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## Normative Systems and Human Rights

Richard S. Kay

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# NORMATIVE SYSTEMS AND HUMAN RIGHTS

*Richard S. Kay\**

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## INTRODUCTION

It is both an honor and a pleasure to participate in this symposium celebrating the extraordinary scholarly career of Michael Perry. I have been fortunate to have known Michael Perry and his work for more than forty years. I have been enriched and educated by his sensitive and insightful writing. His books and articles are distinguished by thoughtfulness in substance and lucidity in expression—qualities lamentably rare in legal scholarship. His work is also marked by an unflinching honesty. He has no axe to grind apart from the essential academic tasks of understanding and illuminating those subjects that he has chosen to study. Finally, I am personally indebted to him for his unfailingly kind assistance and encouragement. He has been a most valuable colleague and friend.<sup>1</sup>

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\* Wallace Stevens Professor Emeritus and Oliver Ellsworth Research Professor, University of Connecticut School of Law. I am grateful for the essential editorial assistance of Ray Laguerre.

<sup>1</sup> Before beginning, I feel obliged to state my distress at the decision of the editors of the *Emory Law Journal* (who, in their dealings with me, have been consistently kind and professional) to withdraw their invitation to publish the essay of a distinguished invited contributor to this project. This decision was apparently based on their impression that the essay was racially insensitive and divisive. Having read the relevant paper taken as a whole, that conclusion strikes me as harsh and unwarranted. Refusing publication based on disagreement with an author's opinions or point of view is the kind of thing which, practiced frequently enough, is fatal to honest scholarship in law and humanities. I am dismayed that this controversy might in any way distract from the honor due to Michael Perry, whose life and work I so profoundly admire. But in this context, I feel a responsibility to insist on the critical importance of academic freedom, the value of which could not be better exemplified than in the career of Michael Perry.

One subject area to which Michael Perry has made sustained and important contributions is human rights. He has produced useful commentary on human rights as a matter of international law, domestic constitutional law, and moral philosophy. This diversity of academic fields, all of which employ the vocabulary of human rights, tells us something important about a central problem in the academic literature. That is the unsettled and apparently unresolvable question of where human rights come from, which is pretty much the same question as what human rights are. In this essay, I will briefly review this issue. I conclude that the search for a unified justification for human rights is necessarily futile. The phrase “human rights,” as used in our rhetoric and in our practice, refers to rules of conduct that arise from different normative systems. The failure to keep this aspect of the term in view is at least partly responsible for the seemingly endless disputes in the scholarly literature.

In Part I, I document the almost universal recognition that the phrase “human rights” stands badly in need of better definition—or definitions. I then describe a critical consequence of the fact that human rights must, first of all, be understood as “rights.” Like all rights, human rights only make sense as part of some system of preexisting norms. In Part II, I examine some of the normative systems that appear to be implicated in one or another discussion of human rights. I start, in Part II.A, with one of the major divides in the literature: the distinction between “moral” and “political” interpretations of human rights. I attempt to show that these two schools of thought can be understood as referring to two different systems of norms. Then, in Part II.B, I briefly consider some other normative systems, each of which appears to play some part in explications of human rights. The human rights protections that stem from each of these systems will be different with respect to sources of legitimacy, procedures, and remedies. In Part III, I consider some consequences of this state of affairs for human rights discourse and practice. The many kinds of human rights will often overlap and be mutually reinforcing. But, inevitably, sometimes they will be contradictory. In Part IV, in light of the data presented, I restate my principal conclusion: a single conceptual model of human rights will never be able to account for the variety of phenomena in the world today, all of which lay claim to the title of human rights.

## I. HUMAN RIGHTS AS RIGHTS

No ideology in the world today is more widely embraced than that of human rights. Writing in 1978, Louis Henkin accurately said of human rights that “[a]ll civilizations proclaim their dedication to them; all the major religions proudly lay claim to fathering them; every political leader and would-be leader makes

them his platform.”<sup>2</sup> As Michael Perry noted in a recent book, “[E]ven among countries that do not take human rights seriously, an ever-diminishing number is willing to be seen as rejecting the political morality of human rights.”<sup>3</sup> It has, in the words of Justine Lacroix and Jean-Yves Pranchère, become a “sort of global *lingua franca*” in international political discourse.<sup>4</sup>

This increasing regard for human rights has unsurprisingly been accompanied by an explosion of academic literature. A substantial part of this material is directed at speculation and argument about just what human rights are. Writers on the subject often begin by citing a fairly standard definition, namely that human rights are rights enjoyed by every human being solely as a result of his or her status as a human being.<sup>5</sup> However, this general formula masks a multitude of differences and is itself almost always subject to both significant qualifications and serious criticism. It is something of an understatement when Perry says that “the term ‘human rights’ has no canonical meaning.”<sup>6</sup> Time does not appear to be narrowing the differences in the debate.<sup>7</sup> As I will explain below, the difficulties associated with defining human rights are largely a consequence of the fact that the term is often applied to quite different things. In his 2017 book, *A Global Political Morality: Human Rights, Democracy, and Constitutionalism*, Perry writes, “I want to emphasize, here at the outset, that this book is about the *political morality* of human rights; it is not about the *international law* of human rights.”<sup>8</sup> Unfortunately, not every

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<sup>2</sup> LOUIS HENKIN, *THE RIGHTS OF MAN TODAY*, at xii (1978).

<sup>3</sup> MICHAEL J. PERRY, *A GLOBAL POLITICAL MORALITY: HUMAN RIGHTS, DEMOCRACY, AND CONSTITUTIONALISM* 4 (2017) [hereinafter PERRY, *GLOBAL POLITICAL MORALITY*].

<sup>4</sup> JUSTINE LACROIX & JEAN-YVES PRANCHÈRE, *HUMAN RIGHTS ON TRIAL: A GENEALOGY OF THE CRITIQUE OF HUMAN RIGHTS* 12 (2018).

<sup>5</sup> See, e.g., PERRY, *GLOBAL POLITICAL MORALITY*, *supra* note 3, at 7–8 (quoting John Tasioulas).

<sup>6</sup> Michael J. Perry, *Human Rights Theory, 1: What Are ‘Human Rights’? Against the ‘Orthodox’ View 2* (Emory Univ. Sch. of L. Legal Stud. Rsch. Paper Series, Research Paper No. 15-349), <https://ssrn.com/abstract=2597403>. Perry’s own contribution to the ongoing discussion is unique and characteristically clear. A right qualifies as a human right (in the moral dimension of human rights) only “if the fundamental rationale for establishing and protecting the right—for example, as a treaty-based right—is that conduct that violates the right violates the imperative to ‘act towards all human beings in a spirit of brotherhood.’” PERRY, *GLOBAL POLITICAL MORALITY*, *supra* note 3, at 25 (citing the Universal Declaration of Human Rights).

<sup>7</sup> See, e.g., MICHAEL K. ADDO, *THE LEGAL NATURE OF INTERNATIONAL HUMAN RIGHTS* 23 (2010) (“[C]enturies of human rights analysis has not clarified or settled the conceptual question of what they are or what they are for. . . .”); Jeremy Waldron, *Is Dignity the Foundation of Human Rights?*, in *PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS* 117, 121 (Rowan Cruft et al. eds., 2015) (“There is still no settled consensus about what it means to say that the right to  $\phi$  is a human right . . . .”); James Griffin, *Human Rights: Questions of Aim and Approach*, in *THE PHILOSOPHY OF HUMAN RIGHTS: CONTEMPORARY CONTROVERSIES* 3, 6 (Gerhard Ernst & Jan-Christoph Heilinger eds., 2012) (stating human rights “may not be uniquely indeterminate among ethical terms, but it is considerably more indeterminate than most of them”).

<sup>8</sup> PERRY, *GLOBAL POLITICAL MORALITY*, *supra* note 3, at 2.

commentator on human rights is so careful to distinguish the various sources and the various effects of human rights. This is, in part, a consequence of the fact that “[h]uman rights as an idea has no specific intellectual home.”<sup>9</sup> Rather, it is “recognised, accepted[,] and applied in all intellectual disciplines, including philosophy, anthropology, psychology, politics, sociology, economics, the sciences and law.”<sup>10</sup> But this multiplicity of sources has not deterred scholars from seeking a single core understanding of the term. James Griffin, for example, suggests that it is possible to identify “existence conditions . . . [and] supply grounds for deciding [their] content . . . [and] resolve conflicts of human rights” in the senses “used today by most philosophers, political theorists, international lawyers, jurists, civil servants, politicians, and human rights activists.”<sup>11</sup> And, while agreeing that the phrase “may legitimately be used in various senses,” John Tasioulas has gone on to attempt to identify “a central or focal sense of the concept, one which has explanatory priority in relation to the others, at least within a theoretical enterprise aimed at a certain kind of understanding or evaluation of aspects of our world.”<sup>12</sup>

It will be useful to start with the obvious. However used, the assertion of a human right depends on an implicit assumption that a “right” is a particular kind of phenomenon. There is presumably a reason for denominating certain conduct as protected by a right “as opposed to interests, values, claims, goals, or moral considerations of some other kind.”<sup>13</sup> On the first day of law courses on human rights, I used to ask students to discuss the difference between these two propositions:

- (A) Everyone should receive competent medical care, and
- (B) Everyone has a right to competent medical care.

