,’ which means religious student.”<sup>152</sup> The Taliban initially comprised a “small spontaneous group” of religious students who “felt outrage at the behavior of the Mujahidin leaders fighting for power in the city and . . . decided to take action to end what they saw as corrupt practices, drawing on Islam as a justification for their intervention.”<sup>153</sup> For reasons that remain somewhat nebulous, the

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151. NIRA YUVAL-DAVIS, GENDER & NATION 38 (1997), *quoted in* PETER MARSDEN, THE TALIBAN: WAR, RELIGION & THE NEW ORDER IN AFGHANISTAN 114 (1998).

152. William Maley, *Introduction to FUNDAMENTALISM REBORN?: AFGHANISTAN AND THE TALIBAN* 1 (William Maley ed., 1998).

153. MARSDEN, *supra* note 151, at 43. According to a background paper prepared by the U.N. High Commissioner for Refugees, the group initially consisted principally of ethnic *Pashtuns* from the city of Kandahar in Southern Afghanistan,

Taliban quickly grew into a formidable armed force, receiving military training, ammunition, and weaponry from a number of sources.<sup>154</sup> In October 1994, the Taliban launched a campaign to overthrow the ruling Mujahidin government.<sup>155</sup> Within two years, the group controlled two-thirds of Afghan territory.<sup>156</sup>

The astonishing speed and success of the Taliban's military campaign reflected in part the weakness of the "so-called Mujahidin Government," which amounted to a mere "coalition government made up of an amalgam of the seven political parties that had previously formed the Afghan Interim Government."<sup>157</sup> Yet the Taliban's success also was attributable to its reputation for religious purity and good behavior. By contrast to the diverse governmental forces, paramilitary groups, bandits, and others that had abused sectors of the population following the Soviet withdrawal in 1989, the Taliban quickly formed a reputation, which preceded their incremental military advances, "for behaving relatively well when taking new areas—they did not engage in looting, rape or mindless destruction . . ." <sup>158</sup>

Yet as they consolidated control over each region, the Taliban imposed rigid behavioral strictures on the population—rules derived from their own stringent interpretation of Shari'a, or Islamic law.<sup>159</sup> It was for the imposition of these rules that the Taliban drew condemnation from the human rights community. Decrees required men to "wear turbans, beards, short hair and *shalwar kameez* and women to wear the *burqa*, a garment that covers the entire body, including the face."<sup>160</sup> The Taliban prohibited women from working and barred them from education—at least until an "appropriate" Islamic curriculum could be drawn up by religious scholars. This

many of whom had graduated from Pakistani Islamic colleges (*madrassas*) that border Afghanistan. See United Nations High Commissioner for Refugees, Centre for Documentation and Research, *Update to the Background Paper on Refugees and Asylum Seekers from Afghanistan*, para. 3 (Jan. 1999), at <http://www.unhcr.ch/refworld/country/cdr/cdrafg.02.html> [hereinafter UNHCR].

154. MARS DEN, *supra* note 151, at 43. The Taliban received support from, among others, Saudi Arabia and Pakistan, and they "were also able to draw on a significant quantity of weaponry, either abandoned by retreating forces or found in the process of disarming the population." *Id.* For a detailed analysis of the military ascendancy of the Taliban, see Anthony Davis, *How the Taliban Became a Military Force*, in FUNDAMENTALISM REBORN?: AFGHANISTAN AND THE TALIBAN, *supra* note 152, at 43-71.

155. MARS DEN, *supra* note 151, at 43-48.

156. *See id.*

157. *Id.* at 42. The Mujahidin suffered from internal power struggles, lack of popular confidence in their Islamic credentials, and, perhaps most critically, the absence of grass-roots support among the rural population. *See id.*

158. *Id.* at 48.

159. *See id.*

160. *Id.* at 46.

project could not begin, according to Taliban leaders, until they had consolidated control over all Afghan territory.<sup>161</sup> Additional decrees proscribed music, games, and representations of the human or animal form, such as televised images.<sup>162</sup>

What horrified the international community, however, was not so much the rules as it was the shocking punitive methods by which they were enforced. Adulterers were stoned to death.<sup>163</sup> Women who neglected to wear the *burqa* or who accidentally exposed their ankles suffered whippings or public beatings.<sup>164</sup> Shari'a courts, reportedly composed of judges "untrained in the law and bas[ing] their judgment on a mixture of personal understandings of Islamic law and a tribal code of honour prevalent in *Pashtun* areas," issued sentences condemning the convicted to public hangings, strangulation and punitive amputations.<sup>165</sup> Arbitrary detention, mass executions, indiscriminate killing of civilians—particularly during the battle of Mazar-I-Sharif in which an estimated 2,000 to 5,000 persons were killed—suppression of journalistic freedoms, and other abuses continue to characterize the Taliban's regime. Many of these latter violations reflect the ongoing civil war and the Taliban's somewhat tenuous hold on sovereignty. The former, by contrast, reflect beliefs and practices that, though fully in conformity with cultural norms deemed legitimate—indeed, appropriate—by the Taliban's leaders,

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161. *See id.*

162. *Id.*

163. UNHCR, *supra* note 153, para. 5.2.

164. *See* Amnesty International, *Women in Afghanistan: the Violations Continue*, AI Report ASA 11/05/97 (June 1997), at <http://www.amnesty.org/ailib/aipub/1997/ASA/31100597.html>. For a description of prevailing human rights conditions in Taliban-controlled Afghanistan, see generally *Report on the Situation of Human Rights in Afghanistan Submitted by Mr. Kamal Hossain, Special Rapporteur, in Accordance with Commission on Human Rights Resolution 1998/70*, Commission on Human Rights, 55th Sess., Agenda Item 9, U.N. Doc. E/CN.4/1999/40 (Mar. 24, 1999); *Final Report on the Situation of Human Rights in Afghanistan Submitted by Mr. Choong-Hyun Paik, Special Rapporteur, in Accordance with Commission on Human Rights Resolution 1996/75*, Commission on Human Rights, 53rd Sess., Agenda Item 10, U.N. Doc. E/CN.4/1997/59 (1997); HUMAN RIGHTS WATCH, *WORLD REPORT 1999*, at 161-64 (1998); U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, *AFGHANISTAN COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1998* (March 1999) [hereinafter U.S. DEP'T OF STATE].

165. *See* UNHCR, *supra* note 153, para. 5.2. In 1998, according to the U.S. State Department:

Taliban courts imposed their extreme interpretation of Islamic law and punishments following swift summary trials. Murderers were subjected to public executions, sometimes by throat slitting, a punishment that at times was inflicted by the victims' families. Thieves were subjected to public amputations of either one hand or one foot, or both . . . Adulterers were stoned to death or publicly whipped with 100 lashes. Those found guilty of homosexual acts were crushed by having walls toppled over them.

U.S. DEP'T OF STATE, *supra* note 164, § 1(c).

strike foreign observers as perhaps the most egregious violations. To what extent, if any, can criticism of these abuses be dismissed as the imperialistic application of foreign norms to a culture that expressly rejects them?

