Grasping at Origins: Shifting the Conversation in the Historical Study of Human Rights

Christopher N.J. Roberts

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Abstract

In recent years, scholars from a range of disciplinary orientations have invested considerable time exploring a very basic question: Where did human rights come from? The answers have not been so basic. There exists an extraordinary range of conflicting historical accounts. The hotly debated question of the moment within this field of study centers on figuring out which version of the history is the correct one. However, given the dramatic distance between the historical accounts, it is very unlikely that the matter will be settled in the near future. This Article argues that it is time to shift the focal point of the debate on the origins of human rights. Instead of asking which narrative is correct and which is wrong, knowledge production within this field of study would be better served by asking: Why are there so many divergent founding stories? This question still permits an inquiry into the history and origins of human rights, but it also requires scholars to be much more mindful about how they and others have been constructing their histories. Asking this question also provides a way to begin to explore a sneaking suspicion that many of the debates over the history of human rights are simply another way of putting forth normative arguments about what human rights ought to be. It is therefore not just the history of human rights that we need to scrutinize. It is time to take stock of all the hidden assumptions, veiled methodologies, and normative underpinnings that in recent years have guided the many competing stories of origin in vastly different directions.

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I. Introduction

Origins are important. Scholars, for instance, have long known that understanding the sociocultural roots of a civilization, the genetic lineage of a species, or the source of a disease is crucial for understanding the nature of the particular society, organism, or illness in question. Within the legal context, determining the nature of existing law often entails identifying its antecedents. Precedent in the context of the common law, legislative histories to inform statutory interpretation, and founding narratives in constitutional law are just a few examples of established modes of legal analysis for determining the nature of existing laws. Similarly, in recent years, scholars from a broad range of disciplines have begun to take interest in locating the historical origins of contemporary international human rights.[1]

Stories of origin are not just about the distant past; once established, they have profound effects on the present and the future. The recent flurry of shared interest in tracing the historical roots of human rights comes at a time of great

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[1] *See generally, for example*, Carol Anderson, Eyes off the Prize: The United Nations and the African American Struggle for Human Rights, 1944–55 (2003) (discussing how the Cold War and U.S. participation in the U.N. stymied the ability of African American leaders to advocate for social and economic rights); Elizabeth Borgwardt, A New Deal for the World: America's Vision for Human Rights (2005) (discussing how New Deal values influenced post-World War II international political and legal institutions); Mary L. Dudziak, Cold War Civil Rights: Race and the Image of American Democracy (2000) (discussing the relationship between U.S. civil rights conditions and U.S. foreign relations during the Cold War); Christopher N.J. Roberts, The Contentious History of the International Bill of Human Rights (2015); Human Rights in the Twentieth Century (Stefan-Ludwig Hoffmann ed., 2011); Human Rights at the UN: The Political History of Universal Justice (Roger Normand & Sarah Zaidi eds., 2008); Daniel J. Whelan, Indivisible Human Rights: A History (2010); Louis Henkin, The Age of Rights (1990); Samuel Moyn, The Last Utopia: Human Rights in History (2010); Mark Mazower, *The Strange Triumph of Human Rights, 1933–1950*, 47 Hist. J. 379 (2004); Mark Mazower, No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations (2009); Mary Ann Glendon, A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights (2001); Daniel C. Thomas, The Helsinki Effect: International Norms, Human Rights, and the Demise of Communism (2001); Lynn Hunt, Inventing Human Rights: A History (2007); Paul Gordon Lauren, The Evolution of International Human Rights: Visions Seen (1998); Micheline R. Ishay, The History of Human Rights: From Ancient Times to the Globalization Era (2004); Thomas Buergenthal, *The Normative and Institutional Evolution of International Human Rights*, 19 Hum. Rts. Q. 703 (1997); Kenneth Cmiel, *The Recent History of Human Rights, in* The Human Rights Revolution: An International History 27 (Akira Iriye, Petra Goedde & William I. Hitchcock eds., 2012); Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe,* 54 Int'l Org. 217 (2000); William I. Hitchcock, *The Rise and Fall of Human Rights?: Searching for a Narrative from the Cold War to the 9/11 Era*, 37 Hum. Rts. Q. 80 (2015); Devin O. Pendas, *Toward a New Politics? On the Recent Historiography of Human Rights*, 21 Contemp. Eur. Hist. 95 (2012); Jenny S. Martinez, The Slave Trade and the Origins of International Human Rights Law (2012); Samuel Moyn, *Substance, Scale, and Salience: The Recent Historiography of Human Rights*, 8 Ann. Rev. L. & Soc. Sci. 123 (2012).

uncertainty about how the field of human rights might help to address both new and long-standing global challenges; how to wage a perpetual war against terrorism, whether to absorb or deflect the now-continuous waves of transnational migration, and how to navigate the social consequences of climate change, to name just a few pressing concerns. To address the innumerable problems and contemporary deficits that are associated with human rights today, it is crucial to understand how to build upon existing strengths that the present has inherited from the past. At the same time, it is also necessary to know what structural weaknesses have been built into the modern human rights institutions, ideas, and laws that we rely upon today. The vigorous debates that have emerged about the history of human rights, therefore, are not just about the *history* of human rights. They establish a basic foundation of knowledge and experience for addressing contemporary and future issues.

Recent scholarship on the history of human rights has focused on a very basic question: *Where did today's human rights come from?*[2] The answers, however, are far from clear. There is very little consensus about the origins of human rights, as evidenced by the competing narratives about their emergence. Many scholars—particularly those who view human rights as universal, timeless entities—trace their origins back to antiquity, and even further.[3] Other scholars locate the roots of modern human rights in the age of enlightenment or in the colonial era.[4] Still, a sizable portion of the literature takes a more contemporary understanding of human rights, focusing on the moments immediately following World War II when the International Bill of Human Rights was created.[5] Recent scholarship on the origins of human rights places the starting date much more recently, within the 1970s.[6]

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[2]   *See supra* note 1.

[3]   *See, for example,* ISHAY, *supra* note 1, at 7, 18–61.

[4]   *See, for example*, HUNT*, supra* note 1, at 23–26; MARTINEZ, *supra* note 1.