Students would generally agree that the second formulation appears to be a more forceful expression of the judgment than the first. We tend to think that the existence of a right to the status mentioned (receiving competent medical care) carries a greater assurance that such status will be realized in fact, while the first statement only expresses a moral judgment about the desirability of that status. It is true that sometimes the language of rights may only be a way of manifesting the intensity of the speaker’s belief. Thus, Richard Bilder aptly noted that “[t]o

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<sup>9</sup> ADDO, *supra* note 7, at 43.

<sup>10</sup> *Id.*

<sup>11</sup> Griffin, *supra* note 7, at 6.

<sup>12</sup> John Tasioulas, *Exiting the Hall of Mirrors: Morality and Law in Human Rights*, in *POLITICAL AND LEGAL APPROACHES TO HUMAN RIGHTS* 73, 76–77 (Tom Campbell & Kylie Bourne eds., 2018).

<sup>13</sup> John Tasioulas, *Taking Rights out of Human Rights*, 120 *ETHICS* 647, 650 (2010).

assert that a particular social claim is a human right is to vest it emotionally and morally with an especially high order of legitimacy.”<sup>14</sup> But a claim of a right strikes most people as incorporating an additional element. That is, there would still be a difference between the two sentences even if the first one read, “It is essential and urgent that everyone receive competent medical care.”

It has been often noted that statements of rights necessarily refer to persons or entities other than the rights holders.<sup>15</sup> The existence of a right contemplates a hypothetical “violation” of that right, one that involves an action or inaction by some other person or thing.<sup>16</sup> Perry has written that “[t]o say that A has a right that B not do X to A is to say that B has a duty not to do X to A.”<sup>17</sup> The duty-bearer may be another person, a government (as is typically the case for “human rights”), or a deity. We can assert rights against the climate (“I have a right to one sunny day on my vacation”) or an inanimate object (“I have a right to finish at least one email before my computer crashes”), but there is no such thing as a perfectly self-regarding right.

This is evident in the categorization of “legal advantage[s]” set forth by Wesley Hohfeld in his classic analysis.<sup>18</sup> Hohfeld attempted to distinguish four particular kinds of advantages, all of which were typically referred to by the umbrella term, “right”: (1) a right (properly so-called), (2) a privilege, (3) a power, and (4) an immunity.<sup>19</sup> But Hohfeld was also clear that each kind of “right” had its own “co-relative”: (1) a duty (properly so-called), (2) a no-right, (3) a liability, and (4) a disability.<sup>20</sup> In each case, the co-relative was borne by

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<sup>14</sup> Richard B. Bilder, *Rethinking International Human Rights: Some Basic Questions*, 1969 WIS. L. REV. 171, 174 (1969); see also John Kleinig, *Human Rights, Legal Rights and Social Change*, in HUMAN RIGHTS 36, 39 (Eugene Kamenka & Alice Erh-Soon Tay eds., 1978) (“[T]here are reasons for doubting that, for many in contemporary society, talk of ‘human’ rights is anything more than a form of words.”).

<sup>15</sup> See John Tasioulas, *On the Foundations of Human Rights*, in PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS, *supra* note 7, at 45, 45 (explaining human rights as “rights possessed by all human beings simply in virtue of their humanity”).

<sup>16</sup> See PERRY, GLOBAL POLITICAL MORALITY, *supra* note 3, at 16.

<sup>17</sup> *Id.* (emphasis added); see also Rowan Cruft, *Human Rights as Rights*, in THE PHILOSOPHY OF HUMAN RIGHTS: CONTEMPORARY CONTROVERSIES, *supra* note 7, at 129, 137 (“[S]omething cannot be a right if it lacks some such relation to directed duties.”).

<sup>18</sup> Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 38 (1913).

<sup>19</sup> *Id.* at 30.

<sup>20</sup> *Id.* at 30–33.

some other person or entity.<sup>21</sup> It follows that “[t]he concept of a right is fully unravelled in the idea of ‘a right against another.’”<sup>22</sup>

The point, for my purposes, is that the assertion of rights is one way of limiting and adjusting relations between and among people. John Austin said that a legal right necessarily involves three parties: “a party bearing the right; a party burdened with the relative duty; and a sovereign government setting the law through which the right and the duty are respectively conferred and imposed.”<sup>23</sup> As the anthropologist Sally Falk Moore put it, “All legal rights and duties are aspects of social relationships. They are not essentially rights in things, though they may pertain to things. They are rights to act in certain ways in relation to the rights of other people.”<sup>24</sup>

What these quotations say about legal rights is, with minor qualifications, equally true of any kind of right. A right is an aspect of a human relationship regulated by a binding norm. More specifically, it is that aspect of the norm that may be cited by a party to the relationship to spotlight an advantage that the relevant norm confers on him or her. As James Allan notes, “[R]ights and duties are themselves tied together by the concept of rules. Any right you care to mention I can transliterate into the form of a rule.”<sup>25</sup> Jeremy Bentham thought that the only rules that gave rise to rights, properly so-called, were legal rules: “Rights are, then, the fruits of the law, and of the law alone. There are no rights without law—no rights contrary to the law, no rights anterior to the law.”<sup>26</sup> And memorably, he described a right independent of law as a “round square” or “a sort of dry moisture.”<sup>27</sup> Only slightly more expansively, Alasdair MacIntyre insisted that a right exists only in connection with “some particular set of institutional arrangements” and “will always be institutionally conferred,

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<sup>21</sup> *Id.* H.L.A. Hart discussed the possibility that a “liberty” (which Hohfeld treated as “the same thing as privilege”) does not entail that “someone else has any duty.” The law makes effective the authorization to take an action that a liberty may protect by means of its general criminal and civil prohibitions on interferences with such actions. See H.L.A. Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175, 179 (1955).

<sup>22</sup> Christopher Arnold, *Analyses of Right*, in *HUMAN RIGHTS*, *supra* note 14, at 74, 76.

<sup>23</sup> John C. Gray, *Some Definitions and Questions in Jurisprudence*, 6 *HARV. L. REV.* 21, 27 (1892) (quoting JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* 284 (Weidenfeld & Nicholson eds. 1954)).

<sup>24</sup> Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 *LAW & SOC. REV.* 719, 734 (1973) (citing WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1964)).

<sup>25</sup> James Allan, *Human Rights, Doubts and Democracy*, in *POLITICAL AND LEGAL APPROACHES TO HUMAN RIGHTS*, *supra* note 12, at 113, 113.

<sup>26</sup> 3 JEREMY BENTHAM, *THE WORKS OF JEREMY BENTHAM* 221 (John Bowring ed., 1843), *quoted in* H.L.A. Hart, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 82 (1982).

<sup>27</sup> 1 JEREMY BENTHAM, *JEREMY BENTHAM’S ECONOMIC WRITINGS* 334–35 (W. Stark ed., 1952), *quoted in* H.L.A. HART, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 82 (1982).

institutionally recognized[,] and institutionally enforced.”<sup>28</sup> But there is no reason to restrict the use of “rights” to these particular kinds of normative systems. To the extent that individuals accept the authority of a common set of norms, one can rationally invoke it to claim a benefit which that system confers. Those norms may be legal, institutional, customary, religious, or moral.<sup>29</sup> The critical element is the shared commitment of both the claimant and the obligor to the authority of certain norms, so that, in the relevant context, they operate as binding rules.<sup>30</sup> And while the specification of norms may be more contestable, this is no less true of moral rules and rights. A given morality, like a legal system, is a collection of “precepts about how persons ought to act toward one another.”<sup>31</sup> It is the presumed force of a mandatory normative system that distinguishes the assertion of a right from the expression of a mere preference or value, even an intensely held preference or value.<sup>32</sup> That is why the “right” to competent health care in the sentences given above strikes us as stating a more powerful claim. To have a right is to have an entitlement within a system that has already been recognized as obligatory.

## II. KINDS OF HUMAN RIGHTS

If this understanding of the special character of rights is accepted, it may put the inconclusive debates about the nature of human rights in a different light. The fact that a human right may be an artifact of one of several normative systems suggests that it is fruitless to inquire about the “real” or the “central” feature of human rights.<sup>33</sup> When considering whether a human right exists and has been violated in a particular situation, it will always be necessary to ask how

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<sup>28</sup> PERRY, GLOBAL POLITICAL MORALITY, *supra* note 3, at 22 (quoting ALASDAIR C. MACINTYRE, ARE THERE ANY NATURAL RIGHTS? 12 (1983)).

<sup>29</sup> Writing about “natural rights,” Justine Lacroix and Jean-Yves Pranchère say that it is impossible to talk about such rights “except if one refers to the commandments of some natural law issued by a divine sovereign. . . . [And for de Maistre] there could be no such thing as eternal rights and duties without an explicit reference to a Legislator God.” LACROIX & PRANCHÈRE, *supra* note 4, at 96 (citations omitted).

<sup>30</sup> See Jan Narveson, *Human Rights: Which, if Any, Are There?*, in HUMAN RIGHTS 175, 177 (J. Roland Pennock & John W. Chapman eds., 1981) (“If it is insisted that laws underlie rights, then they will have to be unwritten and unlegislated laws at bottom.”).

<sup>31</sup> Alan Gewirth, *The Basis and Content of Human Rights*, in HUMAN RIGHTS, *supra* note 30, at 119, 124; see also Hart, *supra* note 21, at 177 (“[A] right belongs to that branch of morality which is specifically concerned to determine when one person’s freedom may be limited by another’s . . .”).