The Taliban provide a particularly poignant example of crude cultural relativism. By contrast to certain "Asian values" proponents—who purport to accept international human rights, rejecting only their "Western" interpretation or imposition<sup>166</sup>—the Taliban pull no punches; they repudiate international human rights law lock, stock, and barrel. Prior to the Taliban's rise to power, Afghanistan had ratified many of the seminal treaties constitutive of the modern international human rights regime.<sup>167</sup> But the Taliban have stated unequivocally that, should treaty obligations conflict with their understanding of the Shari'a, they will be ignored:

During his visit to Kabul, the Special Rapporteur asked the Attorney-General of the Taliban how they intended to deal with obligations stemming from international human rights treaties. He indicated that if a promise, convention, treaty or other instrument, even if it was in the Charter of the United Nations, was contrary to Shariah, they would not fulfill it or act on it. If the Charter were to proscribe executing a murderer, which the Shariah allowed, "We accept Shariah, our God's convention." The Attorney General added that, "If someone is drinking in public, even if the Covenant or United Nations Charter says they should not be punished, we will. The core of our action and our policy is the law of God, as contained in the Koran. We do not follow individuals, or people or other countries. We follow the law of God."<sup>168</sup>

On November 10, 1995, UNICEF issued a communiqué stating that, as a consequence of the Taliban's breach of the Convention on the Rights of the Child, to which Afghanistan is party, it would suspend

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166. *E.g.*, Kausikan, *supra* note 139; *Statement by Ambassador Wu Jianmin, Head of the Chinese Observer Delegation, Subcommittee on Prevention of Discrimination and Protection of Minorities, 48th Sess., Agenda Item 6 (Aug. 8, 1996)* ("[T]he Chinese Government attaches equal importance to the protection of the civil and political rights of the people . . . . In doing so, however, China proceeds from its own national conditions instead of copying from others' models.").

167. Afghanistan is party to the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; the Convention on the Political Rights of Women, Mar. 31, 1953, 193 U.N.T.S. 135; the International Convention on the Elimination of all Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195; the ICESCR, Dec. 16, 1966, 993 U.N.T.S. 3; the ICCPR, Dec. 16, 1966, 993 U.N.T.S. 171; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1985); and the Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. (No. 49), at 166, U.N. Doc. A/RES/44/49 (1990).

168. *Final Report on the Situation of Human Rights in Afghanistan Submitted by Mr. Choong-Hyun Paik, Special Rapporteur, in Accordance with Commission on Human Rights Resolution 1996/75*, Commission on Human Rights, 53rd Sess., Agenda Item 10, para. 31, U.N. Doc. E/CN.4/1997/59 (1997); *see also* UNHCR, *supra* note 153, para. 5.



aid to educational programs from which girls had been excluded.<sup>169</sup> Predictably, “[t]his argument made no impression, for the Taliban recognise only the validity of Shar’ia; they do not feel bound by UN human rights instruments, which they regard in good part as vehicles of Western cultural imperialism.”<sup>170</sup> Sher Muhammad Stanakzai, the Taliban’s acting foreign minister, responded in kind to international criticism of the Taliban’s use of *hudud*, certain punishments prescribed by Shari’a criminal law, including stoning adulterers and amputating the limbs of thieves. “We have not introduced this law,” Sher Stanakzai proclaimed on Voice of Shari’a Radio, “This is the law that was revealed by God to Muhammad. Those who consider the imposition of this law to be against human rights are insulting all Muslims and their beliefs.”<sup>171</sup>

These statements, needless to say, constitute an unambiguous repudiation of the alleged universality of human rights. The Taliban do not purport to respect human rights in their own, culturally contingent, sense, or to acknowledge rights but accord them a more subordinate role in their overall hierarchy of cultural values. Nor do they claim that human rights mean something different in Afghan society. Quite the contrary, they view international human rights as part and parcel of the corrupt influences and imperialistic Western practices that they aim to eradicate. Thus, in response to a torrent of international human rights-based criticism of their treatment of women,<sup>172</sup> one Taliban official said the purpose of these laws is “to protect [our] sisters from corrupt people.”<sup>173</sup> On December 6, 1996, the Department for the Promotion of Virtue and Prevention of Vice, a Taliban agency established to implement the moral strictures of Shari’a, stated that its policies ensure the “dignity and honour of a Muslim woman . . . .”<sup>174</sup> The paradox here bears emphasis: while international human rights presumptively protect the “dignity and worth of the human person,”<sup>175</sup> it is precisely this dignity that the Taliban invoke in defense of practices alleged to constitute human rights violations. Imposing punitive measures on the drunkard, the

169. Nancy Hatch Dupree, *Afghan Women Under the Taliban*, in *FUNDAMENTALISM REBORN? AFGHANISTAN AND THE TALIBAN*, *supra* note 152, at 145-46.

170. *Id.* at 147.

171. MARS DEN, *supra* note 151, at 63 (quoting Sher Muhammad Stanakzai, Voice of Sharia Radio, Nov. 20, 1996).

172. See Dupree, *supra* note 169, at 148-49 (noting condemnation of the Taliban’s “medieval” treatment of women by: the Director-General of UNESCO, the European Commissioner for Humanitarian Aid, former Secretary General Boutros Boutros-Ghali, and U.S. Secretary of State Madeleine Albright).

173. *Id.* at 149 (quoting Amir Khan Muttaqi, the Taliban’s Acting Minister of Information and Culture).

174. MARS DEN, *supra* note 151, at 63.

175. G.A. Res. 217A, *supra* note 14, pmbl.

adulterer, or the “indecently exposed” woman does not violate dignity—far from it; such measures, in the Taliban’s view, promote it. As Jack Donnelly therefore rightly points out, “[a]lternative conceptions of human dignity amount to challenges to the idea of human rights.”<sup>176</sup>

How can advocates of universal human rights respond effectively to the challenge presented by crude relativism? To begin, it will help to restate this challenge in its most general form: because, as a matter of social fact, cultures maintain divergent mores and conceptualize human rights differently, or not at all, the coercive imposition of international human rights norms on cultures that claim to reject them amounts to unjustified cultural imperialism. “Coercive imposition” is a tautology. But it bears the emphasis, for what is ultimately at stake is the legitimacy of some form of coercion.<sup>177</sup> In short, either (1) the descriptive fact of cultural pluralism means the Taliban should be permitted to order Afghan society in accordance with their culturally contingent—but no less legitimate—interpretation of Shari’a, in which case we tolerate their behavioral strictures and the coercive methods by which they are enforced against members of their cultural community (stoning adulterers to death, amputating the limbs of thieves); or (2) we deny that cultural pluralism means that cultural groups enjoy absolute latitude to structure their social, legal, and political order as they see fit, in which case we also embrace the idea that international actors can and should intervene—through violence at times—to coerce an end to these practices.<sup>178</sup>

We might, therefore, restate the challenge as follows: Does cultural relativism render certain kinds of coercion under the banner of “universal” human rights illegitimate? Before suggesting several answers, this Section canvasses two plausible approaches that, while not without a significant strategic role in the promotion and enforcement of international human rights, do not ultimately confront this challenge directly. The first shall be called “legal positivist,” after the influential and predominant jurisprudential

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176. DONNELLY, *supra* note 5, at 50.

177. See David Maybury-Lewis, *Anthropologists, Anthropology and the Relativist Challenge*, in Symposium, HUMAN RIGHTS AT HARVARD, Apr. 5, 1997 (1999), at 24, 29 (noting that “[a]s one runs through the various, contentious practices like *sati* [the Hindu practice of widows throwing themselves on the funeral pyres of their husbands] and female circumcision, the arguments eventually boil down to coercion”).

178. This latter statement, needless to say, is a theoretical proposition about moral legitimacy. In practice, of course, we frequently remain incapable of acting effectively to terminate ongoing human rights abuses, or the international community lacks the political will to intervene even if it were feasible. China’s brutal fifty-year occupation of Tibet is a paradigmatic example of both of these phenomena. See generally INTERNATIONAL COMMISSION OF JURISTS, TIBET: HUMAN RIGHTS & THE RULE OF LAW (1997).

school. The legal positivist acknowledges the descriptive fact of cultural pluralism but suggests that, from the standpoint of international law, cultural relativism remains simply inapposite. Nothing about this relative moral value claim, for the legal positivist, affects the empirical status of the legal proposition that universal human rights—as codified in international treaties to which states remain party—retain binding force. The second approach, articulated in the compelling work of Abdullahi Ahmed An-Na'im,<sup>179</sup> may be labeled the “cross-cultural consensus” approach. This argument seeks to invoke the cultural resources available in each culture to forge a cross-cultural consensus that invests human rights with universal legitimacy. This consensus—based on the interpretation, reappropriation, and redeployment of alternative schemes of human dignity found in cultures lacking an indigenous “rights” tradition—allegedly bestows upon universal human rights a more genuine legitimacy than external impositions of value.