[5]   *See generally* GLENDON, *supra* note 1; BORGWARDT, *supra* note 1; JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT (1999); Susan Waltz, *Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights*, 23 HUM. RTS. Q. 44 (2001); David P. Forsythe, *The United Nations and Human Rights, 1945–1985*, 100 POL. SCI. Q. 249 (1985); HUMAN RIGHTS IN THE TWENTIETH CENTURY, *supra* note 1; HUMAN RIGHTS AT THE UN: THE POLITICAL HISTORY OF UNIVERSAL JUSTICE, *supra* note 1. The International Bill of Human Rights consists of three interrelated human rights documents: the 1948 Universal Declaration of Human Rights (UDHR), the 1966 International Covenant on Civil and Political Rights (ICCPR), and the 1966 International Covenant on Economic, Social, and Cultural Rights (ICESCR). Universal Declaration of Human Rights, G.A. Res. 217 (III) A (Dec. 10, 1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social, and Cultural Rights, Dec. 16. 1966, 993 U.N.T.S. 3.

[6]   MOYN, *supra* note 1.

With so many competing narratives, a defining feature of this relatively new field of historical inquiry is its substantive *incoherence*. A new question that has emerged, therefore, centers on trying to figure out which historical narrative of the many circulating versions of the past is the "correct" one.[7] Again, the implications of this question extend far beyond the field of history. This is because the timeframe within which human rights came into being has important implications for their legitimacy and uses today. It is much more difficult, for example, to argue that human rights are timeless entities that must be respected universally if the history shows that they are only a few decades old, were created through exclusive political processes, or were designed for the benefit of the elite.

This Article argues that instead of doggedly grasping for the "true" story of when human rights emerged, it is necessary to be much more mindful of how *we* in the *present* construct our stories of the past. Instead of asking which historical narrative is correct and which is wrong, knowledge production within this field of study would be better served by first asking: *Why are there so many vastly divergent stories of origin?*

Addressing this new research question requires shifting intellectual gears. Rather than searching for the origins of human rights within the historical record, it is first necessary to look for *the intellectual sources* of our competing stories of origin. Indeed, the historical study of human rights holds great promise for informing crucial matters of national and global policy. But if the field is to continue to flourish and possess relevance beyond its own internal debates, it is crucial to locate coherence not only in the substance of our historical narratives of origin, but also in the methods and approaches that scholars use to construct them. The purpose of this Article is therefore not to assess the merit of specific studies on the history of human rights. Instead, this Article approaches the topic at a meta-level, paying close attention to crucial methodological, epistemological, and ontological concerns.

The Article proceeds in four sections. Section II explores a host of underappreciated disciplinary issues that present unique challenges for the historical study of human rights. It uses the unlikely, yet illustrative, example of how stories of origin have informed the final determination in two dog bite cases as an entry point into the discussion. Section III of this Article examines a number of the most common—and generally unquestioned—implicit assumptions surrounding the idea of human rights. In doing so, it shows how standard ways of conceiving of human rights actually create significant obstacles for those who study them. Section IV explores the problem of how to study an inherently normative subject and argues for a more empirically grounded approach. Finally, Section V of the Article argues that instead of focusing primarily on the question:

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[7]   Philip Alston, *Does the Past Matter?,* 126 HARV. L. REV. 2043 (2013) (reviewing MARTINEZ, *supra* note 1).

When did human rights emerge? it is more productive to first ask: *When do human rights emerge?* Finally, Section V also sets forth a new analytic framework that is designed to help scholars tackle the most vexing obstacles to date in the historical study of human rights.

II. DISCIPLINARY APPROACHES

Before asking where human rights come from, it is useful to explore where historical stories of origin come from—on an epistemological plane. The most common conceptions of human rights draw from disciplinary orientations such as political science, international relations, philosophy, and law. Researchers have typically examined the historical emergence of human rights through one or more of these distinct disciplinary lenses.[8] Yet, there are substantial challenges associated with pursuing such disciplinary approaches within the historical study of human rights. Section II argues that although taking distinct disciplinary avenues into the study of human rights is necessary and has produced a wealth of valuable knowledge, doing so also has produced a great deal of confusion in the ongoing search for origins.

This Section begins with the seemingly unlikely example of two competing stories from case law regarding the ancestry of the domesticated dog to illustrate a serious point about the sources from which such divergent stories of origins arise, as well as the consequences of such divergence. It proceeds by offering a detailed discussion of the benefits and impairments that are associated with long-standing approaches to human rights. The concerns raised only become more acute when one considers the proliferation of interest in the origins of human rights. For now, joining legal scholars, political scientists, and philosophers in the study of human rights, are anthropologists, sociologists, economists, and historians—to name a few disciplines from a much longer list.[9]

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8   *See* TONY EVANS, US HEGEMONY AND THE PROJECT OF UNIVERSAL HUMAN RIGHTS 3–6 (1996); Susan Waltz, *Reclaiming and Rebuilding the History of the Universal Declaration of Human Rights*, 23 THIRD WORLD Q. 437, 438 (2002); Christopher N.J. Roberts, *The Sociology of Law*, *in* THE HANDBOOK OF SOCIOLOGY AND HUMAN RIGHTS 204, 204–206 (Brian Gran, Keri E. Iyall Smith & David L. Brunsma eds., 2012); ANTHONY WOODIWISS, HUMAN RIGHTS 7 (2005) (underscoring the importance of an approach that "refuses to separate rights from social life").

9   *See generally* Sofia Gruskin et al., *History, Principles, and Practice of Health and Human Rights*, 370 THE LANCET 449 (2007); Stephen P. Marks, *The Evolving Field of Health and Human Rights: Issues and Methods*, 30 J. L. MED. & ETHICS 739 (2002); Rebecca J. Barber, *Protecting the Right to Housing in the Aftermath of Natural Disaster: Standards in International Human Rights Law*, 20 INT'L J. REFUGEE L. 432 (2008); Paul Farmer, *Pathologies of Power: Rethinking Health and Human Rights*, 89 AM. J. PUB. HEALTH 1486 (1999); Peter D. Jacobson & Soheil Soliman, *Co-opting the Health and Human Rights Movement*, 30 J. L., MED. & ETHICS 705 (2002); Margaret R. Somers & Christopher N. J. Roberts, *Toward a New Sociology of Rights: A Genealogy of "Buried Bodies" of Citizenship and Human Rights*, 4 ANN. REV. L. & SOC. SCI. 385 (2008); WOODIWISS, *supra* note 8; Bryan Turner, *Outline of a Theory of Human Rights*, 27 SOC.