<sup>32</sup> See Joseph Raz, *Human Rights Without Foundations*, in THE PHILOSOPHY OF INTERNATIONAL LAW 321, 324 (Samantha Besson & John Tasioulas eds., 2010).

<sup>33</sup> This approach has some things in common with the “pluralistic grounding of human rights” defended by John Tasioulas. See Tasioulas, *supra* note 13, at 663. Whereas Tasioulas still wishes to identify “universal” human rights by reasoning from multiple kinds of human interests, the view in text assumes that the fields of application of various human rights will be limited as a result of their differing sources of legitimacy. See *id.*



this right is believed to have achieved its status and then to apply the appropriate criteria dictated by the rule-system that specifies its force in the relevant circumstances. In this Part, I will briefly review some of the normative regimes from which human rights may develop. But first, I will discuss how this way of understanding human rights applies to one of the major divides in the philosophical literature.

*A. Moral or Political Rights?*

At first glance, the distinction between “moral” and “political” conceptions of human rights that consumes much of the current academic writing on human rights may not appear to track the differences in the relevant normative systems just discussed. The “moral view” sees human rights as attributes of a universal morality prescribing proper and improper human conduct. It, therefore, complements the standard characteristic of these rights as those that belong to every person simply because of each person’s standing as a human being.<sup>34</sup> Naturally, there are a number of such moralities and the sets of rights attached to them differ accordingly.<sup>35</sup> Recently, attention has focused on the idea of “human agency” advanced by Alan Gewirth and later by James Griffin.<sup>36</sup> This view identifies a primary human value as the capacity to form and direct one’s own life.<sup>37</sup> The corresponding human rights are limited to protecting activities that are essential to such a capacity.<sup>38</sup> In Griffin’s version, these are the activities necessary for the maintenance of personal autonomy and liberty.<sup>39</sup> As logical as such specifications may be, however, they do not match up with the wide and evolving assortment of rights appearing in the various international human rights instruments existing and proposed in the world today. This should not surprise. As Gewirth conceded, his enterprise was “normative,” “refer[ring] to what entitlements legal enactments and social regulations ought to recognize, not or not only to what they in fact recognize.”<sup>40</sup>

It is partly the moral explanation’s deviation from the substance of current human rights discourse that underlies the alternative, “political” conception. On this view, it only makes sense to speak of human rights in connection with

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<sup>34</sup> See, e.g., Erasmus Mayr, *The Political and Moral Conceptions of Human Rights—A Mixed Account*, in *THE PHILOSOPHY OF HUMAN RIGHTS: CONTEMPORARY CONTROVERSIES*, *supra* note 7, at 73, 73.

<sup>35</sup> See ALLEN BUCHANAN, *THE HEART OF HUMAN RIGHTS* 252 (2013) (describing “ethical pluralism”).

<sup>36</sup> ALAN GEWIRTH, *HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATIONS* 15–16 (1982); JAMES GRIFFIN, *ON HUMAN RIGHTS* 32–33 (2008).

<sup>37</sup> GRIFFIN, *supra* note 36, at 32–33.

<sup>38</sup> *Id.* at 33–34.

<sup>39</sup> *Id.*

<sup>40</sup> Gewirth, *supra* note 31, at 120.

existing human rights practice. This “practice,” according to Joseph Raz, consists of “ratifying conventions, enacting legislation, and adopting other measures in the name of human rights; litigating, implementing, applying, and so on, those so-called human rights measures; advocating observance and incorporation into law of other so-called human rights, and more.”<sup>41</sup> These political human rights do not derive (or do not derive exclusively) from philosophical speculation on what it means to be human. They are rather observed in the actual expressions of political actors regarding “particular historic circumstances.”<sup>42</sup> This “practical conception takes the doctrine and practice of human rights as we find them in international political life” and makes “no assumption of a prior or independent layer of fundamental rights whose nature and content can be discovered independently” of the actual practice.<sup>43</sup>

Adopting John Rawls’s suggestion in his *The Law of Peoples* about how human rights arguments were actually used, some writers have focused attention on the fact that participants in human rights practice apply the terminology to justify interference by international political actors in the internal affairs of another country.<sup>44</sup> Human rights violations, that is, constitute an exception to what had been a cardinal principle of international law: “[T]hat a state’s treatment of its own nationals is a matter exclusively within the domestic jurisdiction of that state, i.e. is not controlled or regulated by international law.”<sup>45</sup> The emergence of this exception after the atrocities of the mid-twentieth century, represented a profound change in the political assumptions about the ethical obligations of states.<sup>46</sup>

In contrast to this “political” understanding, the “moral” view of human rights is *pre*-political in the sense that it depends solely on assumptions about the nature of human beings, whereas the “political” approach arises only as an inference from statements and actions of political actors. Raz says that

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<sup>41</sup> Joseph Raz, *On Waldron’s Critique of Raz on Human Rights*, in HUMAN RIGHTS: MORAL OR POLITICAL? 139, 140 (Adam Etinson ed., 2018).

<sup>42</sup> *Id.* at 141.

<sup>43</sup> CHARLES R. BEITZ, *THE IDEA OF HUMAN RIGHTS* 102 (2009).

<sup>44</sup> JOHN RAWLS, *THE LAW OF PEOPLES* 79–80 (1999).

<sup>45</sup> J. L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 291 (Sir Humphrey Waldock ed., 6th ed. 1963).

<sup>46</sup> Louis Henkin, *International Human Rights as “Rights,”* in HUMAN RIGHTS, *supra* note 30, at 257, 257–58; M.W. Janis, *Individuals as Subjects of International Law*, 17 CORNELL INT’L L.J. 61, 65–66, 73–74 (1984). This development may be an aspect of what Richard Rorty called “sentimental education[.] . . . expand[ing] the reference of the terms ‘our kind of people’ and ‘people like us.’” 3 RICHARD RORTY, *TRUTH AND PROGRESS: PHILOSOPHICAL PAPERS* 176 (1998).

“[d]isabling the defence ‘none of your business’ is definitive of the political conception of human rights,” which “need not be universal or foundational.”<sup>47</sup> Or, in Charles Beitz’s pithy remark, “[i]t is not part of international doctrine—that human rights are ‘out there,’ existing in some separate normative order.”<sup>48</sup> Insofar as this understanding defines “a *human* right simply in virtue of the type of external response that is appropriate when it is violated,”<sup>49</sup> it is unclear how it can be usefully compared with the competing moral designation. The two criteria appear to examine possible rights for the presence of incommensurable characteristics. Indeed, Raz effectively accepted that this may be a case of apples and oranges when he clarified his position by acknowledging that there may indeed be a sense in which certain rights are “held by all human beings in virtue of their humanity,” but that even such “true human rights theories should not be the standards by which to judge human rights practice.”<sup>50</sup>

It is also possible, however, to see this controversy as one involving a comparison of two implicit normative systems. Exponents of moral rights necessarily refer to some independent canons of behavior. As will be further discussed below, this view is in many ways the descendant of the natural law philosophy of the seventeenth and eighteenth centuries.<sup>51</sup> A background “system of morality” grounds these claims, just as a legal system grounds claims of legal rights.<sup>52</sup> Referring to Bentham’s argument that “rights to do some action . . . arise from the absence of legal obligation not to do it,” H.L.A. Hart saw no reason that it “should not be applied *mutatis mutandis* to conventional morality.”<sup>53</sup> So, John Locke thought natural law was “that Law which God has set to the actions of men.”<sup>54</sup> But reliance on rights that are inferred from the modern political “practice” of human rights also involves the application of a collection of rules. In this case, the rules are not—or not as obviously—deduced from some set of axiomatic principles. They are rather inferred from the actual statements and behaviors of the participants in the practice. It is true that this practice may consist of “a plurality of diverse political arrangements based on a

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<sup>47</sup> Raz, *supra* note 32, at 332.

<sup>48</sup> BEITZ, *supra* note 43, at 54.

<sup>49</sup> Jeremy Waldron, *Human Rights: A Critique of the Raz/Rawls Approach*, in HUMAN RIGHTS: MORAL OR POLITICAL?, *supra* note 41, at 117, 136 (criticizing this approach).

<sup>50</sup> Raz, *supra* note 41, at 141.

<sup>51</sup> See *infra* Part II.B.1.

<sup>52</sup> See J. Roland Pennock, *Rights, Natural Rights, and Human Rights—A General View*, in HUMAN RIGHTS, *supra* note 30, at 1, 6.

<sup>53</sup> HART, *supra* note 26, at 84–85.

<sup>54</sup> Hannah Dawson, *The Normativity of Nature in Pufendorf and Locke*, 63 HIST. J. 528, 539 (2020) (quoting JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 71, 352 (Peter H. Nidditch ed., 1975)).

range of ill-defined values.”<sup>55</sup> Still, Beitz assumes that even though its contents are many and varied, it is possible to observe a catalog of actions and statements and to distill from them a “global normative order.”<sup>56</sup> This order consists of the “publicly available, critical practical standards to which agents can appeal in justifying and criticizing actions and policies proposed or carried out (or not) by governments.”<sup>57</sup> As was the case with “moral” rights, the processes of identification and expression of the norms derived from political practice will be inexact and contestable.<sup>58</sup> But people familiar with the development of common law are unlikely to find this difficulty insurmountable for either kind of human right. It is possible, therefore, to regard the ongoing debate between proponents of the “moral” and “political” conceptions of human rights as posing a choice between two different normative systems.