### 1. The Legal Positivist Approach

The positivist confronts the descriptive fact of cultural pluralism with a form of legal realism. He does not deny the validity of cultural relativism. Nor does he suggest that human rights inherently possess a greater legitimacy than alternative conceptions of human dignity. The positivist instead repudiates cultural relativism on the basis of empirically verifiable legal facts. After the UDHR's adoption in 1948 and the astonishingly rapid subscription of nations to the treaties constitutive of the modern international human rights regime, human rights obtained “universality” in virtue of their codification as legal norms binding on nearly all states. Arguably, even states that have not ratified these treaties are bound by human rights law because these norms—or, at least, some widely subscribed subset of them—have crystallized into customary international law. Returning to the Taliban, the legal positivist might point out, as numerous international actors did,<sup>180</sup> that Afghanistan is party to the ICCPR, the Torture Convention, and the Convention on the Political

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179. E.g., Abdullahi Ahmed An-Na'im, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman or Degrading Treatment or Punishment*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES, *supra* note 105, at 19 [hereinafter An-Na'im, *Toward a Cross-Cultural Approach*]; Abdullahi Ahmed An-Na'im, *The Contingent Universality of Human Rights: The Case of Freedom of Expression in African and Islamic Contexts*, 11 EMORY INT'L L. REV. 29 (1997).

180. See Dupree, *supra* note 169, at 146-49. United Nations “special peace mediator,” Dr. Norbert Holl, for example, “warned that it was not up to the Taliban leaders to rule on human rights, since ‘Whoever is controlling Afghanistan is bound by the Charter of the U.N.’” *Id.* at 149 (citing *Holl Asks Taliban to Ensure Human Rights*, THE NATION, Oct. 22, 1996).

Rights of Women. All of these treaties arguably proscribe the dubious judicial procedures and punishments instituted by the Taliban.<sup>181</sup> Additionally, international law does not excuse a state party of its treaty obligations simply by virtue of a change in its domestic law or a governmental transition.<sup>182</sup>

Thus, for nations that acknowledge international law—or, at least, have a stake in being perceived as a state that abides by its international obligations—legal positivist universality can exert significant pressures to comply with human rights standards. It therefore serves a crucial value: when manipulated with diplomatic and strategic acuity, it can effect positive changes in the human rights practices of certain state actors. At the theoretical level, however, as the example of the Taliban clarifies, legal positivism fails to answer satisfactorily the crude relativist challenge. Legal positivism is compelling only to the extent that state actors accept one of its axiomatic claims—that legal obligations can exist quite independent of comprehensive moral, philosophical, or religious doctrines.<sup>183</sup> But the Taliban, far from embracing this dichotomy, expressly repudiates it. Marsden observes that the Taliban's creed derives in part from that of the Muslim Brotherhood of the late-1920s, which proclaimed that Islam is a "comprehensive self-evolving system . . . applicable to all times and places."<sup>184</sup> No distinction exists between the secular public world and an alleged private sphere of "comprehensive moral, philosophical or political doctrines."<sup>185</sup> The positivist argument that legal obligations—here, international

181. *E.g.*, Convention on the Political Rights of Women, Mar. 31, 1953, arts. i-iii, 27 U.S.T. 1909, 193 U.N.T.S. 135 (enfranchisement of women and non-discrimination in the political realm); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 1, 1465 U.N.T.S. 85; International Covenant on Civil and Political Rights, Dec. 19, 1966, arts. 7 (prohibition of torture), 14 (due process guarantees), 18 (freedom of thought, conscience and religion), 26 (non-discrimination), 999 U.N.T.S. 171.

182. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679, 690 (1969) ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."); *see also* Tinoco Case (Great Brit. v. Costa Rica), 1 R. Int'l Arb. Awards 369 (1923), *reprinted in* 18 AM. J. INT'L L. 147 (1924) (holding that a domestic transition in government does not relieve a state party of international obligations assumed by treaty under the prior regime).

183. *See generally* RAWLS, *supra* note 126 (arguing that political liberalism demands public justifications for principles of political justice that do not rely upon individuals' idiosyncratic "comprehensive moral, philosophical or religious doctrines").

184. MARS DEN, *supra* note 151, at 68.

185. "Islam is not simply a basis for individual faith but a system that encompasses all aspects of society, including individual behaviour and the relationship of the individual to both society and the state. There is therefore no question of the state being a secular entity and of religion being relegated to the private sphere. The state is seen as the collective embodiment of the Islamic values espoused by society . . ." *Id.* at 69.

human rights—survive whatever comprehensive religious or moral doctrines (as well as their instantiation in domestic law and practice) govern society presupposes a real dichotomy between religious and secular law. States that reject this dichotomy will not find positivist universality compelling. This means that in certain “rogue” states international human rights will not enjoy universal respect; it does not, however, necessarily refute their normative universality. Again, we have conceded that no descriptive consensus supports empirically the existence of universally acknowledged human rights. Recall, however, that the challenge of crude relativism is normative, not descriptive. It claims, not simply that cultural pluralism exists, but that the external imposition of human rights norms on cultures that purport to reject them is somehow illegitimate or unjustified.

## 2. The Cross-Cultural Consensus Approach

Alternatively, then, one might seek to repudiate crude relativism by resort to a culture's internal resources. Norms that promote human dignity exist in nearly all societies.<sup>186</sup> Properly interpreted, recast, and reoriented, these norms arguably can be redeployed in the service of human rights; they provide the “raw material” from which to forge genuine “cross-cultural” universality. Like the legal positivists, exponents of this view, such as Abdullahi A. An-Na'im<sup>187</sup> and Charles Taylor,<sup>188</sup> acknowledge the descriptive fact of cultural pluralism but still embrace the universality of human rights. They argue, however, that any successful rejoinder to the crude cultural relativist must come from within the relativist's own cultural tradition. True legitimacy, An-Na'im writes, requires that “shared moral values be authentic and not imposed from outside . . . . [Values must be] legitimate with reference to the norms and mechanisms of change within a particular culture.”<sup>189</sup> Taylor likewise concludes that “[c]ontrary to what many people think, world convergence will not come through a loss or denial of traditions all around, but rather by

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186. See generally DONNELLY, *supra* note 5, at 49-65 (surveying alternative conceptions of human dignity in major non-Western, non-liberal traditions but arguing that each, upon analysis, does not equate with human rights).

187. E.g., Abdullahi Ahmed An-Na'im, *The Cultural Mediation of Human Rights: The Al-Arqam Case in Malaysia*, in THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS, *supra* note 138, at 147; Abdullahi Ahmed An-Na'im, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman or Degrading Treatment or Punishment*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES, *supra* note 105, at 19; Abdullahi Ahmed An-Na'im, *The Contingent Universality of Human Rights: The Case of Freedom of Expression in African and Islamic Contexts*, 11 EMORY INT'L L. REV. 29 (1997).

188. See Charles Taylor, *Conditions of an Unforced Consensus in Human Rights*, in THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS, *supra* note 138, at 124.

189. An-Na'im, *Toward a Cross-Cultural Approach*, *supra* note 179, at 25.

creative reimmersions of different groups, each in their own spiritual heritage, traveling different routes to the same goal."<sup>190</sup> In short, the cross-cultural approach seeks to repudiate the crude cultural relativist challenge by reappropriating the very cultural traditions relied upon by the relativist to justify behavior that violates universal human rights.<sup>191</sup> Relative to the relativist's own cultural traditions and viewed in the right interpretive light, such behavior appears illegitimate.