A. Good Dog or Bad Dog? Competing Analytics Tell Both Stories

Stories of origin are not created equally. Scholars must choose from a vast array of intellectual tools to produce any historical narrative.[10] Just as an artist's choice to use pens or paintbrushes has a profound effect on the final product, so too does a researcher's analytic approach affect the nature, form, and final character of the ultimate historical rendition. But often the profound effects of making such a choice—or even that there is a choice at all—are less apparent. Because these points are often overlooked in the historical study of human rights, they are best elucidated through a substantively unrelated example.

Consider the following two extremely similar dog bite cases. In both cases, the respective court considers whether the defendant is liable for the plaintiff's injuries. Each judge, before offering his final determination, evaluates the dangerous propensities of dogs as a category of animal. And each judge, seeking to understand better the nature of the domesticated dog, acquires factual guidance by tracing its historical origins. Yet, while both judges depict stories of origin for *canis familiaris*—the domestic dog—each uses a distinct analytic lens to access the disparate historical facts that ultimately produce two wildly divergent accounts.

In the first case, *Carlisle v. Cassasa*,[11] Judge Merrell uses something akin to a phylogenetic approach in which he traces the genetic ancestor of the canine. This approach offers a short and austere account of the historical origins of the dog. Judge Merrell explains that although dogs are now considered house pets, if one traces their ancestral roots, it is quite apparent that they emerged not from a stock

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489 (1993); BRYAN TURNER, VULNERABILITY AND HUMAN RIGHTS (2006); JUDITH R. BLAU & ALBERTO MONCADA, HUMAN RIGHTS: BEYOND THE LIBERAL VISION (2005); Gideon Sjoberg et al., *A Sociology of Human Rights,* 48 SOC. PROBS. 11 (2001); LYDIA MORRIS, RIGHTS: SOCIOLOGICAL PERSPECTIVES (2006); Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOC. 1373 (2005); Mathieu Deflem & Stephen Chicoine, *The Sociological Discourse on Human Rights: Lessons from the Sociology of Law*, 40 DEV. & SOC'Y 101 (2011); SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE (2006); MARK GOODALE, SURRENDERING TO UTOPIA: AN ANTHROPOLOGY OF HUMAN RIGHTS (2009); THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL (Mark Goodale & Susan Engle Merry eds., 2007); HUMAN RIGHTS IN GLOBAL PERSPECTIVE: ANTHROPOLOGICAL STUDIES OF RIGHTS, CLAIMS AND ENTITLEMENTS (Richard Ashby Wilson & Jon. P. Mitchell eds., 2003); Lars Bromley, *Eye in the Sky: Monitoring Human Rights Abuses Using Geospatial Technology*, 10 GEO. J. INT'L AFF. 159 (2009); Willem Doise et al., *Human Rights Studied as Social Representations in a Cross-National Context*, 29 EUR. J. SOC. PSYCHOL. 1 (1999).

10   *See generally, for example*, E.H. CARR, WHAT IS HISTORY? (1961); Marie-Bénédicte Dembour, *What Are Human Rights? Four Schools of Thought*, 32 HUM. RTS. Q. 1 (2010).

11   Carlisle v. Cassasa, 234 A.D. 112, 115 (N.Y. App. Div. 1931).

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of similarly-domesticated animals, but from "wolf ancestors."[12] Based on the evolutionary origins of the species, he continues, dogs have inherited the "wild and untamed characteristics" that are associated with wolves.[13] "It is a matter of such common knowledge that the court can almost take judicial knowledge of the fact," he continues, that animals such as the one who bit the plaintiff are "by nature, vicious."[14] This particular historical depiction establishes the interpretive lens through which the judge views the facts at hand: "the defendants' dog was a vicious and ferocious animal," he explains, that attacked the plaintiff violently "showing its white teeth and . . . blazing eyes."[15] Although Judge Merrell never acknowledges that he is employing any particular intellectual perspective, as the comparison with the second case shows, it nevertheless affects the form and substance of his story.

In the second dog bite case, *Kroger Co. v. Craig*,[16] Judge Stone uses a sociocultural lens to construct a much more felicitous story of origin. He writes: "[T]he canine . . . has a proud heritage rooted in antiquity. To the ancients, the dog was more than a pet in the household, a servant in the field, and an assistant in the hunt. He was an object of ceremony, reverence and veneration as well."[17] In his historical depiction of the dog, Judge Stone sheds light on the nature of this household pet and its relation to humans through a lengthy historical examination that probes ancient cultures, traditional mores, and belief systems:

> The Egyptians regarded him as a symbolic guide and protector of the dead, crowned their god Anubis with a doglike head, fashioned images of the dog on the walls of their burial chambers and temples, ceremoniously embalmed his body and entombed it in the special burial ground set aside for dogs in every town, and even built a city, Cynopolis, in his honor . . . In Rome, dogs became so popular that Julius Caesar is said to have mused aloud that Roman ladies of luxury had decided to have dogs instead of children.[18]

After traversing the historical record and documenting centuries of adulation for the canine, Judge Stone concludes his story of origin with the following coda: "Since, down through the ages, the dog has earned and has merited acceptance as man's best friend, small wonder then that the law long ago recognized dogs as ordinarily harmless and classified them as animals domitae naturae, i.e., domestic animals, rather than as animals ferae naturae, i.e., wild animals."[19]

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12 *Id.* at 112.

13 *Id.*

14 *Id.* at 117.

15 *Id.*

16 Kroger Co. v. Craig, 329 S.W.2d 804, 808 (Mo. Ct. App. 1959).

17 Id. at 808.

18 *Id.*

19 *Id.*

His story, like that offered in the first case, has direct bearing on his interpretation of the facts and final determination. Each story is designed to address the same legal matter. But each story establishes a wildly different depiction of the historical origins of the dog, which, in turn, leads to an entirely different—though eminently predictable—legal outcome. The plaintiff of course prevailed in the first case, while the court in the second case, not surprisingly, ruled for the defendant.