## B. Sources of Human Rights

It may be useful to review many, though certainly not all, of the more obvious normative systems that underlie contemporary human rights rhetoric. It should also be clear, as Duncan Ivison has observed, that “[p]ublic reasoning about rights, whether in domestic or global contexts, requires acceptance of what Rawls called the ‘fact of reasonable pluralism’ regarding the ultimate grounds of their justification.”<sup>59</sup>

### I. Natural Law

There is some disagreement about how directly our modern human rights discourse follows from the historic philosophy of natural law. Those affirming such a derivation see it as an easy inference from the fact that both traditions purport to identify norms of behavior that transcend political and temporal boundaries. John Finnis, one of natural law’s most prominent modern proponents, citing “Gaius in the second century A.D.” and Thomas Aquinas, among others, found modern human rights to “track[] the conceptual map of what an earlier way of speaking called *natural right(s)*.”<sup>60</sup>

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<sup>55</sup> Tom Campbell, *Human Rights Morality and Human Rights Practice: An Interactive Approach*, in POLITICAL AND LEGAL APPROACHES TO HUMAN RIGHTS, *supra* note 12, at 3, 6.

<sup>56</sup> BEITZ, *supra* note 43, at 209.

<sup>57</sup> *Id.* at 210.

<sup>58</sup> In the case of human rights premised on moral grounds, the existence of multiple systems of morality and the difficulty of specifying determinate rules from such systems makes the process inherently controversial. See, e.g., Gewirth, *supra* note 31, at 120.

<sup>59</sup> Duncan Ivison, *Traces of Recognition: Rights and Political Realism*, in POLITICAL AND LEGAL APPROACHES TO HUMAN RIGHTS, *supra* note 12, at 28, 36.

<sup>60</sup> 3 JOHN FINNIS, HUMAN RIGHTS AND COMMON GOOD: COLLECTED ESSAYS (2011); MICHAEL J. PERRY,

There is more than one kind of natural law. Advocates originally understood it as a derivative of divine law. Not surprisingly, religious conviction has been and continues to be in the conversation whenever the basis of human rights or any of its predecessors is at issue.<sup>61</sup> Michael Perry has argued that belief in the binding character of such rights crucially depends on a person's sense of obligation toward every other person, and that such a sense can only develop with sufficient intensity from recognition that "the Other, too, is, in the deepest possible sense—i.e., as a child of God—your sister/brother."<sup>62</sup> Other constructions of natural law incorporate a cruder but more straightforward place for God's commandments. In the Declaration of Independence, the American founders were explicit that individuals had been "endowed by their Creator with certain unalienable Rights."<sup>63</sup> Indeed, according to Joseph de Maistre, the only way human beings could be vested with rights that trump the edicts of the human state was if the rights were based on the existence of rules promulgated by the "Legislator God."<sup>64</sup>

There were two ways in which the laws of God were accessible to mortals. One was direct revelation,<sup>65</sup> but they could also be deduced by observing God's preferences in the structure of the world that He created and then applying "God-given 'right reason.'"<sup>66</sup> The seventeenth century jurist Samuel von Pufendorf also explicitly linked nature's laws with God's commandments to men.<sup>67</sup> The mere natural inclinations of human beings could not, by themselves, rise to the status of law since all law "supposes a Superior Power."<sup>68</sup> Therefore, "the Obligation of Natural Law proceeds from GOD himself, the Great Creator and Supreme Governour of Mankind."<sup>69</sup> In this way, by imbuing human beings with the capacity to observe and understand the workings of nature, God could make

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THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES 3 (1998) [hereinafter PERRY, FOUR INQUIRIES] (stating human rights are arguably "a modern version of the natural law theory, whose origins we can trace back, at least to the Stoic philosophers . . ." (quoting LESZEK KOLAKOWSKI, MODERNITY ON ENDLESS TRIAL 214 (1990)). Further evidence of the connection—at least as far back as the Enlightenment version of natural rights thinking in the late-eighteenth century—is found in the fact that, although modern English speakers now speak of "human rights" rather than "natural rights," both phenomena in French bore, and continue to bear, the identical name "droits de l'homme." See SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 24–26 (2010).

<sup>61</sup> See Dawson, *supra* note 54, at 537–39 (discussing this relationship in early modern western thinkers).

<sup>62</sup> PERRY, FOUR INQUIRIES, *supra* note 60, at 19.

<sup>63</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>64</sup> LACROIX & PRANCHÈRE, *supra* note 4, at 96 (citations omitted).

<sup>65</sup> HENKIN, *supra* note 2, at 5.

<sup>66</sup> *Id.*

<sup>67</sup> SAMUEL VON PUFENDORF, OF THE LAW OF NATURE AND NATIONS 112–14 (trans. Basil Kennet, Oxford 1703).

<sup>68</sup> *Id.* at 112.

<sup>69</sup> *Id.* at 113.

His commands known in ways additional to his “Reveal’d Word.”<sup>70</sup> The main point is that even though each of the various iterations of divinely created natural law and each of the particular rules inferred from such law was contestable, it was still a binding code of conduct. John Austin, the great philosopher of positive law, was quick to acknowledge the existence and paramount force of divine law, and he identified such law—the “law[] set by God to his human creatures”—with “‘the law of nature;’ ‘natural law;’ ‘the law manifested to man by the light of nature or reason;’ ‘the laws, precepts, or dictates of natural religion.’”<sup>71</sup>

Once it was deemed possible to apprehend universal law by the application of human reason to the facts of the natural world, it did not take long for some thinkers to dispense with the legislative role of the deity. Secular versions—“natural law theories without God”<sup>72</sup>—have been with us ever since. For reasons already explained, such rights “hav[e] [a] place only in a system of morality.”<sup>73</sup> Now, we have to locate “the notion of human rights within the best overall understanding of ethics, showing that it earns its place there.”<sup>74</sup> The rules underlying these rights cannot bind with the kind of external force associated with either divine or legal injunctions.<sup>75</sup> But the personal commitment of the individuals who accept a given system of morality can still give rise to a sense of obligation that may be comparably effective. Enlightenment thinkers were able to reason their way to a code of morality regulating the way human beings should behave *inter se*, and from which followed the essential requirements and limits of any social organization.<sup>76</sup> Such a morality may be constructed upon what its exponents take to be basic and obvious ingredients of human well-being. This is the idea that, as Perry puts it, “all (or virtually all) human beings share some significant characteristics, [and] in that sense they share a ‘nature’, in virtue of which some things are good for every human being.”<sup>77</sup> Various

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<sup>70</sup> *Id.* at 114. For a valuable examination of natural law thinking in this period focusing on Pufendorf and Locke, see generally Dawson, *supra* note 54.

<sup>71</sup> AUSTIN, *supra* note 23, at 34. Austin was willing to include this divine law in the category of positive law insofar as it issued from “a *certain* source.” *Id.* at 134.

<sup>72</sup> Allan, *supra* note 25, at 116.

<sup>73</sup> Pennock, *supra* note 52, at 6.

<sup>74</sup> Tasioulas, *supra* note 13, at 648.

<sup>75</sup> *Cf.* PERRY, GLOBAL POLITICAL MORALITY, *supra* note 3, at 21 (discussing the elements of force underlying social and moral rights).

<sup>76</sup> HENKIN, *supra* note 2, at 9. In this, I disagree with John Tasioulas’s suggestion that “when the theological interpretation [of natural law] was abandoned, ‘nothing was put in its place.’” Tasioulas, *supra* note 13, at 647–48 (quoting GRIFFIN, *supra* note 36, at 2).

<sup>77</sup> PERRY, FOUR INQUIRIES, *supra* note 60, at 68; *see also id.* (“According to this position, the fundamental subject matter of morality is human well-being; according to the natural-law conception of the subject matter of moral knowledge, moral knowledge is knowledge of or about the constituents and conditions of human

versions of this basic assumption underlie several of the best known “moral” defenses of human rights, including those put forward by John Finnis, Alan Gewirth, and James Griffin.<sup>78</sup>

This definition of human rights suggests an interesting and important approach to the subject recently raised by Perry in *A Global Political Morality*. If we believe that our morality is a way of identifying those goods and behaviors that are essential to the “flourishing” of human beings as a species, it may make sense to consult the observations of evolutionary biologists who study those traits that improve the “fitness” of organisms. Perry cites the research of the primatologist and ethologist, Frans de Waal, who has studied the persistent role of altruistic behavior in species “from elephants to wolves and people.”<sup>79</sup> We may infer from this research that performing acts of kindness—motivated first perhaps by calculation but eventually by natural inclination—promotes individual well-being and therefore results in enhanced survival insofar as it anticipates reciprocal and co-operative conduct from one’s fellows. Evolutionary theorists have sketched out various mechanisms through which this kind of a predisposition could develop.<sup>80</sup> Consequently, in some versions of this development, regard for others ends up being an adaptation that promotes the fitness of the species.

This picture mirrors the relationship between human choices and the natural world that Hannah Dawson detected in her study of seventeenth-century thinkers, working well before the emergence of a science of evolutionary biology. She refers, for example, to Hugo Grotius, who claimed the following:

Like other animals—and here the self-sacrificial character of natural sociability comes into view—men ‘forget’ ‘their own interest, in favour of their young ones, or those of their own kind.’ Even children

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flourishing or well-being.”); Campbell, *supra* note 55, at 5 (“Descriptive naturalists seek to provide a basis for human rights in a secularized version of the sort of natural law theory which seeks to identify a number of authentic human characteristics, capacities or needs derived from our knowledge and understanding of human nature and human circumstances.”); FINNIS, *supra* note 60, at 4 (“Human persons share a nature that is known by knowing the many and deeply varied objects that make sense of human acts . . .”).