Understood as a strategic measure, the cross-cultural approach warrants considerable praise. Rote attempts to compel adherence to human rights norms by citing their codification in international instruments will, as the above-quoted exchange between the Special Rapporteur and the Taliban's attorney general indicates, frequently prove innocuous, particularly where a state's political elite refuses to acknowledge international law.<sup>192</sup> To employ concepts of value and human dignity already internalized by a given cultural tradition may be far more effective.<sup>193</sup> Michael Ignatieff, for example, recounts that,

190. Taylor, *supra* note 188, at 144.

191. *See id.* at 142 (extolling the "possibilities of reinterpretation and reappropriation that [each] tradition itself contains").

192. While the Taliban exemplifies one group that refuses to acknowledge international obligations that contravene its comprehensive moral, legal and political doctrines, this phenomena is not limited to non-liberal states. Indeed, the U.S. Senate's reservation to the ICCPR, which declared that the United States ratifies subject to the understanding that the treaty requires no changes inconsistent with its domestic constitutional law, might be cited as a paradigmatic example. SENATE COMMITTEE ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, Jan. 30, 1992, para. 3.4, *reprinted in* 31 I.L.M. 645, 660 (1992) ("Nothing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."). The Human Rights Committee, charged under Article 40 of the ICCPR with the interpretation and implementation of its provisions, famously responded to this assertion by noting that, where states adopt "widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law[,] no real international rights or obligations have thus been accepted. *General Comment No. 24 On Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations Under Article 41 of the Covenant*, Human Rights Committee, 52d Sess., 1382d mtg., para. 12, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), *reprinted in* 34 I.L.M. 839, 843. (1995). For a critical overview of American "cultural relativism," see Johan D. van der Vyver, *Universality & Relativity of Human Rights: American Relativism*, 4 BUFF. HUM. RTS. L. REV. 43 (1998).

193. Indeed, the International Court of Justice has affirmed rhetorically the efficacy of the cross-cultural approach:

It greatly strengthens the concept of humanitarian laws of war to note that this is not a recent invention, nor the product of any one culture . . . [I]t is deep-rooted in many cultures—Hindu, Buddhist, Chinese, Christian, Islamic and traditional African. These cultures have all given expression to a variety of limitations on the extent to which any means can be used for the purposes of fighting one's enemy. The problem under consideration is a universal problem,

to encourage the Taliban to comply with the 1949 Geneva Conventions,<sup>194</sup> the International Committee of the Red Cross disseminated pamphlets invoking Islamic iconography and maxims, reappropriating these cultural resources in the service of international humanitarian law.<sup>195</sup> An-Na'im similarly contends that arguments based upon Shari'a—citing the Prophet's maxim that "if there is any doubt, . . . the Qur'anic punishment should not be imposed"—will more effectively limit the controversial criminal punishments (*hudud*) imposed by some Islamic states.<sup>196</sup> But note that these examples address the means of realizing an international public order that maximizes respect for the ends promoted by human rights. They do not address the logically prior question of what ends ought to be advanced by this, or any other, strategy, and as Isaiah Berlin famously observed, "[w]here ends are agreed, the only questions left are those of means, and these are not political but technical, that is to say, capable of being settled by experts or machines like arguments between engineers or doctors."<sup>197</sup>

Yet "ends" are precisely what crude relativism challenges. Undoubtedly, reappropriating existing cultural resources to promote world convergence on fundamental ends is perhaps the most promising technical method of forging a cross-cultural consensus about human rights—one that might eventually suffice to be deemed true descriptive universality.<sup>198</sup> But this presupposes actors, like An-Na'im and Taylor, who are in fact already committed to the very human rights norms that crude relativism challenges. The cross-

and this Court is a universal Court, whose composition is required by its Statute to reflect the world's principal cultural traditions. The multicultural traditions that exist on this important matter cannot be ignored in the Court's consideration of this question, for to do so would be to deprive its conclusions of that plenitude of universal authority which is available to give it added strength—the strength resulting from the depth of the tradition's historical roots and the width of its geographical spread.

*International Court of Justice: Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 35 I.L.M. 809, 896 (1996) (footnotes omitted).

194. Convention (No. I) for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Convention (No. II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Convention (No. III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

195. MICHAEL IGNATIEFF, *THE WARRIOR'S HONOR: ETHNIC WAR AND THE MODERN CONSCIENCE* 149-51 (1998).

196. See An-Na'im, *Toward a Cross-Cultural Approach*, *supra* note 179, at 36.

197. Berlin, *supra* note 52, at 118.

198. See JOHNSTON, *supra* note 32, at 16 (noting that "criticisms that appeal to existing norms or shared understandings are likely to be more effective than criticisms that appeal to abstract ideals in which people do not already believe").

cultural approach begins by presuming that universal human rights represent the desirable end-state. It then inquires how, in a global order characterized descriptively by cultural pluralism, one may effectively establish conditions under which, more often than not, international human rights receive respect. The cross-cultural approach's answer is to manipulate and redeploy each culture's internal resources in the service of human rights.

This is not to criticize the "cross-cultural consensus" methodology. It is merely to note that, while laudable as a strategic tool, the cross-cultural, like the legal positivist approach, does not directly address the normative challenge of crude cultural relativism. Nor do its proponents intend it to do so. In fact, implicit in An-Na'im and Taylor's arguments is the notion that the external imposition of human rights—as conceived in the Western liberal tradition—is not justified in some privileged sense that alternative conceptions of human dignity lack. Rather, the objective seems to reside in amalgamating the most broadly-shareable mores of each society in an effort to achieve an overlapping consensus of basic values that most cultures will respect most of the time. While there may be no reason to object to this goal, it cannot be equated with an international order guided by universal respect for human rights.

### 3. Outrelativizing Relativism

Crude cultural relativism, however, does more than acknowledge cultural pluralism. It infers a questionable conclusion from this empirical fact—"that no transcendent or trans-cultural ideas of right can be found or agreed on, and hence that no culture (whether or not in the guise of enforcing international human rights) is justified in attempting to impose on others what must be understood as its own ideas."<sup>199</sup> This proposition states a fundamental challenge that any successful defense of the universality of human rights must address. To begin, then, we should ask *why* it strikes us as problematic in the first place. The answer is that we are disturbed by the idea of imposing on others; it seems to legitimize coercion. Again, we find that arguments about the universality of human rights distill to arguments about the propriety of coercion. Under what circumstances is it justified, in relation to individuals, to cultures, and to states? Needless to say, this question is perhaps the core inquiry of political philosophy,<sup>200</sup> and its comprehensive treatment is beyond the scope of this article. But its assessment cannot be wholly avoided, for it speaks to the central question under consideration, i.e., the propriety of imposing human rights on cultures that purport to

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199. STEINER & ALSTON, *supra* note 6, at 193 (emphasis added).

200. See Berlin, *supra* note 52, at 121.



reject them. Before turning to coercion, however, this Article suggests a number of preliminary, though admittedly non-dispositive, rejoinders to crude relativism.