There are a number of important dynamics at play in these cases that apply to the historical study of human rights. It is quite possible that the stories were generated after the decision was made and used primarily in justification, rather than production, of the final determination. It is also possible that the two judges differed significantly in their personal affinities for dogs. Notwithstanding these two possibilities, which will be addressed in subsequent parts of this Article, it is crucial to recognize that it does no good to ask which historical narrative is the "correct" one. That is, of course, because both stories are absolutely *true*.

Although the substance of these two cases is entirely unrelated to the construction of human rights narratives, the underlying parallels are striking. In the study of human rights, there now exists a spectrum of wildly conflicting accounts of origins.[20] The dog bite cases offer a vivid illustration of the causes and effects of such vastly contradicting histories. In the present examples, the cause is rooted in each judge's choice—whether conscious or not—to employ a unique analytic lens to conduct the historical analysis. The effect is to set forth, within narrative form, the factual bases for two extremely different depictions of the contemporary nature of the dog, as well as completely opposing legal determinations and policy solutions. Though dog bites are not inconsequential, the parallel issues surrounding rights and human rights are of the greatest importance. If dog bites appear so vastly dissimilar through distinct analytic lenses, what do human rights look like through the range of analytic lenses and disciplinary approaches that are now engaged in their historical study?

B. Disciplinary Approaches: Benefits and Impairments

Taking a specific disciplinary approach into the historical study of human rights allows a researcher to leverage the core competencies of her discipline, while building from shared ideas and common bodies of knowledge. But at the same time, those benefits only accrue to the extent that one explicitly acknowledges the influence of any such approach as well as its limitations.[21] Unfortunately, such

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[20]   *See, for example, supra* note 1 and accompanying text.

[21]   A number of scholars have offered excellent and much needed interventions in the area of methods. *See generally* TODD LANDMAN, STUDYING HUMAN RIGHTS (2006); Todd Landman, *The Political Science of Human Rights*, 35 BRIT. J. POL. SCI. 549 (2005); GARY GOERTZ & JAMES MAHONEY, A TALE OF

discussions only infrequently enter the conversations or debates surrounding the history of human rights. Nevertheless, the underlying premise is a very basic and intuitive one that applies in virtually every field of study. Suppose for instance, that two scientists wish to describe the natural world—one chooses to use a telescope and the other a microscope. The depictions of the natural world that each offers will differ far more than even those in the preceding dog bite examples. Yet, because it is so patently obvious that the disciplines of astronomy and biology employ distinct analytic tools within their respective fields, we do not see too many arguments between the fields about which depiction of nature is the "correct" one. However, within the study of human rights—a cross-disciplinary enterprise—there are no such guarantees.

Taking disciplinary routes into the study of human rights makes sense for a number of reasons. First, human rights appear in a multiplicity of forms. Human rights can be taken as law or legal doctrine, as pretexts for political interests, as social or cultural values, as moral or philosophical concepts.[22] Given the challenge—or perhaps the impossibility—of studying human rights in all of their innumerable guises at once, it is fitting that human rights are studied through one of many intellectual orientations at a time.

Second, adopting a particular disciplinary approach enables scholars to focus on their own core competencies, allowing those with specialized knowledge within a particular area of study to explore that particular aspect of human rights. For example, viewing human rights as a function of law would likely point a researcher towards focusing on legal institutions, doctrine, treaties and so forth. A philosophical approach might lead to a focus on the moral ideas and natural principles within the Universal Declaration of Human Rights (UDHR).[23] An understanding of human rights that prioritizes state action might highlight the political and diplomatic aspects of this history. Such studies that have adopted these approaches have produced a wealth of knowledge.[24]

No single disciplinary approach can capture the exceedingly broad reality of human rights on its own. But at the same time, although disaggregating the

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TWO CULTURES: QUALITATIVE AND QUANTITATIVE RESEARCH IN THE SOCIAL SCIENCES (2012); STATISTICAL METHODS FOR HUMAN RIGHTS (Jana Asher, David Banks & Fritz J. Scheueren eds., 2008); Somers & Roberts, *supra* note 8; Moyn, *supra* note 1; GOODALE, *supra* note 9; THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL, *supra* note 9; HUMAN RIGHTS IN GLOBAL PERSPECTIVE: ANTHROPOLOGICAL STUDIES OF RIGHTS, CLAIMS AND ENTITLEMENTS, *supra* note 9; Dembour, *supra* note 10.

[22] Elsewhere I write: "Rights can accrue by virtue of one's humanity, through one's citizenship, via common law, custom, treaty, birth, race, gender, religion, sovereign edict, or act of parliament." Christopher N.J. Roberts, *Standing Our Legal Ground: Reclaiming the Duties Within Second Amendment Rights Cases,* 47 ARIZ. ST. L.J. 235, 242 (2015).

[23] Universal Declaration of Human Rights, *supra* note 5.

[24] *See generally* C. WILLIAM WALLDORF JR., JUST POLITICS (2008).

concept into its various guises permits analytic traction, doing so has the unfortunate consequence of defining an inherently multifaceted phenomenon in terms that sever much of what makes human rights, *human rights*. In practice, human rights have the ability to occupy multiple categories at once and are extremely mutable. Indeed, one of the great powers of human rights as a concept and a practice is its ability to move fluidly between such categories of use. For example, those seeking to halt abuses at the hand of their government can claim their human rights by reference to international treaty. But they can also invoke the idea of human rights as a powerful moral imperative that supersedes the existing positive law. From a natural rights perspective, positive law operates under the purview of such higher law—whether or not it is actually codified in law.[25]

But when approached through one disciplinary lens at a time, the dynamic, fluid, transmutable quality of human rights—one of its greatest powers—will evade detection. For instance, studying human rights just as law or as a moral idea limits the analytic range to a very narrow field of view. It might very effectively capture the human rights phenomenon as it manifests in one of these distinct guises, but is unable to move along with it as it passes seamlessly through the narrow analytic field of view. The upshot is that any one perspective stands to capture an integral part of the human rights phenomenon, even as it is just a very small piece of a much broader and expansive reality. In this way, relying on disciplinary divisions of labor risks chopping the object of inquiry—i.e. human rights—into pieces that do not allow scholars to study it in a holistic way or to follow it as it shifts across those boundaries. Because the multiplicity and mutability of human rights are so central to what they are and how they operate, there is the possibility that maybe, in the end, we are not even studying "human rights" but something altogether different.[26]

So although studying human rights through a unitary disciplinary perspective is extremely productive, any single disciplinary approach will inevitably possess its own blind spots.[27] It is therefore essential for scholars of the history of human rights to recognize this underlying epistemological dynamic within their own analyses for a crucial reason: the manner in which the human rights concept is typically defined in each orientation establishes a distinct relationship with the historical record, which in turn focuses on certain elements while downplaying, or obscuring, others.