<sup>78</sup> See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (2d ed. 2011); GEWIRTH, *supra* note 36; GRIFFIN, *supra* note 36.

<sup>79</sup> PERRY, *GLOBAL POLITICAL MORALITY*, *supra* note 3, at 37 n.30 (quoting FRANS DE WAAL, *PRIMATES AND PHILOSOPHERS: HOW MORALITY EVOLVED* 15 (2006)).

<sup>80</sup> Alternative explanations for the evolution of a preference for fellow feeling are helpfully surveyed in Stuart A. West, Ashleigh S. Griffin & Andy Gardner, *Evolutionary Explanations for Cooperation*, 17 *CURRENT BIOLOGY* R661, R661 (2007). Martin Nowak has worked out the conditions for the various ways that cooperative behavior might successfully evolve. Martin A. Nowak, *Five Rules for the Evolution of Cooperation*, 314 *SCIENCE* 1560, 1560–61 (2006).

. . . completely unschooled in right and wrong, nevertheless have ‘a propensity to do good to others.’<sup>81</sup>

This view is especially congenial to Perry’s argument that the morality of human rights depends on “the conviction that the Other is, finally, one’s own sister/brother—and should receive, therefore, the gift of one’s loving concern.”<sup>82</sup>

It is necessary, however, to balance this attractive picture of the direction of human evolution with a different version. It is widely agreed that a tendency towards cooperation may lead to improved fitness *within a genetically connected family or community*.<sup>83</sup> It is not so clear that this inclination must extend to all the members of a very large population.<sup>84</sup> Some theorists contend that the disposition to mutual assistance may go so far as to extend to an entire ethnic group.<sup>85</sup> But mostly such explanations presume that evolved attitudes of solidarity are limited to some genetically related or geographically fixed group<sup>86</sup> and not to the entire species, as would need to be the case if we were to regard it as a foundation of human rights. In fact, one of the major purposes of tribal social cohesion is exactly its use in the competition with other families, an enterprise for which the development of indifference or even hostility to unrelated groups may well be a useful adaptation.<sup>87</sup> To the extent that the result of evolution is an attitude of what one study called “parochial altruism,”<sup>88</sup> it is unlikely to provide a firm basis for wide acceptance of human rights. Recognition of these facts was evident in the argument of Richard Rorty (no evolutionary theorist) that the propagation of belief in universal human rights depends on “sentimental education” to overcome most people’s conviction that “they live in a world in which it would be just too risky—indeed, would often

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<sup>81</sup> Dawson, *supra* note 54, at 553–54. Dawson also quotes St. Augustine’s *City of God* to the effect that “[a] human being’ is ‘drawn by the laws of his nature’ beyond his nearest and dearest ‘to enter upon a fellowship with all his fellow-men and to keep peace with them.’” *Id.* at 553.

<sup>82</sup> PERRY, FOUR INQUIRIES, *supra* note 60, at 21. Perry has also cited similar research by political psychologist Kristin Renwick Monroe. PERRY, GLOBAL POLITICAL MORALITY, *supra* note 3, at 39.

<sup>83</sup> On “kin selection,” see RICHARD DAWKINS, THE SELFISH GENE 89–94 (1989).

<sup>84</sup> W.D. Hamilton, the progenitor of much of modern kin selection theory, thought that even attenuated genetic relations could have an effect in larger communities. W.D. Hamilton, *Innate Social Aptitudes of Man: An Approach from Evolutionary Genetics*, in BIOSOCIAL ANTHROPOLOGY 133, 142–43 (Robin Fox ed., 1975).

<sup>85</sup> See Gustav Jahoda, *On the Origins of Antagonism Towards “The Others,”* 127 ZEITSCHRIFT FÜR ETHNOLOGIE 1, 9 (2002) (discussing the views of the late sociobiologist scholar, Pierre Van den Berghe).

<sup>86</sup> In fact, one of the major problems investigated by students of animal behavior is just how individuals can recognize those group members upon whom it is advantageous to confer benefits. See West et al., *supra* note 80, at 661.

<sup>87</sup> Thus, Richard Dawkins noted that “[b]lood-feuds and inter-clan warfare are easily interpretable in terms of [W.D.] Hamilton’s genetic theory.” DAWKINS, *supra* note 83, at 99.

<sup>88</sup> Jung-Kyoo Choi & Samuel Bowles, *The Coevolution of Parochial Altruism and War*, 318 SCIENCE 636, 636 (2007).



be insanely dangerous—to let one’s sense of moral community stretch beyond one’s family, clan, or tribe.”<sup>89</sup>

## 2. *Positive Law*

The various forms of natural law surveyed above each provide plausible bases upon which entitlements to human rights may be constructed. As may be obvious, there are two difficulties: first, the intensely controversial nature of the reasons supporting the authority of these normative systems; and second, the obscurity of the correct method for extracting particular rules—and particular rights—from each of them. One response to this problem is to enact human rights, or adequate surrogates for some human rights, into positive law. But the variety of positive law systems means that, perhaps even more than in the case of natural law, there will be numerous and different legal orders underlying human rights. I will touch briefly on several of these systems in this section.

Human rights can be protected in many categories of domestic law, in, as Michael Addo has pointed out: “public law, private law, civil law, common law, family law, [and] commercial law.”<sup>90</sup> But the most obvious home for human rights in municipal law is constitutional law. For the American founding generation, who believed that the very purpose of the state was to protect natural rights, constitutions were the perfect place to entrench those rights in legally enforceable form.<sup>91</sup> (In France, on the other hand, the adoption of the Declaration of the Rights of Man and Citizen was not intended to subject the legislative power to human rights, or in any event to judicial enforcement of those rights. This was evidenced by the Law of 16-24 August 1790 explicitly barring any official from “obstructing or suspending” legislative acts, a prohibition enacted in the early French republican constitutions and largely observed by the judiciary until the reforms of the Fifth Republic.<sup>92</sup>) Modern constitutions invariably include some set of fundamental rights, and, increasingly, they establish a procedure for challenging public acts claimed to

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<sup>89</sup> Rorty, *supra* note 46, at 176, 178.

<sup>90</sup> ADDO, *supra* note 7, at 46.

<sup>91</sup> By “the 1770’s, the state-of-nature or modern natural rights analysis appears to have been the dominant theoretical justification for [American] revolution and written constitutions.” Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 939 (1993); *see id.* at 937–44 (discussing the ways in which American constitutional law was meant to reflect natural law).

<sup>92</sup> James Beardsley, *Constitutional Review in France*, 1975 SUP. CT. REV. 189, 192 (1975). For a thorough account of the strict French approach to judicial enforcement of rights against the legislature, *see generally id.* For an incisive comparison of the basic constitutional philosophies of the American and French revolutionary statesmen, *see generally* IOANNA TOURKOCHORITI, FREEDOM OF EXPRESSION: THE REVOLUTIONARY ROOTS OF AMERICAN AND FRENCH LEGAL THOUGHT (2022).

infringe upon those rights. Michael Perry has powerfully argued that there is a necessary relationship between judicially enforceable constitutions and human rights, noting that a society embracing constitutionalism “should both entrench in its fundamental law the human rights to which it is (or professes to be) committed and authorize its courts to protect the rights by enforcing them.”<sup>93</sup>

These days, however, when we talk about the “law” of human rights, we usually refer to international law. Like natural law and domestic law, however, international law is not just one thing. It consists of multiple normative orders, many of which declare an intention to protect what they call “human rights.” The special role of international law in this mission may seem obvious insofar as it relies on the idea that its norms apply to every human being, thus transcending political boundaries. Using international law as the vehicle for protecting human rights is also particularly congenial to the “political” conception of human rights discussed earlier in which the rights provide a standard for justifying interference by outside actors into the internal affairs of another state.<sup>94</sup> As already noted, the twentieth-century embrace of human rights rules by drafters and practitioners of international law marked a qualitative break with what had been one of its central axioms, namely the idea that it protected and regulated only states—not individuals.<sup>95</sup> So, in 1945, with the atrocities of the fascist governments still vivid in the minds of the leaders of the victorious states, the U.N. Charter made several references to “human rights.”<sup>96</sup> At its very beginning, the Preamble stated the parties’ determination to “reaffirm faith in fundamental human rights,” and Article 1 included encouragement of “respect for human rights and for fundamental freedoms for all” as one of the purposes of the organization.<sup>97</sup> This recognition, as Louis Henkin put it, “ushered in [a] new international law of human rights.”<sup>98</sup>

Commentators agree that a critical development in this transformation was the United Nations’ adoption of the Universal Declaration of Human Rights in 1948.<sup>99</sup> Perry calls the Declaration “the foundational human rights document of

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<sup>93</sup> PERRY, GLOBAL POLITICAL MORALITY, *supra* note 3, at 89.

<sup>94</sup> See LACROIX & PRANCHÈRE, *supra* note 4, at 16–18 (contrasting the domestic role of “rights of man” with the supranational use of “human rights”).

<sup>95</sup> See *supra* notes 43–45 and accompanying text.

<sup>96</sup> U.N. Charter pmb., art. 1; see also U.N. Charter arts. 13, 55, 62, 68, 76 (making further references to human rights).