First, independent of the substantive legitimacy of coercion, crude relativism undermines itself. It suffers from the Humean naturalistic fallacy. Simply put, no value claim—a normative “ought”—finds logical support in any purely factual claim—a descriptive “is”. Bernard Williams concisely captures this difficulty in his essay *An Inconsistent Form of Relativism*.<sup>201</sup> The “vulgar relativist” proposition, he notes, reduces to the following syllogism:

[T]hat ‘right’ means (can only be coherently understood as meaning) ‘right for a given society’; that ‘right for a given society’ is to be understood in a functionalist sense; and that (therefore) it is wrong for people in one society to condemn, interfere with, etc. the values of another society.<sup>202</sup>

But this logic is self-evidently pathological. It proposes, at once, that: (1) all claims of right must be understood as relative to the culture making them; but that (2) one such claim—that imposing foreign values on a society that does not share them is morally wrong—merits universal respect notwithstanding the truth of relativism. Crude cultural relativism presumes that the descriptive fact of cultural pluralism compels the normative value conclusion that every culture should tolerate the practices of every other culture. But this latter claim simply does not follow from the former. As anthropologist Elvin Hatch notes, “To say that values vary from culture to culture is to describe (accurately or not) an empirical state of affairs in the real world, whereas the call for tolerance is a value judgment of what ought to be, and it is logically impossible to derive the one from the other.”<sup>203</sup> The crude relativist’s challenge to the “moral imperialism” of international human rights thus suffers from an internal pathology of logic.

This rejoinder, however, remains somewhat trivial. It shows only that cultural pluralism does not lead inexorably to the conclusion that no culture may interfere justifiably in the affairs of another. It might still be true that cultural groups should generally refrain from imposing their values onto others that do not share them. A complex system of internalized values in large measure defines a culture. “To be acculturated means to have adopted at a

201. See Williams, *supra* note 10, at 171-74.

202. *Id.* at 171.

203. ELVIN HATCH, CULTURE AND MORALITY: THE RELATIVITY OF VALUES IN ANTHROPOLOGY 8 (1983), reprinted in STEINER & ALSTON, *supra* note 6, at 196; see also Williams, *supra* note 10, at 173 (noting that the “central confusion of relativism is to try to conjure out of the fact that societies have differing attitudes and values an *a priori* nonrelative principle to determine the attitude of one society to another”).

very deep level of consciousness—so deep that one is often unaware of its effect on contemporary behavior—the fundamental postulates of a particular system.”<sup>204</sup> It may therefore be desirable to forbear, where possible, from disturbing these fundamental postulates. Insofar as it upsets the stability of a cultural community, to interpose foreign values may cause more harm than good. Even from a liberal perspective, as Kymlicka argues, “freedom is intimately linked with and dependent on culture”<sup>205</sup> because it “involves making choices amongst various options, and our societal culture not only provides these options, but also makes them meaningful to us.”<sup>206</sup>

Yet disparities in cultural values and practices cannot simply be ignored. Indeed, it is precisely because cultural survival depends upon the internalization of certain values that they cannot “merely evaporate because one is confronted with human beings in another society.”<sup>207</sup> Few today, for example, would resort to cultural relativism to defend cultural practices that sanction slavery, human sacrifice, or genocide. These “easy cases” do not show a universal consensus. But they indicate that what Donnelly calls “radical cultural relativism”—the notion that “culture is the [sole] source of the validity of a moral right or rule”<sup>208</sup>—is not the view that most relativists defend when they question the universality of human rights. The issue is rather whether and to what extent cultural pluralism counsels against imposing foreign norms onto a cultural group that does not share them, either because in theory, this imposition is somehow morally illegitimate; or, in practice, the introduction of foreign norms threatens to disrupt the integrity of a cultural community.

In the latter case, however, while recognizing the force of Kymlicka’s argument that “access to a societal culture” is a necessary condition for “meaningful individual choice[.]”<sup>209</sup> one must also bear in mind that the very same “societal culture” can at times constitute the principal barrier to individual choice. For instance, certain Christian sects—the Amish—shield children in their culture from ordinary public education, fearing that this exposure could enable and animate decisions to exit their discrete cultural community.<sup>210</sup> Thus, if one agrees that ensuring “meaningful individual choice”—autonomy—is critical, we must ask whether the extent and nature of cultural “disruption” that might be caused by “imposing” human

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204. W. Michael Reisman, *The Tormented Conscience: Applying and Appraising Unauthorized Coercion*, 32 EMORY L.J. 499, 534 (1993).

205. KYMLICKA, *supra* note 4, at 75.

206. *Id.* at 83.

207. Williams, *supra* note 10, at 173.

208. DONNELLY, *supra* note 5, at 109 (emphasis added).

209. KYMLICKA, *supra* note 4, at 84.

210. *Id.* at 41-42.

rights universally will be offset by the value of vesting formerly disenfranchised individuals or social classes with the protections that international human rights law extends to all persons.

Several further difficulties weaken the crude relativist normative challenge. For example, it often presumes a high level of cultural homogeneity within a nation-state. This proves fictitious in two senses. First, the cultural values alleged to characterize a given community are rarely as univocal or ubiquitous as the relativist claims; and second, the interpretation that these cultural values receive often reflects more the self-interest of the elites than it does traditions and practices cherished by the cultural community as a whole. When the Taliban's acting foreign minister, Sher Muhammad Stanakzai, proclaims, "[t]hose who consider the imposition of [our] law to be against human rights are insulting all Muslims and their beliefs," it is surely *not* the case that "all Muslims" would agree.<sup>211</sup> As An-Na'im notes, within a single culture, multiple perceptions and interpretations of its constitutive shared values subsist.<sup>212</sup> Cultural pluralism does not, that is, simply stand for disputes between "Islam

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211. MARSDEN, *supra* note 151, at 63 (quoting Sher Muhammad Stanakzai, Voice of Sharia Radio, Nov. 20, 1996). See generally Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash With a Construct?*, 15 MICH. J. INT'L L. 307 (1994). "An examination going beyond the official rhetoric about Islamic human rights[.]" Mayer argues,

reveals that there is no real consensus on the part of Muslims that their religion mandates a culturally distinctive approach to rights or that it precludes the adoption of international human rights norms. In fact, the relationship of Islamic culture to the positions that Muslims inside and outside governments are currently articulating on human rights is neither a simple nor a direct one, and the range of Muslims' attitudes on human rights defies Orientalist stereotypes and facile generalizations about a supposedly monolithic Islamic culture.

*Id.* at 309. Thus, for example, the Special Rapporteur to Afghanistan, in the wake of the Taliban's military conquest, was informed by a Sunni Islamic scholar that "the Taliban's interpretation of the Koran was not correct and that many of the rules they applied had nothing to do with Islam but were in fact reflections of local interpretations and tribal customs." *Final Report on the Situation of Human Rights in Afghanistan Submitted by Mr. Choong-Hyun Paik, Special Rapporteur, in Accordance with Commission on Human Rights Resolution 1996/75*, Commission on Human Rights, 53d Sess., Agenda Item 10, para. 29, U.N. Doc. E/CN.4/1997/59 (1997); see also Sub-Commission on the Promotion and Protection of Human Rights, *The Situation of Women and Girls in Afghanistan*, Sub-Commission Res. 1999/14, para. 3 (1999) (noting that the Taliban's moral strictures in relation to women are "totally at variance with the precepts of Islam, which imposes on Muslims the duty to acquire an education, as a number of ulemas have confirmed to the Special Rapporteur on the situation of human rights in Afghanistan").

212. An-Na'im, *Toward a Cross Cultural Approach*, *supra* note 179, at 20.

and the West"<sup>213</sup> but also for internal disagreements *among* Islamic cultural groups and nation-states.

Likewise, in the context of the "Asian values" debate, Yash Ghai points out that "neither Asian culture nor Asian realities are homogenous throughout the continent."<sup>214</sup> Thus, for example, some "Asian values" theorists claim that Confucian cultural traditions in East and Southeast Asia create greater popular desire for the social order and efficient governance allegedly enabled by authoritarian regimes than for democracy.<sup>215</sup> But the Dalai Lama, as one prominent exemplar of the diverse Buddhist traditions of Asia, expresses the view that "not only are Buddhism and democracy compatible, they are rooted in a common understanding of the equality and potential of every individual."<sup>216</sup> The point here is not that one view or the other is correct, but rather that we have no reason to assume that the State—to whom universal human rights law principally applies—speaks with a monolithic cultural voice. In the era of the nation-state, rarely, if ever, do territorial boundaries embrace a single cultural tradition.<sup>217</sup> A "cultural" rejection of universal human rights law may therefore reflect, not universal cultural norms, but particular perceptions, understandings, and interpretations of these norms.