Acknowledging that any one disciplinary approach necessarily leads to an incomplete historical analysis is in no way a critique; it is a reality that, if integrated into the foundational assumptions of this field of study, will allow scholars to

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[25]   *See* Dembour, *supra* note 10, at 6.

[26]   Somers & Roberts, *supra* note 9, at 406, 412.

[27]   *See generally* ROBERTS, *supra* note 1.

account for the unique representational effects of their distinct disciplinary lenses. Interdisciplinary communication becomes essential. For when the diverse insights that are attained by looking at human rights from such distinct perspectives are pieced together, a nuanced, yet holistic, image begins to emerge about the expansive and varied nature of the phenomenon. The intellectual payoff is one that could not possibly be attained by studying human rights exclusively from any one approach. Unfortunately, though, interdisciplinary communication offers its own exceedingly complex set of challenges.

The difficulties associated with speaking across disciplinary boundaries are nothing new. But in the study of human rights they can be particularly acute because various disciplinary approaches often conceive of human rights in incompatible, if not mutually exclusive, guises. For example, a legal scholar taking a doctrinal approach is approaching human rights within a very different methodological context as compared to a social scientist. The underlying assumptions as well as the understood nature of the very object of study can differ dramatically depending on what disciplinary approach scholars take. It is quite common for scholars of human rights in different disciplines to find that although they are studying the same thing at a nominal level, they are a universe away from one another in terms of the underlying assumptions about what human rights actually are—the same term after all represents a huge range of ideas and phenomena that are often incompatible with one another. Many of the debates within the study of human rights, in fact, turn on disagreements over conflicting—if not mutually exclusive—notions of rights. There are, for instance, persistent debates about whether human rights law is "really law." There are debates about whether human rights are moral ideas or whether they are politics and so forth. An affirmative belief in one particular conception of human rights often negates the existence of another conception. For instance, a natural rights conception within which rights accrue to individuals by virtue of their own humanity will stand in direct contradiction to a notion of rights emerging from positive law.

The problem is compounded by the fact that certain conceptions of rights are often associated with particular disciplinary orientations. It is not uncharacteristic, for instance, for a legal scholar to presume that rights are sourced from *laws*. Nor is it unusual for an international relations scholar to suggest that politics, rather than law, is the wellspring of rights. Nevertheless, the debates in this area of study are often framed in a way that requires those who are studying human rights not only to defend their particular conception of the nature of rights, but their entire disciplinary orientations as well. There is, of course, little chance of convincing an international lawyer that there is no such thing as "international law." So at a minimum, scholars should be cognizant that disagreements about human rights—including disputes about their origins—are often sourced from incompatible understandings of what human rights are. Unfortunately, a common

solution in the study of human rights has been to leap over such foundational matters in order to engage with the particular substantive issues at stake.[28]

C. To Define or Not to Define?

Human rights are abstract concepts that only come to life when they are attached to specific referents. A definition of these concepts then is absolutely crucial for the overall study; it is the gatekeeper that allows one to study them at all. Moreover, if one wishes to study human rights in an analytically precise way, an explicit definition is required. But even when an explicit definition is not offered in a particular study, an implicit definition is always doing its work in the background. As a preliminary matter, some sort of meaning is always attached to the concept when it is invoked. This is a truism to be sure—without meaning a concept is of course meaningless. This truism, though, is one worth thinking deeply about in the context of the study of human rights, for, in practice, we often presume that we know what human rights are without having to define them explicitly.[29]

Leaving the human rights concept undefined is not wholly unexpected; one of the attributes of human rights that gives it great power in the contemporary world is its ability to do its work without having to be explicitly defined in practice. For example, it is generally agreed that a human rights "violator" is not good, without having to say another word about what human rights are, what the concept means in practice, or even how it is being used by the person making the claim. Similarly, to call oneself a human rights "supporter" puts oneself on the "good side" of the situation—again, without having to define human rights. The notion that human rights emerge from obvious "wrongs" embodies this idea.[30] The text of the UDHR, for instance, references the "barbarous acts which have outraged the conscience of mankind" as an important reason for its existence.[31] This short passage from the UDHR contains the presumption that certain conduct is so clearly in violation of basic tenets of morality and shared norms that it is unnecessary to go into further detail about it—it is simply a violation of human rights.

Similarly, in scholarship, the human rights concept is also oftentimes not explicitly defined or left only vaguely defined.[32] Just invoking the phrase human rights is often enough to allow us to know roughly what is being spoken of,

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[28]   *See* Dembour, *supra* note 10, at 10.

[29]   *See generally* Somers & Roberts, *supra* note 9.

[30]   *See generally* ALAN DERSHOWITZ, RIGHTS FROM WRONGS: A SECULAR THEORY OF THE ORIGIN OF RIGHTS (2004).

[31]   Universal Declaration of Human Rights, *supra* note 5.

[32]   *See generally* Dembour, *supra* note 10.

thereby eliminating the need to delve into a technical discussion about the specific nature of the human rights under consideration. In passing or cursory discussions of human rights, leaving it undefined or vaguely defined is not too much of a problem. Just as there is no need for U.S. constitutional law scholars to define what they are speaking of when they use the phrase "Bill of Rights," there is in such cases generally no need to define the phrase human rights any further.

Despite standard practice, leaving the human rights concept undefined can create a number of problems. The great problem with leaving human rights implicitly defined is that, given the breadth and multiplicity of the concept, it is never quite clear just what the phrase "human rights" refers to precisely when it is invoked. Whether the meaning bestowed upon the phrase "human rights" is outlined explicitly, implicitly, or understood at a subconscious level, it is always there doing its work. Yet, without an explicit definition, there is always a high likelihood that we will have very different things in mind. This is not just a problem with semantics or nomenclature. If one participant in an intellectual debate, for instance, is talking about human rights as a post–World War II political institution and the other is referring to it as a timeless moral idea, they will be a universe away from one another with respect to the object of their attention. Although the ensuing debate might exhibit all the trappings of the highest level of scholarly intercourse, they simply are not connecting with one another even as they debate over a nominally identical phrase. One can speculate about how often this occurs in contemporary debates surrounding human rights.