<sup>97</sup> U.N. Charter pmb., art. 1; see also U.N. Charter arts. 13, 55, 62, 68, 76 (making further references to human rights).

<sup>98</sup> HENKIN, *supra* note 2, at 94.

<sup>99</sup> PERRY, GLOBAL POLITICAL MORALITY, *supra* note 3, at 4.

our time.”<sup>100</sup> However, it is useful to remember that while the U.N. Charter is a treaty that binds its member states in international law, the Declaration was adopted on the explicit understanding that it was “a common standard of achievement” but had no force in international law.<sup>101</sup> As Perry notes, “[I]t is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation.”<sup>102</sup> The drafters of the Declaration did, however, expect that the rights declared in that instrument should and would later be codified in separate binding treaties. That process took eighteen years and was largely completed in 1966 with agreement on two “Covenants”: one on “Civil and Political Rights” and a second on “Economic, Social and Cultural Rights.”<sup>103</sup> These were almost universally agreed to and ratified.<sup>104</sup> As is the case with most international law, however, these global human rights treaties have only the most rudimentary machinery to deal with states that fail to observe the Covenants’ standards.<sup>105</sup>

In addition to these U.N. treaties, however, there are several regional conventions focusing on human rights, most notably the European Convention for the Protection of Human Rights and the Inter-American Convention on Human Rights.<sup>106</sup> These treaties (especially the former) are notable for the formidable systems they have developed to adjudicate claims of violations and allowing (again, far more practically in the European system) individuals to initiate proceedings when they feel they have been victims of such violations.<sup>107</sup>

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.* (quoting 5 DIGEST OF INTERNATIONAL LAW 243 (Marjorie M. Whiteman ed., 1965)).

<sup>102</sup> *Id.* at 19 (quoting 5 DIGEST OF INTERNATIONAL LAW, *supra* note 101).

<sup>103</sup> United Nations International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; United Nations International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3. There are various other human rights treaties that were agreed to both before and after the adoption of these two covenants. These focus on more specific issues such as racial discrimination, women’s rights, and the rights of refugees. See the full list in MARK WESTON JANIS, INTERNATIONAL LAW 276 & n.75 (7th ed. 2016).

<sup>104</sup> For a list of state signatories, see generally *Status of Treaties: International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en) (last visited Apr. 30, 2022) (listing the signatories of the International Covenant on Civil and Political Rights); *Status of Treaties: International Covenant on Economic, Social, and Cultural Rights*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en) (last visited Apr. 30, 2022) (listing the signatories of the Covenant on Economic, Social, and Cultural Rights). As indicated in the second table cited, the Covenant on Economic, Social and Cultural Rights has not been ratified by the United States. *Id.*

<sup>105</sup> See Thomas Buergenthal, *International Human Rights: Need for Further Institutional Development*, 50 CASE W. RESV. J. INT’L L. 9, 10–12, 15–16 (2018) (describing and criticizing these procedures).

<sup>106</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; American Convention on Human Rights: “Pact of San José, Costa Rica,” Nov. 22, 1969, 1144 U.N.T.S. 123.

<sup>107</sup> For a helpful review of the two systems, see JANIS, *supra* note 103, at 277–97.

The member states of the European Union, all of whom are also parties to the European Convention on Human Rights, are further subject to that organization's Charter of Fundamental Rights of 2000.<sup>108</sup> The Charter contains a similar but somewhat more extensive list of rights. It is applicable to the institutions of the Union and also, under certain circumstances, to the acts of its members.<sup>109</sup> The interpretation of the Charter, like that of all European Union law, is committed to the European Court of Justice.<sup>110</sup> Insofar as some states will be subject to both the Charter and the Convention, issues can arise in connection with the coexistence of these regimes.<sup>111</sup>

In addition to these multiple and overlapping treaties, human rights claimants may seek protection in *customary* international law. This law consists of rules inferred from a uniform practice that states follow with “a sense of . . . obligation.”<sup>112</sup> The process of identifying such rules based on the behavior of states is obviously highly imprecise. As Mark Janis notes, “The determination of customary international law is more an art than a science.”<sup>113</sup> The factors that are taken into consideration are, as Janis observes, “exceedingly various.”<sup>114</sup> In many ways, arguments based on such law resemble the assertions rooted in the several versions of natural law discussed above. Indeed, the precursor of international law, the “law of nations,” was for a long time indistinguishable from natural law.<sup>115</sup> The difficulty of identifying these rules is multiplied by the further assumption that their legal quality may be demonstrated by consulting the opinions of academic commentators, the resolutions of international bodies, and statements of best practices recommended by international organizations.<sup>116</sup>

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<sup>108</sup> Charter of Fundamental Rights of the European Union, Oct. 2, 2000, 364 O.J.E.C. 1.

<sup>109</sup> *Id.* at 9.

<sup>110</sup> Treaty on the Functioning of the European Union art. 267, Mar. 25, 1957, 326 O.J.E.U. 47, 164.

<sup>111</sup> For a recent discussion of a possible conflict between the European Court of Justice and the European Court of Human Rights with respect to the application of European Arrest Warrants, see Luc von Danwitz, *In Rights We Trust*, VERFASSUNGSBLOG (Aug. 21, 2019), <https://verfassungsblog.de/in-rights-we-trust/>.

<sup>112</sup> JANIS, *supra* note 103, at 48 (quoting Restatement (Third) of Foreign Relations Law of the United States §102(2) (Am. L. Inst. 1987)).

<sup>113</sup> *Id.* at 46. In addition to this difficulty, a persistent problem for any customary law is figuring out how the fact of widespread and long-time practice infuses that practice with normative force. See Richard S. Kay, *Changing the United Kingdom Constitution: The Blind Sovereign*, in SOVEREIGNTY AND THE LAW: DOMESTIC, EUROPEAN, AND INTERNATIONAL PERSPECTIVES 98, 112, 114–15 (Richard Rawlings et al. eds., 2013) (critically evaluating arguments for such force).

<sup>114</sup> See JANIS, *supra* note 103, at 50.

<sup>115</sup> See *id.* at 62–65.

<sup>116</sup> See *id.* at 48–50, 52–55; Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 839 (1997) (stating customary international law has become “less tied to state practice. International and U.S. courts now rely on General Assembly resolutions, multilateral treaties, and other international pronouncements as evidence of [customary international law] without rigorous examination of whether these pronouncements reflect the actual

The increasingly wide acceptance of the moral and political force of human rights norms, when combined with the broad range of matters that may justify a finding of customary international law, opens the door to claims of human rights violations even in cases where no human rights *treaty* covers the relevant facts.<sup>117</sup> Thus, although the Universal Declaration of Human Rights was, at the time of its promulgation, clearly understood not to be a treaty creating legal obligations, over time, many human rights advocates have concluded that its provisions have acquired the status of customary international law, therefore binding every state.<sup>118</sup>

International law rights, whether created by treaty or identified in customary law, are often legitimated as norms that the duty-bound states have, by their own behavior, explicitly or implicitly acknowledged to be obligatory. A third set of human rights, however—those arising from the existence of “peremptory norms” (*jus cogens*)—can claim no basis in any kind of state consent.<sup>119</sup> These norms bind states automatically, and they may not be avoided even by contrary custom or treaty. How a norm acquires this status is something of a mystery. The authoritative Vienna Convention on the Law of Treaties defines a peremptory norm as one “accepted and recognized by the international community of states as a whole” as “a norm from which no derogation is permitted.”<sup>120</sup> Despite the insistence of some international lawyers to the contrary, this definition seems to describe criteria more or less identical to those established for norms of customary law. The potent effects of peremptory norms have commended them to advocates of international human rights. There have been many candidates for such norms, but few of them have attracted sufficient acceptance to be widely recognized as such. The few exceptions are norms that prohibit such state practices as torture, slavery, and genocide, although such rights are already explicit or implicit in every other normative system from which human rights develop.<sup>121</sup>

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practice of states”).

<sup>117</sup> See *id.* at 818, 841 (listing human rights claims based on customary international law).

<sup>118</sup> See MOYN, *supra* note 60, at 207.

<sup>119</sup> JANIS, *supra* note 103, at 65.

<sup>120</sup> *Id.*

<sup>121</sup> See *id.* at 68–69. Janis also suggests that the principles of state sovereignty might qualify as a peremptory norm, something that would be in tension with the concurrent recognition of peremptory norms establishing human rights.

### 3. *Human Rights and Multiple Normative Systems*

What this superficial survey of the normative systems upon which human rights claims may be founded shows is that our human rights practice and rhetoric incorporate several very different things. Michael Perry's statement at the very beginning of *A Global Political Morality*—explaining that he was writing about “the *political morality* of human rights” and not “the *international law* of human rights”<sup>122</sup>—is a too rare recognition of that fact. As we have seen, we use the same expression, “human rights,” to refer to the artifacts of different normative systems. Each claimed violation of human rights can therefore be understood only against the background of the appropriate system or systems—whether voluntary or compulsory, universal or limited by geographic location or personal status—from which the particular right in question arises. Some writers have, in fact, emphasized a “pluralistic approach to the grounds of human rights”<sup>123</sup> or a “pluralistic justificatory methodology.”<sup>124</sup> Acknowledging the inevitability of this phenomenon, of course, means giving up the idea that human rights have some platonic form, the nature of which we may apprehend by continued reason and argument. Rather, as René Provost and Colleen Sheppard have pointed out, human rights are “situate[d] . . . within multiple or plural legal orders, including both formal and informal legal regimes,” leading to “a fragmented, polycentric regime.”<sup>125</sup> Human rights, that is, do not and cannot escape the unavoidable consequences of the plural legal universes in which individuals find themselves and in which these individuals can exploit the opportunities and cope with the demands of the different rule systems of the multiple communities of which they are members.<sup>126</sup>

The fact that human rights may arise from plural normative systems means that the resulting rights will differ in ways that reflect their different points of origin. Among other differences, rights derived from different systems will have different legitimating etiologies; they will be differently interpreted, with different means of enforcement and different remedies for their infringement. The effectiveness of any asserted human right will be a function of the normative force of the particular normative system from which it originates. So, a human right inferred from a personal (that is, an unofficial) moral system will be

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<sup>122</sup> PERRY, *GLOBAL POLITICAL MORALITY*, *supra* note 3, at 2.