Which interpretations tend to be at war with the prerogatives of universal human rights? This question invites a more cynical rejoinder to crude cultural relativism. Scholars and human rights activists alike observe that frequently it is not cultural values that inhibit societies from realizing a legal order that respects universal human rights; it is the self-serving manipulation of these values by elites.<sup>218</sup> Authoritarian leaders often invoke cultural relativism to cloak the characteristic abuses of totalitarian rule:

Arguments of cultural relativism regularly involve urban elites eloquently praising the glories of village life—a life that they or their parents . . . struggled hard to escape . . . . Government officials denounce the corrosive individualism of Western values—while they line their pockets with the proceeds of massive corruption . . . . Leaders sing the praises of traditional communities—while they wield arbitrary power antithetical to traditional values, pursue development policies

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213. See generally HUNTINGTON, *supra* note 11, at 209-18 (arguing that the roots of conflict between the "West" and the "Islamic World" stretch back far in history and, particularly since the end of the Cold War, have been escalating).

214. Yash Ghai, *Human Rights and Governance: The Asia Debate*, 15 AUSTL. Y.B. INT'L L. 1, 6 (1994); see also DE BARY, *supra* note 139, at 1-16.

215. *E.g.*, Kausikan, *supra* note 139.

216. His Holiness the Dalai Lama, *Buddhism, Asian Values, and Democracy*, 10 J. DEMOCRACY 3, 4 (1999).

217. See *Controversies and Culture*, *supra* note 5, at 10.

218. DONNELLY, *supra* note 5, at 119-20.

that systematically undermine traditional communities, and replace traditional leaders with corrupt cronies and party hacks.<sup>219</sup>

U.N. Secretary-General Kofi Annan echoed this same conclusion in a recent statement at the Aspen Institute: "It is never the people who complain of human rights as a Western or Northern imposition. It is too often their leaders who do so. . . . You do not need to explain the meaning of human rights to an Asian mother or an African father whose son or daughter has been tortured or killed. They understand it—tragically—far better than we ever will."<sup>220</sup> Yet the use of culture to justify human rights violations need not be self-consciously cynical. At times, societal elites—such as the Brahmin caste in traditional Hindu society—rely subconsciously upon deeply ingrained cultural beliefs to legitimize their self-assessment of practices that offend human rights norms.<sup>221</sup>

Finally, to the extent that states advance crude relativist objections to universal human rights, we should bear in mind that these arguments assume unjustifiably an identity between government objectives and cultural values. Human rights abuses, as noted above, imply official complicity. When they are not perpetrated directly by governmental, quasi-governmental, or paramilitary groups, human rights abuses nonetheless enjoy either official sanction or, at the very least, tolerance. Absent some form of official complicity, the abuse perhaps constitutes a crime but not, strictly speaking, a human rights violation. Thus, if crude relativism provides a respectable reason to abrogate international human rights, it must be true that a state's objectives may be identified legitimately with the cultural values invoked to defend the practice at issue. But "[t]he community and State are different institutions and to some extent in a contrary juxtaposition."<sup>222</sup>

Not surprisingly, where many egregious patterns of human rights violations occur, it strains credulity to make this simple

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219. *Id.*

220. Press Release, *Ignorance, not Knowledge . . . Makes Enemies of Man*, Secretary-General Tells Communications Conference at Aspen Institute (Oct. 20, 1997), at [http://www.unhcr.ch/hurricane/hurricane.nsf/\(Symbol\)/SG.SM.6366.En?Opendocument](http://www.unhcr.ch/hurricane/hurricane.nsf/(Symbol)/SG.SM.6366.En?Opendocument); see also *Controversies and Culture*, *supra* note 5, at 10 (noting that it "tends to be the people in power who use Islamic or Asian values to justify political repression and restrictions of rights, and it tends to be the people they are repressing who appeal to the outside world to uphold those rights"); Jim Hoagland, *Asian Values? Masses Use Different Definition Than Ruling Class Does*, DALLAS MORNING NEWS, May 19, 1998, at 15A, 1998 WL 2537894.

221. See An-Na'im, *Toward a Cross-Cultural Approach*, *supra* note 179, at 20 (noting that it is normal for elites to "maintain perceptions and interpretations of cultural values and norms that are supportive of their own interests, proclaiming them to be the only valid view of that culture").

222. Yash Ghai, *Human Rights in the Asian Context: Rights, Duties and Responsibilities*, at [http://www.ahrchk.net/solidarity/199709/v79\\_04.htm](http://www.ahrchk.net/solidarity/199709/v79_04.htm) (last updated Aug. 24, 2000).

identification. In fact, when human rights abuses occur on a massive and systematic scale, it is frequently because the state, or, more commonly, one cultural or national elite that seizes control of the state, seeks to suppress or destroy certain other cultural, ethnic, or political groups within its territory. The war in the former Yugoslavia is a case in point. Likewise, in the Rwandan genocide of 1994, it was not culture per se, but a political elite's manipulation and exacerbation of preexisting socio-cultural divisions within Rwandan society that caused the systematic slaughter of Tutsi.<sup>223</sup> Again, in the People's Republic of China of the 1960s and 1970s, nothing about Chinese—still less “Asian”—values sanctioned the massive destruction and terror of the Cultural Revolution. Indeed, ironically, this human rights catastrophe involved an attempt to eradicate traditional Chinese cultural values in the service of a state ideology that, far from being shared by its citizenry, grew out of the radical ideas of a long-dead social critic of nineteenth-century industrial Europe. In short, particularly in states that lack democratic institutions, the crude cultural relativist's identification of the state—and its objectives—with the cultural values of its people remains dubious.

#### IV. RELATIVISM REVISITED: UNDERSTANDING AND APPLYING THE LIBERAL CONCEPTION OF AUTONOMY AND REASONABLE TOLERANCE

The above arguments cast doubt upon the empirical accuracy and sincerity of cultural relativist challenges to universal human rights. But assume that a state's practices conform to the values of many of its citizens. Assume further that its population is relatively homogeneous and that the state's elite pursues policies that genuinely reflect many of its people's cultural values. Finally, assume that these values manifest an alternative conception of human dignity, but one that is largely incompatible with international human rights law. Under these circumstances, do human rights enjoy some privileged status that merits their application to a culture that appears to reject them? This Part concludes that, even in such an implausible scenario, they do.

In this context, the following discussion revisits the example of the Taliban. For its leaders, structuring Afghan society according to their interpretation of Shar'ia promotes human dignity, insulates men and women from corruption, and shields citizens from the

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223. See HUMAN RIGHTS WATCH, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* 1 (1999) (“[T]his genocide was not an uncontrollable outburst of rage by a people consumed by ‘ancient tribal hatreds’ . . . . [It] resulted from the deliberate choice of a modern elite to foster hatred and fear to keep itself in power.”).

corrosive influence of decadent Western practices. The Taliban are not unique in this respect. Many groups impose strictures on their members to preserve existing social arrangements and to prevent the deterioration of, or to reestablish, "traditional" cultural mores. These strictures force individuals to obey societal norms, often in violation of international human rights law. At the same time, the crude relativist argues, these alternative cultural arrangements merit tolerance; it would be wrong for foreigners to coerce societal compliance with international human rights.