The necessity of defining human rights is inherent in the empirical study of human rights; but so is the difficulty of doing so. For the reasons mentioned above, it is extremely difficult to outline a meaningfully complete, nuanced, and explicit definition of human rights without spurring disagreement from others about that definition. So there is a catch-22 of sorts: Define human rights explicitly and many others are likely to reject the definition and therefore everything that rests upon it. Or, employ a vague definition—if any at all—and allow the unstated signifier to lurk beneath the abstract, surface level representation. Either way—whether the definition is explicit or implicit—we are still left with the problems of incompatible understandings, interdisciplinary communication, and unstated definitions.

D. Concluding Matters

On the one hand, disciplinary approaches are valuable in the production of knowledge because they allow scholars to narrow human rights—which, by all accounts, represents an exceedingly broad, multidimensional object of inquiry—down to a tractable subject that aligns with the core competencies of a particular discipline. But at the same time, beginning an historical analysis from distinct disciplinary perspectives often produces extraordinarily different depictions and

interpretations of the history in question. Second, those disparate historical narratives, in turn, are likely to yield divergent understandings of contemporary human rights and conflicting guidance for dealing with vital contemporary matters.

In the short-term, leaving the subject undefined allows scholars from diverse intellectual orientations to communicate—albeit at a nominal level—about human rights. But in the long-term, the vastly different underlying conceptions of what human rights actually are have created unnecessary confusion and debate in this area of study. It is essential for scholars to be explicit about the operative definitions that are at play instead of assuming that the words "human rights" mean the same thing for everyone. The following Section of this Article examines the nature and effect of a few typical assumptions that generally remain hidden and unspoken.

III. Assumptions and Unspoken Starting Points

The history of human rights has become a way for scholars to communicate across disciplinary divisions.[33] It is now possible for researchers from virtually any field to engage with one another in lively debates about human rights without having to ask difficult ontological questions or descend into endless philosophical debates, for example, about the "real" nature of human rights. That said, the debates over conflicting histories of human rights in many cases are now simply serving as proxies for the deeper conflicts about the nature of human rights. Indeed, there are numerous—though often unspoken—assumptions that inform the historical study of rights. Section III of this Article examines two such assumptions that have been influential in the historical narratives that have emerged in the past decade or so: the idea of natural rights and the assumption of consensus. In doing so, it makes the argument that conflicting stories of origin can often be traced back to the many conflicting—though generally hidden—a priori assumptions lurking beneath such accounts. Finally, it offers several intellectual and methodological solutions for how to manage such underlying assumptions in the historical study of human rights.

A. Assumptions in General

In any study there are a host of implicit a priori assumptions that frame the analysis. Even when the object of a study is defined explicitly, the entire inquiry will be guided by a series of basic assumptions about the nature of the object of study and the context within which it resides. Often times, these assumptions are

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[33]   The selected history of human rights studies cited in note 1, *supra*, is authored, for example, by historians, legal scholars, philosophers, sociologists, political scientists, and anthropologists, to name just a few of the represented disciplines.

stated explicitly at the outset of a study. But there are always many more assumptions that are so basic and obvious that they are simply taken for granted without any need of mention. For example, a scientific study that examines the effect of a drug does not need to state that it is assumed that the basic rules of scientific causation apply. It is simply taken for granted, for instance, that x must precede y for x to have an effect on y. Similarly, in the physical sciences, there are certain constants that can be assumed without explanation or justification: the boiling point of water at sea level, the force of gravity, or the speed of light in a vacuum, for instance. The same is true in the social sciences. Economists might base a study on a priori assumptions that individuals are rational actors or that firms attempt to minimize costs. Political scientists might presume that legislators seek to maintain their offices, and sociologists might presume that there is a thing called "society." As discussed below, there are a number of a priori assumptions that inform the study of human rights.

In any given empirical study, a priori assumptions—both implicit and explicit—help form the overall structural framework for the research endeavor. They narrow the infinite range of possible research questions, variables, interpretations, and conclusions down to a manageable level. By distinguishing the claims that do and do not require factual support, they also identify the evidence that a researcher must focus on. They offer a practical, and hopefully intuitive, structure that sets the parameters and boundaries of the overall study. But a priori assumptions must also be handled with care to ensure that they do not interfere with the goals of the overall study. An inappropriate assumption might, for instance, explain away what needs to be explained or prohibit empirical engagement with the relevant facts. There are certain a priori assumptions that effectively remove a range of important empirical questions and facts from consideration. A factually incorrect premise, for example, has the potential to steer the entire study from start to finish in the wrong direction and preclude engagement with relevant questions and facts from the start. Because entire fields of study are often defined by a shared set of underlying assumptions, the effects of an inappropriate assumption can extend far beyond a single study.[34] If scholars systematically incorporate into their research a set of inappropriate assumptions, it can lead an entire field in the wrong direction through the compounding effect of subsequent studies building upon and confirming the flawed findings of previous studies.[35] Decades of accumulated knowledge, therefore, can suddenly

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[34]   For example, the assumptions underlying certain subfields in economics—rational choice, being a prime example—define those subfields.

[35]   Beyond the history of human rights, the effects of relying on an incorrect assumption can be grim. For instance, in the field of criminal law, it has recently come to light that the road-side drug testing kits that are relied on to secure tens of thousands of criminal convictions each year are extremely unreliable and prone to false positives. Here, an unwarranted assumption—namely, the presumed

fall into question and doubt. This is actually a much more common occurrence than it might at first glance seem. As Kuhn suggests, the paradigm shifts that occur periodically and inevitably in the sciences follow such a distinctive pattern as part of the normal process of knowledge production.[36]

Just as in the context of debate and argumentation, implicit premises can be very difficult to root out—a fact that makes them all the more powerful as they do their work behind the scenes, often out of consciousness. Given the highly variable and conceptual nature of human rights, it is particularly important to examine some of the most common and taken for granted assumptions that underlie the study. Such assumptions often are deeply embedded, hidden within the standard epistemologies and methods used to understand and study human rights.[37] Uprooting these will take a little more work. By questioning the generally unquestioned a priori assumptions that underlie studies of human rights, the goal of the following analysis is to see what, if any, problems they present for the historical and empirical study of human rights. The process of interrogating—or put another way, stress-testing—some of the most common, and unquestioned, starting points in the study of human rights is a reflexive process. It therefore, also has the added didactic benefit of illustrating the inherent power human rights possess in form not only over nations and citizens, but scholars and thinkers as well. By recognizing the way it can influence us to accept powerful and influential assumptions without question, the following analysis will help to determine whether it is necessary to relax, nuance, or abandon them altogether.