<sup>123</sup> Ivison, *supra* note 59, at 29. Ivison's plurality of grounding, however, refers to multiple and different moral bases for rights claims. *See id.* at 35.

<sup>124</sup> BUCHANAN, *supra* note 35, at 53.

<sup>125</sup> *DIALOGUES ON HUMAN RIGHTS AND LEGAL PLURALISM* 3, 5 (René Provost & Colleen Sheppard eds., 2013).

<sup>126</sup> *See* LEOPOLD POSPISIL, *ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY* 111–12 (1971).

respected by people holding to that system to a degree consistent with the intensity of their commitment. It follows, for example, that a right arising from sincere religious conviction may, in a given population, be more compelling than one worked out from a similar moral code in the same population that has no connection to divine sanction.

On the same reasoning, the legitimacy of rights grounded in positive law will, by itself, be no greater and no less than the legitimacy of other rules arising from the same legal system. Tracing the legitimacy of the relevant legal system as a whole will differ, depending on the character of that system. So, typically, the force of domestic law arises from “some political act that expresses the consent of relevant political actors, or of peoples. National constitutions in the liberal tradition are understood as originating in direct or indirect exercises of popular sovereignty that provide one source of legitimation for the enforcement of the rights they contain.”<sup>127</sup> As noted, international law found in treaties or other agreements has usually been treated as legitimate because it is believed to follow from the assent of the contracting states. A similar rationale may be applied to customary international law, insofar as the uniform behavior of states may also be interpreted as a kind of approval.<sup>128</sup> But the authority of some other aspects of customary international law, especially rules or rights derived mainly from conclusions drawn by judges and jurists, is more problematic. In theory, this customary law is equally binding even if the regulated state’s consent is absent.<sup>129</sup> In any event, as Gerald Neuman has noted, “international treaty regimes and national constitutional orders rest on distinct and incommensurable sources of consensual legitimacy and authority, which can cause interpretations of fundamental rights to diverge or to come into direct conflict.”<sup>130</sup> Among the possible consequences of such a conflict are differences in the case law produced in national constitutional courts and that issuing from international human rights courts, all working with superficially identical rights. Each tribunal will have its own canons of interpretation based on its understanding of the nature of the legal system that supplies the basis for the rights and of which, typically, the court is itself a part.

Finally, various normative systems are associated with diverse enforcement mechanisms, the nature and practical operation of which have resulted in distinctly different kinds and degrees of protection. This is a result of both the

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<sup>127</sup> Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1866 (2003).

<sup>128</sup> JANIS, *supra* note 103, at 5.

<sup>129</sup> Neuman, *supra* note 127, at 1874–75.

<sup>130</sup> *Id.* at 1876.

character of the background normative system and the practical machinery, if any, employed to make it effective. Human rights derived from natural or divine law lack such machinery, marking a critical difference with positive law enactments of rights. Similarly, comparing various “bills of rights” in municipal constitutions requires evaluation not merely of the particular rights detailed in the texts but also of the arrangements established to oversee their protection on the ground.<sup>131</sup> The same is true of international law rights. From the beginning of its human rights enterprise, the United Nations has operated some kind of human rights agency—first, a Human Rights Commission and later, a Human Rights Council. But neither of these were charged with “enforcing” the rights in the Universal Declaration and the various Covenants and Conventions created pursuant to it. They have never gone beyond investigating and publicizing violations.<sup>132</sup> These institutions are widely agreed to have been, at best, only moderately effective even in those limited tasks.<sup>133</sup> A central problem has been the politicization of the issues and decisions, something more or less inevitable given the character of the United Nations. In contrast, the judicial apparatus of the European Convention on Human Rights and the work of the 650 people who staff its Registry<sup>134</sup> have resulted in a system not unlike those in states with established constitutional courts. The European Court of Human Rights has developed a dense jurisprudence, and it has attracted wide respect as an effective institution for interpreting and applying the Convention’s rights.<sup>135</sup> While some of its judgments have faced national resistance, they have, for the most part, been complied with by the respondent states who have paid compensation to victims and have revised offending national laws and institutions.<sup>136</sup> Other regional or specialized institutions relying on different normative systems have their own peculiar strengths and weaknesses.<sup>137</sup>

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<sup>131</sup> For a recent survey, see generally ADAM CHILTON & MILA VERSTEEG, *HOW CONSTITUTIONAL RIGHTS MATTER* (2020).

<sup>132</sup> Douglas Dohono, *Human Rights Enforcement in the Twenty-First Century*, 35 GA. J. INT’L. & COMP. L. 1, 17–18 (2006).

<sup>133</sup> For a balanced recent assessment of the U.N. Human Rights Council, see generally Sarah Joseph & Eleanor Jenkin, *The United Nations Human Rights Council: Is the United States Right to Leave this Club?*, 35 AM. U. INT’L L. REV. 75 (2019).

<sup>134</sup> *Human Rights Building*, EUR. CT. OF HUM. RTS., <https://www.echr.coe.int/Pages/home.aspx?p=court/building&c=> (last visited Apr. 30, 2021).

<sup>135</sup> See Richard S. Kay, *The European Human Rights System as a System of Law*, 6 COLUM. J. EUR. L. 55, 56–57 (2000).

<sup>136</sup> See *id.*; Mark W. Janis, *The Efficacy of Strasbourg Law*, 15 CONN. J. INT’L L. 39, 46 (2000).

<sup>137</sup> See *e.g.*, Alexandra Huneucus & Mikael Rask Madsen, *Between Universalism and Regional Law and Politics: A Comparative History of the American, European, and African Human Rights Systems*, 16 INT’L J. CONST. L. 136, 137 (2018).



This abbreviated description of the differences in human rights regimes situated within different normative systems is sufficient to show how these regimes reflect the distinct characteristics of those systems. Of course, these versions of human rights will also have much in common, displaying a substantial overlap with respect to the activities they protect, require, or forbid. As noted, some commentators go further and suggest that one kind of right is the pure form, distinct from and anterior to any of the historical normative systems discussed here. Such writers assume that these “proto-human rights” exist and “that they are rights, although it is not clear what kind of rights they are and in what universe. Most plausibly they appear to be moral rights in an accepted moral order, or even legal rights under some modern version of natural law.”<sup>138</sup> On this view, legislated human rights are “reflections of nonlegal principles that have normative force independent of their embodiment in law, or even superior to the positive legal system.”<sup>139</sup> In this respect, the legal rights are “*determinations*, that is, specifications and delimitations which when reasonable could nonetheless reasonably have been different, in some or many respects.”<sup>140</sup> Allen Buchanan criticizes this way of understanding positive law human rights. He calls it the “Mirroring View,” according to which “there is only one concept of human rights, namely, the concept of moral human rights . . . and that international human rights documents are attempts to list moral human rights.”<sup>141</sup> In contrast, in Buchanan’s view, legal rights “are what they are” and “need not be embodiments of corresponding moral rights.”<sup>142</sup>

This is not to say that the rights deriving from different normative systems are entirely independent. “We live in a world of multiple, overlapping normative communities”<sup>143</sup> and the norms of these communities “constantly interact and intersect.”<sup>144</sup> In the case of human rights, recognition of a given right as implicit in a widely shared set of moral norms will usually precede its adoption as a constitutional or international law human right. As Addo has written, “The evolution of human rights in the legal sphere . . . [may be] an unplanned and

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<sup>138</sup> Henkin, *supra* note 46, at 263; *see also* BEITZ, *supra* note 43, at 49–50 (“[N]aturalistic conceptions regard human rights as having a character and basis that can be fully comprehended without reference to their embodiment and role in any public doctrine or practice.”).

<sup>139</sup> Neuman, *supra* note 127, at 1868. Michael Addo speaks of a “transubstantiation of moral ideals into law.” ADDO, *supra* note 7, at 154.

<sup>140</sup> FINNIS, *supra* note 60, at 3.

<sup>141</sup> BUCHANAN, *supra* note 35, at 18 (discussing GRIFFIN, *supra* note 35). For a critical discussion of the “mirroring view,” *see id.* at 50–56.

<sup>142</sup> *Id.* at 11 (emphasis omitted).

<sup>143</sup> Paul Schiff Berman, *The New Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 225, 226 (2009).