The debate thus returns full circle to the question of coercion. In practice, the objections sketched above often betray the disingenuousness of crude relativism. But a compelling defense of universal human rights must interpret the position charitably for the argument's sake. We need to appraise whether cultural pluralism, by itself, indicates that certain kinds of coercion intended to enforce international human rights are illegitimate. But what aspect of coercion would render it "illegitimate" or "unjustified" in any context? Obviously, we do not disapprove of all forms of coercion. Without violating human rights, states compel citizens to pay taxes, to serve on juries, at times to enlist in the army, and so forth. Therefore, we have no difficulty with forcing children to attend school and receive an education.<sup>224</sup> But we balk at the Taliban's strictures that force women to behave in certain ways and that forbid them certain forms of education and employment.

In the liberal tradition, the salient difference resides in the understanding of the nature of the coercion in each case. Isaiah Berlin defined coercion as "the deliberate interference of other human beings within the area in which I could otherwise act."<sup>225</sup> Where this interference serves, broadly speaking, the institutions that preserve human freedom and choice—as education, taxes, and jury duty all arguably do—it does not strike us as illegitimate. By contrast, where coercion interferes substantially with human freedom and choice, it becomes untenable:

It is one thing to require people to do jury duty or to vote, and quite another to compel people to attend a particular church or to follow traditional gender roles. The former are intended to uphold liberal rights and democratic institutions, the latter restrict these rights in the name of cultural tradition or religious orthodoxy.<sup>226</sup>

The quintessential idea that motivates this distinction is the peculiar liberal conception of the self.<sup>227</sup> For this reason, the following

224. See KYMLICKA, *supra* note 4, at 36.

225. Berlin, *supra* note 52, at 122.

226. KYMLICKA, *supra* note 4, at 36.

227. See Berlin, *supra* note 52, at 134 ("Conceptions of freedom directly derive from views of what constitutes a self, a person, a man. Enough manipulation with the

discussion, which expounds the source of respect for autonomy within the liberal tradition, applies, first and foremost, to individuals. It applies to communities only insofar as they can genuinely be understood to enable the kind of meaningful individual choice that the liberal tradition venerates.<sup>228</sup> It would remain perfectly coherent for a community-based or patriarchal society to *reject* this idiosyncratic conception of the self and its concomitant concern with individual autonomy. But then to purport to reject the universality of human rights on cultural relativist grounds requires that the proponent of relativism explain why coercion—in the form of imposing international human rights law—is illegitimate. Absent some presently unarticulated alternative, the contention is that cultural relativism necessarily appeals, albeit tacitly, to the liberal principle of autonomy. An appeal to autonomy, however, is only available to the extent that the rationale for valuing autonomy holds true. This rationale, in turn, is inextricably linked to a belief that the individual is the fundamental unit of concern and source of value. Cultural relativism therefore cannot embrace autonomy to reject the universal applicability of human rights, but then dispense with autonomy in relation to the very source of its value and rationale—the liberal conception of the individual.

Liberals understand the self as an *agent*, a being capable of formulating personal projects according to widely diverse values.<sup>229</sup> Robert Nozick—one exemplar of this tradition—sets forth this vision of the self—and its many philosophical assumptions—in *Anarchy, State & Utopia*.<sup>230</sup> We conceive of the self, he writes, as “sentient and self-conscious; rational (capable of using abstract concepts, not tied to responses to immediate stimuli); possessing free will; [and] being a moral agent,” as a being that is able “to regulate and guide its life in accordance with some overall conception it chooses to accept.”<sup>231</sup> Liberals therefore try to establish social and legal institutions that do not interfere with each person’s autonomous pursuit of his or her values.

The rationale for this principle of tolerance is neither obvious nor obviously correct. It stems from the controversial assumption that no one set of values—no single “conception of the good”—is right for everyone. This claim could be metaethical, empirical, or both. It could mean that, as a matter of metaethics, personal, cultural, and societal differences render certain values worthier of pursuit for some

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definition of man, and freedom can be made to mean whatever the manipulator wishes.”).

228. See KYMLICKA, *supra* note 4, at 82-84.

229. See JOHNSTON, *supra* note 32, at 22-27.

230. See generally ROBERT NOZICK, *ANARCHY, STATE & UTOPIA* (1971).

231. *Id.* at 48-49.



people than for others; or it could mean that, empirically, even if one set of values is in fact right for everyone we cannot know this. But critically, note that in either case the rationale for valuing autonomy reduces to the same basic claim—that *choice* is the prerequisite for individuals to give meaning to their lives.

So stated, the argument against coercion appears highly quixotic and by no means shared by the world's diverse cultural traditions. Many religious, moral, and cultural doctrines, far from disclaiming knowledge of the good life, advance strong conceptions of it that demand universal assent. The Taliban—though they are hardly unique in this regard—do not recognize a Rawlsian distinction between, on the one hand, mere “political” conceptions of right that can be switched on and off as one moves in and out of the public political arena and, on the other hand, comprehensive private moral and religious doctrines.<sup>232</sup> Quite the contrary, the latter encompass and ordain the former. Moreover, even assuming we do acknowledge this distinction, as Kymlicka rhetorically asks, “[W]e know that some people will make imprudent decisions, wasting their time on hopeless or trivial pursuits. Why then should the government not intervene to protect us from making mistakes, and to compel us to lead the truly good life?”<sup>233</sup>

The answer, he emphasizes, resides in human fallibility. We recognize that, “[s]ince we can be wrong about the worth or value of what we are currently doing, and since no one wants to lead a life based on false beliefs about its worth, it is of fundamental importance that we be able rationally to assess our conceptions of the good in the light of new information or experiences, and to revise them if they are not worthy of our continued allegiance.”<sup>234</sup> A liberal conception of “rights as trumps” against the demands of the community or the state finds its justification in two interrelated ideas: First, that everyone must “have the resources and liberties needed to lead their lives in accordance with their beliefs about value . . .;” and second, that individuals also need the information and liberty to “question those beliefs, to examine them in light of . . . an awareness of different views about the good life” and, if warranted, to revise them.<sup>235</sup> Human rights, as one peculiar subset of rights generally, seek to protect human dignity by preserving each person's ability to choose

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232. See generally RAWLS, *supra* note 126.

233. KYMLICKA, *supra* note 4, at 80. I draw heavily on Kymlicka's rehearsal of these familiar liberal themes because he discusses them in the context of multiculturalism. But as he emphasizes himself, these notions permeate liberal schools of thought, from classical liberals like J.S. Mill to modern liberals like John Rawls and Ronald Dworkin.

234. *Id.* at 81.

235. *Id.* at 81-82.

among the diverse conceptions of ultimate value that different cultures embrace.

We live in a world, not of competing relativisms—"these values embody the good for a circumscribed set of persons leading lives in this particular cultural context"—but of competing universalisms—"these values embody *the* good."<sup>236</sup> Paradoxically, then, the feature of comprehensive "conceptions of the good" that proves most adverse to an international order structured by respect for universal human rights is dogmatic universalism—the claim that one system of value prescribes what "is right" for everyone and can therefore be justifiably imposed, through violence if necessary, on others. At first glance, this appears to beg the question. Does not the phrase "universal human rights" imply precisely such a system of values? Is it not precisely this "imperialistic" feature of international human rights that cultural relativists reject?

These questions indicate that liberalism's preoccupation with "rights" does not render it, as some argue, wholly neutral towards different conceptions of the good.<sup>237</sup> It cannot tolerate any conception of the good life that requires suppression of the conditions under which free and informed choice by individuals remains possible. Simply stated, liberalism rejects institutional arrangements that do not preserve autonomy. Yet clearly, some cultural value systems, which in the view of their adherents promote human dignity, actually demand the repression of autonomy. By restricting women's educational opportunities, the Taliban destroy the conditions under which women can make free and informed choices about what values—and, consequently, what life and vision of human dignity—they wish to embrace. Human rights, then, do not permit cultures absolute latitude to structure their socio-political and legal arrangements as they choose; in this respect, they may fairly be deemed "imperious."