B. Natural and Quasi-Natural Conceptions of Human Rights

Human rights are often treated as natural or quasi-natural entities.[38] On the one hand, this widely accepted, common starting point would seem appropriate given how they typically manifest in the "wild," so to speak: The Universal Declaration of Human Rights (UDHR), for instance, states in its preamble that "human rights should be protected by the rule of law,"[39] thereby implying that human rights exist prior to the codified positive law. Similarly, Article 1 of the text states, "All human beings are born free and equal in dignity and rights."[40] In fact,

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reliability of such test kits—has unjustly wrought havoc on the lives of many. *See* Ryan Gabrielson & Topher Sanders, *Busted*, PROPUBLICA (July 7, 2016), https://perma.cc/QD27-N7FS.

36 THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

37 As Dembour suggests, it is necessary to look for specific "clues" in order to determine the underlying—and often unspoken—assumptions that animate a particular study of human rights. Dembour, *supra* note 10, at 10.

38 Moyn, *supra* note 1 at 126; Dembour, *supra* note 10, at 2–3.

39 Universal Declaration of Human Rights, *supra* note 4.

40 *See id.* at art. 1.

all three of the human rights texts that comprise what is known as the International Bill of Human Rights contain text recognizing that the human rights are rooted in the "inherent dignity" of every individual.[41] The natural-leaning conception of human rights that is outlined in these seminal human rights texts represents one of their greatest powers; natural rights are conceptually indomitable. If, for instance, a particular value or attribute is one that exists by virtue of one's humanity, arises in nature, or otherwise just *is*, it is impossible for a dictator or tyrant, or any other mortal, to take it away. They may be violated, they may be protected, they may be enshrined in law, or forgotten about. But as a natural entity, their existence is a constant. There is nothing that can deface, alter, or erase their being.[42] As a premise, this natural form even eliminates the possibility of *knowing* or *understanding* its existence beyond the proposition that it just *is*.[43] Although a great strength in the context of a political struggle, in the study of human rights, taking this natural form as a factual premise does precisely the same thing: it removes from consideration questions about its history, how it was created, or why such ideas of right seem so compelling. Removing such critical questions from consideration is an obvious problem for those seeking to learn the history of human rights. The challenge for empirical studies of human rights is to study human rights on its own terms—which includes the acceptance of it acting and operating as a natural-leaning concept—without allowing the concept to remove from the table key questions and lines of inquiry.

Another important consideration is whether an underlying assumption is factually correct. When one takes into account temporality, historical chronology, and changing interpretations over time, things quickly get very complex in this area of study. For instance, imagine if the implicit a priori suppositions that structure an historical study of human rights actually have not persisted over time, but nevertheless are imported into an historical context in which they did not formerly exist—that is, if one were to grant a priori status to an understanding of human rights phenomena that is unique to the contemporary world. Doing so would ultimately shield from analytic view those historical data that do not conform. This, in turn, would limit or preclude historical engagement with the various antecedents that might have been instrumental in the creation of the modern human rights regime, but are no longer visibly with us.

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[41]   *Id.*; International Covenant on Civil and Political Rights, *supra* note 5; International Covenant on Economic, Social, and Cultural Rights, *supra* note 5.

[42]   *See generally* Somers & Roberts, *supra* note 9.

[43]   For example, "we hold these truths to be self evident . . ." accomplishes the same thing. The Declaration of Independence ¶ 2 (U.S. 1776).

C. Dealing with "Naturalness"

Though conceptual assumptions are a necessary component of any study, there is always the danger that they will speak for the historical facts rather than the other way around. Taking human rights as inherent, natural, or quasi-natural entities, for instance, works against an empirical research framework as it removes from consideration the process through which such ideas or principles came to be considered natural. One way to deal with this dilemma is not to dispute the existence of natural understandings of human rights. Instead it is to accept their existence—not as the Truth—but as a social fact; that is, to recognize that any natural conception of human rights—any conception at all, in fact—was the product of human endeavor.[44] In particular, where this Article is most concerned, is that if a concept appears to be inherent, natural, inevitable, and so forth, it removes a number of things from the table for empirical or historical investigation from scholars who—if they accept such propositions as a presupposition—are no longer simply observers of human rights, but become objects of their influence. So within this framework, whether or not something is a natural right or not is not at issue. Nor can it be. The new premise is that any natural conception has been made, constructed, and claimed to be natural by human endeavor. The starting presumption is that natural rights have to be created by people just as any other right is created. The question then becomes *how* was it created, who created it, when did they create it, why did they create it, and under what conditions was its creation possible? These questions then become empirical and historical ones that researchers have great traction over.

This starting premise allows aspects of the inquiry to take place on empirical terrain that otherwise would not have been accessible. The key again is to use what is often taken as a premise and accepted as an assumption at the outset—that human rights are natural—as an historical outcome in need of explanation rather than as an assumption to accept as a fundamental truth. So when examining the history of human rights within the empirical framework outlined within this Article, there is no need or place for considering whether or not rights in the U.S. Constitution are "self-evident truths," whether or not "all men" are or are not "created equal," whether or not they were "endowed by their Creator with certain unalienable rights," and so forth.[45] Nor is there place within this framework to take sides on whether or not human rights are fundamental, whether people have them by virtue of their humanity and so forth. Within the framework, they are impossible questions—and possess no meaning as truth propositions. But as outcomes of contentious struggles over the meaning of rights and the organization

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44   *See* ÉMILE DURKHEIM, SELECTED WRITINGS 122 (Anthony Giddens ed. and trans., 1972).