<sup>144</sup> DIALOGUES ON HUMAN RIGHTS AND LEGAL PLURALISM, *supra* note 125, at 3.

imperceptible transformation of a political concept into the legal domain.”<sup>145</sup> The association of legal rights with previously acknowledged moral rights, moreover, may enhance the regard that the codified right enjoys in the relevant society, and thus it can increase the extent to which that right is observed. The legal right becomes endowed with what Gerald Neuman calls a “suprapositive” character.<sup>146</sup> Prior moral norms may also end up playing a part in the way legal institutions interpret and enforce the legal right.<sup>147</sup> This does not mean that every legal individual right will have a moral counterpart. As Buchanan notes, “[l]egal rights [are] . . . human creations, can serve a number of different purposes and can be justified by appeal to a number of different kinds of moral considerations, of which moral rights are only one.”<sup>148</sup>

Certainly, not every interaction between sets of human rights originating in different normative systems will be harmonious or lead to mutual reinforcement. Inevitably, tensions, if not conflicts, arise in a world crowded with normative systems. Neuman has pointed out the difficulties of simultaneous compliance with the “[t]wo leading systems [that] exist today for protecting the fundamental rights of individuals”: domestic constitutions and international instruments.<sup>149</sup> Neuman writes that “[b]oth systems assert an ultimate authority to evaluate whether governmental practices comply with fundamental rights, and each system sits potentially in judgment over the other.”<sup>150</sup> These complications may be exacerbated by the evolving interpretations of given rights developed by international agencies and tribunals and municipal constitutional courts. This “may leave a state bound by an obligation to which it did not intentionally consent, or indeed could not constitutionally consent.”<sup>151</sup>

National constitutions and international legal obligations thus create the possibility of conflicting positive law systems. The same kind of problem arises in many other situations. The norms of the family, the church, or the tribe may also contradict those of the state.<sup>152</sup> A much noted example involves the equality

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<sup>145</sup> ADDO, *supra* note 7, at 9.

<sup>146</sup> Neuman, *supra* note 127, at 1868.

<sup>147</sup> *Id.*

<sup>148</sup> BUCHANAN, *supra* note 35, at 11.

<sup>149</sup> Neuman, *supra* note 127, at 1863 (naming “constitutional law and human rights law” as the “[t]wo leading systems”).

<sup>150</sup> *Id.*; see also DIALOGUES ON HUMAN RIGHTS AND LEGAL PLURALISM, *supra* note 125, at 11 (noting the “phenomenon of fragmentation at the international and domestic levels resulting in multiple, overlapping human rights regimes”).

<sup>151</sup> Neuman, *supra* note 127, at 1875.

<sup>152</sup> See Carol Weisbrod, *Women and International Human Rights: Some Issues Under the Bridge*, in OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST DEMOCRACIES 403, 405–10 (Nancy L. Rosenblum ed., 2000) (discussing tensions between religious and secular

rights of women, protected by the widely adopted Convention on the Elimination of All Forms of Discrimination Against Women; the rights protected in this convention may clash with obligatory rules of certain religious communities.<sup>153</sup> In this case and others, conflicts might be resolved by consulting an implicit or explicit hierarchy of normative systems, based on the affected individual's evaluation of the relative authority of each system. So, for many, divine law must prevail over the law of the state, a conclusion we may trace back at least to Antigone's defiance of royal commands in Sophocles's play.<sup>154</sup> The same priority was embraced by Blackstone when he wrote that the laws of nature, "dictated by God himself, [are] of course superior in obligation to any other . . . [and] no human laws are of any validity, if contrary to this"<sup>155</sup>—a dictum that was at that very time being lived out by American revolutionaries insisting that they had been "endowed by their Creator with certain unalienable Rights."<sup>156</sup>

Notwithstanding the theoretical difficulties spawned by multiple and conflicting normative orders, we know by experience that they need not lead to legal, moral, or political gridlock. Most of the time, we find ways to manage any contradictions. To the extent there are institutions administering the various systems, they can, and often do, find ways to accommodate conflicting demands on their subjects or adherents. In making their own decisions, they can take into account the existence of other normative systems. Thus, a number of national constitutions provide for explicit recognition of the customary law of indigenous communities, though subject to various limitations and exceptions.<sup>157</sup> Likewise, states sometimes adopt religious rules to govern marriage and family relations and vest the administration of those rules in religious institutions.<sup>158</sup> Conversely, religious authorities may surrender their idiosyncratic practices to fixed state requirements. A well-known example is the protracted legal and political contest over the Mormon institution of plural marriage in the nineteenth century, concluding with the church's revision of its marriage rules.<sup>159</sup> Several national constitutions, moreover, expressly incorporate international human rights law in

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norms).

<sup>153</sup> Carol Weisbrod, *Universals and Particulars: A Comment on Women's Human Rights and Religious Marriage Contracts*, 9 S. CAL. REV. L & WOMEN'S STUD. 77, 78 (1999).

<sup>154</sup> SOPHOCLES, ANTIGONE II. 503–05 (trans. Roberts Fagles, ca. 441 B.C.E) ("Nor did I think your edict had such force/ that you, a mere mortal, could override the gods,/ the great unwritten, unshakable traditions.").

<sup>155</sup> 1 WILLIAM BLACKSTONE, INTRODUCTION TO THE LAWS OF ENGLAND \*3, \*41.

<sup>156</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>157</sup> For a review of the law in several such jurisdictions, see, e.g. Benjamin Franklen Gussen, *A Comparative Analysis of Constitutional Recognition of Aboriginal Peoples*, 40 MELB. U. L. REV. 867 (2017).

<sup>158</sup> See Weisbrod, *supra* note 152, at 406, 414.

<sup>159</sup> See Carol Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, 26 J. FAM. L. 741, 754–57 (1988).

their legal systems and, in some cases, invest it with the same status as the constitution itself.<sup>160</sup> Less formally, officials may construe individual rights in municipal law to conform to their understanding of international human rights dealing with the same subject matter. The “suprapositive” rights identified by Neuman may “supply an external standard of normative evaluation, which the legal system fully or partially internalizes as a positive fundamental right.”<sup>161</sup> This may give such rights a broader scope than would be the case were they lacking this connection to some independent human rights system. More generally, it is reasonable to hope that the various normative codes—codes that, after all, often develop and coexist in the same society—will influence each other and will, to some extent, converge, thus reducing the occasions for conflict.<sup>162</sup>

### CONCLUSION

In the end, it is necessary to recognize that what we casually call “human rights” are actually aspects of different normative systems and that none of these systems is the “real,” primitive system. Acknowledgment of this fact works a major qualification on the assumption that human rights “are properly attributed on a universal basis to all human beings.”<sup>163</sup> This is not news to anyone familiar with the international legal embodiments of human rights, which consist of different sets of rights created in different places by different people employing different processes, and which are interpreted and enforced by different institutions. Typically, moreover, they are applied with an eye to the different historical and cultural environments of the places where violations are alleged to have occurred by agencies that will show considerable deference to the decisions made by responsible authorities.<sup>164</sup> And, at least in international law, when these practices are judged insufficient to prevent interference with critical

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<sup>160</sup> Neuman, *supra* note 127, at 1890.

<sup>161</sup> *Id.* at 1868 & n.10 (“Positive fundamental rights embodied in a legal system are often conceived as reflections of nonlegal principles that have normative force independent of their embodiment in law, or even superior to the positive legal system (hence the adjective ‘suprapositive’”).

<sup>162</sup> Thus, “the development of legal systems [has] been powerfully influenced by moral opinion, and, conversely, that moral standards [have] been profoundly influenced by law.” H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 598 (1958); *see also* Berman, *supra* note 143, at 233 (noting that “interactions among various tribunals and regulatory authorities are more likely to take on a dialectical quality”).

<sup>163</sup> Waldron, *supra* note 7, at 120.

<sup>164</sup> Philip Alston, *Against a World Court for Human Rights*, 28 ETHICS & INT’L AFFS. 197, 208 (2014). In European Human Rights law, this deference has congealed into the judicially created “margin of appreciation,” itself a doctrine of formidable obscurity. *See* MARK W. JANIS, RICHARD S. KAY & ANTHONY W. BRADLEY, EUROPEAN HUMAN RIGHTS LAW 242–45 (3d ed. 2008).

interests and values in the regulated societies, the states party to human rights treaties have yet another option: to adhere to the treaty but only with specific reservations, further fragmenting the supposed universality of the rights at issue.<sup>165</sup>

None of this is to say that “human rights” talk is incoherent or unproductive. While it is impossible to specify its exact contents, there can be an “overlapping consensus”<sup>166</sup> consisting of widely condemned treatments or practices. Charles Beitz has posited a model of human rights protecting “urgent individual interests”—those “recognizable as important in a wide range of typical lives” but that need not be “possessed . . . or desired by everyone.”<sup>167</sup> What this formula lacks in precision, it may make up in its rough congruence with what most people mean by “human rights” most of the time. But this and any other attempt to sum up the essential character of human rights will fail to capture some rights that have been adopted in one or another international or regional human rights treaty, just as it will include others that may be widely disputed in some circumstances and in some places. As I hope the exposition here has shown, some incongruity is a necessary consequence of the fact that the same term—“human rights”—has been appropriated by different normative orders, created for diverse purposes, and imbued with diverse authority.

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<sup>165</sup> On the effects of reservations in international law, see JANIS, *supra* note 103, at 23–26.

<sup>166</sup> John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987).

<sup>167</sup> BEITZ, *supra* note 43, at 110. Beitz uses a similarly sensible formula when he refers to “the constitutive norms of a global practice whose aim is to protect individuals against threats to their most important interests arising from the acts and omissions of their governments.” *Id.* at 197.