But at the same time, human rights do not compel any one particular set of values.<sup>238</sup> Within constraints delineated by the autonomy principle, international human rights provide an

236. Eck, *supra* note 118, at 18-19.

237. See JOHNSTON, *supra* note 32, at 25. The idea that liberalism is neutral toward conceptions of the good is the notion that, within a libertarian socio-political context, individuals and social groups can freely adopt and pursue whatever happens to be their idiosyncratic values, limited only by an obligation not to infringe a like liberty for others. But of course, most actions infringe on others' liberty in some sense. If one values economic development and another values ecological conservation, conflict will inevitably result; and no "neutral" principle will tell them how to settle these disputes or how to make choices that do not potentially erode each others' values.

238. "Human-rights obligations bar coercion by government or law; they do not mandate a particular social outcome. True, legal and social coercion can be difficult to distinguish, but international human-rights norms can deal only with the legal issues." *Controversies and Culture*, *supra* note 5, at 10.

overarching political and legal framework that permits individuals and cultural units relatively broad latitude to structure their social circumstances and to pursue their values as they see fit. International human rights therefore prove far more inclusive of diverse conceptions of cultural value than alternative functional concepts for promoting human dignity. Most non-rights-based conceptions of human dignity insist upon a singular substantive conception of the good; they therefore demand adherence to specific values, ideologies, and attendant behaviors. The human rights tradition is unique in that it does not demand adherence precisely because the universal human rights tradition, far from denying pluralism and far from denying diverse conceptions of cultural value, is animated by the distinctively liberal presumption of reasonable value pluralism.

With this background in mind, recall that crude cultural relativism challenges the alleged "intolerance" of universal human rights as illegitimate—an unjustified imposition of foreign values on a cultural community that does not share them. But what could "illegitimate" mean in this context? Crude cultural relativism, after all, vehemently defends the proposition that conceptions of legitimacy are culturally determined. Yet, as has been seen, it fails to support its own argument in this regard because it unjustifiably infers a normative conception of legitimacy from a mere descriptive fact. To substantiate its challenge, then, cultural relativism must appeal to some other principle—other than merely "the truth of relativism"—that can differentiate legitimate from illegitimate coercion. The liberal tradition—and the distinctive conception of "human rights" to which it gave rise—suggests one: roughly, respect for individual autonomy. "What distinguishes *liberal* tolerance is precisely its commitment to autonomy—that is, the idea that individuals should be free to assess and potentially revise their existing ends."<sup>239</sup> But crude cultural relativism cannot rely on the autonomy principle to repudiate the universality of human rights while at the same time violating this principle in relation to members of its own society. As Arthur Schlesinger observed in the context of the debate over multiculturalism, "One of the oddities of the situation is that the assault on the Western tradition is conducted very largely with analytical weapons forged in the West."<sup>240</sup> The same can be said, in short, of the vast majority of cultural relativist objections to universal human rights.<sup>241</sup>

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239. KYMLICKA, *supra* note 4, at 158.

240. ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY 72 (1991).

241. See Inoue Tatsuo, *Liberal Democracy and Asian Orientalism*, in THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS, *supra* note 138, at 27, 30-37 (arguing that

Other principles for differentiating legitimate from illegitimate coercion in the context of diverse cultural communities do exist. The most well-known, the Ottoman "millet" system, permitted Greek Orthodox, Armenian Orthodox, and Jewish communities subsisting within the Ottoman Empire to structure their internal affairs as they saw fit, though "their relations with the ruling Muslims were tightly regulated."<sup>242</sup> Historically, this system provided a relatively humane and stable system of tolerance among religious groups.<sup>243</sup> Yet it permitted these groups to impose restrictions internally on the autonomy of their respective members, and theoretically, it is not clear on what basis—other than the pragmatics of ruling an empire—this distinction could be justified. A "millet"-like system remains plausible today. In a rough sense, international law traditionally proceeded from an analogous principle, regulating relations among states but permitting each sole authority over matters "essentially within [its] domestic jurisdiction." But after abandoning transcendental concepts of right, the appropriate inquiry becomes whether, regardless of its presently unarticulated theoretical justification, this system would be desirable today, in an interdependent global community of highly diverse peoples and states.

## V. CONCLUSION

Crude cultural relativism emphasizes correctly that conceptions of human dignity respond to the prevailing social and cultural features of the society in which they develop. But to accept this premise invites the following question: Which mechanism for promoting human dignity responds most appropriately to the threats to human dignity posed by contemporary social and historical contingencies? Jack Donnelly, Rhoda Howard, and other scholars have observed that international human rights are peculiarly well-suited to protect persons from the threats to human dignity posed by the modern nation-state, market economies, and industrialization. These conditions do not exist to the same degree in all regions of the world. But today, they penetrate virtually every state, culture, and

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cultural relativists tend to employ a distinctly *Western* political morality, logic, and vocabulary in their efforts to rebut the universality of human rights).

242. KYMLICKA, *supra* note 4, at 156.

243. See Benjamin Braude & Bernard Lewis, *Introduction to CHRISTIANS AND JEWS IN THE OTTOMAN EMPIRE: THE FUNCTIONING OF A PLURAL SOCIETY 1* (Benjamin Braude & Bernard Lewis eds., 1982) ("For nearly half a millennium the Ottomans ruled an empire as diverse as any in history. Remarkably, this polyethnic and multireligious society worked."), *quoted in* KYMLICKA, *supra* note 4, at 157.

society, Western and non-Western alike.<sup>244</sup> This may explain why “[w]hen Chinese students cried and died for democracy in Tiananmen Square, they brought with them not representations of Confucius or Buddha but a model of the Statue of Liberty.”<sup>245</sup> The liberal value of individual autonomy that finds expression in universal human rights law resonates with the particular needs of human beings faced with threats to human dignity posed by the modern nation-state and its instrumentalities.

Absent a transcendental justification, which is both undesirable and dangerous, resort to the liberal principle of autonomy to vindicate the universality of human rights does not provide a philosophically-hermetic rebuttal to the relativist’s charge that human rights “impose” foreign norms. But one must appraise this challenge, not in isolation, but in context and by reference to its logical alternative—an international laissez-faire system that permits elites (often those who control the military) to impose their conception of the good upon subordinate groups and individuals, armed with the machinery of the state.

In practice, cultural relativism rarely states a sincere call for cultural tolerance; in theory, cultural relativism lacks any coherent theoretical ground to demand tolerance. At the outset, then, one has reason to view cultural relativist claims with skepticism. But universal human rights law also claims two affirmative policy justifications. First, it is maximally inclusive. Within limits dictated by the autonomy principle, international human rights law accommodates the greatest diversity of alternative cultural conceptions of human dignity; in other words, it is the most tolerant of cultural pluralism. Second, international human rights law is the uniquely appropriate mechanism to counterbalance the threats to human dignity posed by the nation-state, its offshoots, and its instrumentalities. To acknowledge the universality of human rights, then, is not to deny cultural pluralism or the relativity of value. It is to recognize the normative force of the system of international human rights in the face of cultural relativist challenges—which, in the end,

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244. See DONNELLY, *supra* note 5, at 64-65. Donnelly suggests that “where there is a thriving indigenous cultural tradition and community, arguments of cultural relativism offer a strong defense against outside interference—including disruptions that might be caused by introducing ‘universal’ human rights.” *Id.* at 118. But such communities, he argues, rarely exist in an unadulterated form in the modern world. “Even most rural areas of the Third World have been substantially penetrated, and the local culture ‘corrupted,’ by foreign practices and institutions, including the modern state, the money economy, and ‘Western’ values, products, and practices.” *Id.* at 119. Consequently, human rights become necessary to fill a vacuum created by the disappearance or corruption of alternative social institutions and arrangements that may once have protected human dignity.

245. SCHLESINGER, *supra* note 240, at 78.

appear to state little more than demands for international legal tolerance of intolerance.

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