45   *See supra* note 43.

of human relations, there are rich and complex narratives of origins surrounding every natural supposition.

D. Consensus

It is common for human rights to be associated with the idea of consensus.[46] From the preceding discussion, it is not difficult to begin to root out at a conceptual level why there is such an association. If human rights embody ideas that appear self-evident to a particular audience within a particular context, it is not much of a leap to suggest that there is a certain degree of consensus surrounding the ideas. The importance of dignity, justice, and the rule of law, for example, fits well into this category. Basic human rights prohibitions against slavery and torture also are generally included into the category of human rights norms about which there is substantial agreement.[47]

In the historical work on human rights there is often the assumption that the international system of human rights emerged from consensus.[48] After two World Wars, the Great Depression, and the Holocaust, it is not difficult to imagine why there might have been substantial agreement surrounding certain human rights principles. During the 1940s, President Franklin Roosevelt's famous pronouncement of the "four freedoms"—freedom of speech, freedom of religion, freedom from fear, and freedom from want—appears to capture well the shared sentiments of those who had endured these preceding events.[49] Moreover, the ability to draft and adopt a document like the UDHR certainly offers evidence of consensus at some level.

It is now difficult to imagine that anyone could be against the idea of human rights. But this is precisely the problem. The historical assumption of consensus is largely based, at least in part, on our own contemporary experience with human rights in which approval and support is widespread, if not ubiquitous. As an a priori assumption, the notion of consensus frames the overall historical analysis and influences greatly what to look for within the historical record. In doing so, it assumes away a huge range of relevant historical facts—in particular, the fact that conflict and opposition was actually a huge part of the post–World War II emergence.[50] One only needs to conduct a cursory study of the historical records from the mid to late 1940s to see that consensus surrounding human rights was

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46   *See generally* Somers & Roberts, *supra* note 9.

47   *See* M. Cherif Bassiouni, *International Crimes:* Jus Cogens *and* Obligatio Erga Omnes, 59 LAW & CONTEMP. PROBS. 63, 68–70 (1996).

48   *See* Dembour, *supra* note 10, at 6.

49   *See* DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945, at 469–70 (1999).

50   *See generally* ROBERTS, *supra* note 1.

often in short supply or nonexistent.[51] Although the secondary sources in the literature on human rights tend to portray a history of consensus,[52] the primary source materials show that there was actually an abundance of opposition against various ideas of universal human rights at the U.N. and elsewhere.[53] For example, the American Bar Association, the American Medical Association, the American Anthropological Association, Gandhi, British representatives at the U.N. and many, many other individuals, groups, and nations expressed major concerns—if not outright hostility—towards specific rights provisions in the UDHR, if not the entire project.[54] This opposition, as it turns out, was a major part of the historical development of the modern international human rights concept.[55] But based on the presumption of consensus, this history generally has been overlooked by historians of human rights.[56]

E. Dealing with Consensus

As was established above, human rights and the idea of consensus are frequently associated with one another.[57] But as was also shown, the assumption of consensus does not hold well against the historical reality surrounding the creation of the UDHR.[58] There was a great deal of conflict and opposition, the formative role of which has generally escaped the attention of scholars. Building on the new assumptions outlined above raises new questions about relying on a presumption of consensus.

At one level, there certainly was significant consensus surrounding the UDHR when the United Nations General Assembly successfully adopted it in 1948. There was obviously enough agreement among the drafters of UDHR and enough of a consensus to bring the International Covenants into being and into force. The powerful discourse and the normative force that human rights now exert all point toward there being consensus. But if the new premises outlined above align with reality—and the contemporary literature, the history, and basic intuition supports them—a very basic question must be addressed: how could there possibly be consensus? At a time when the institution of apartheid was just getting started in South Africa and Jim Crow was well established in the U.S., how could there possibly be consensus about the issue of non-discrimination, for

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51   *See id.* at 72–121.

52   *See id.* at 5–7; Dembour, *supra* note 10, at 6.

53   *See, for example,* ROBERTS, *supra* note 1, at 78.

54   *See id.* at 12–13.

55   *See id.*

56   *See id.* at 5–7.

57   *See id.*; Dembour, *supra* note 10, at 6.

58   *See infra* Section II.C.

instance? Or at a moment when the colonial powers—particularly Great Britain— still held significant power over their colonial territories, how could there be consensus on the issue of self-determination? Even after World War II, anti-Semitism remained rife. Gender equality was absent in most settings. The list of human rights that did not enjoy consensus is about as long as the list of human rights within the UDHR.

Again, to say that there was not universal consensus is in no way a critical stance or one that diminishes the influence or power of human rights—it is simply an historical fact. But it is also a logical supposition. First, the need for a human rights text in the first instance presupposes the fact that there are many who would not otherwise adhere to its tenets. Second, if human rights are at all effective in changing behavior, it should be assumed that they are going to also shift power relations—for example, between one race and another, between one religious group and another, or between citizens and their governments. Conflict invariably accompanies any power shift between individuals and groups. So third, if human rights are to have any effect, one should anticipate, and even expect there to be, conflict surrounding the development of those rights.[59] If there is not conflict, one must ask whether or not those rights will offer anything in the way of a substantive guarantee. And finally, the history shows that human rights creation is a reactive process in which rights are created and defined in relation to perceived threats, which itself is a conflict-based process.[60]

This is not to say that there was not consensus or that consensus is not part of the historical equation. It is merely to put forth two precepts: (1) Because human rights will always empower some and disempower others, conflict is a central aspect of the creation of the human rights; therefore, (2) When the idea of consensus is invoked, it must at the very least be nuanced, or specified precisely at what level the consensus operated.

The analytic framework that is outlined here simply swaps what is generally presumed in such studies (that is, consensus) with what generally needs to be explained (that is, conflict). The move is very subtle. Yet it simultaneously represents a potentially transformational shift in the historical study of human rights. In particular, the new historical starting point then is not to assume consensus and explain conflict or empty promises, for example.[61] The starting point leans towards assuming conflict and explaining consensus. It is not that

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[59] *See, for example*, ROBERTS, *supra* note 1, at 23–25; Dembour, *supra* note 10, at 15–17; Dolores Trevizo, *Political Repression and the Struggle for Human Rights in Mexico: 1968–1990s*, 38 SOC. SCI. HIST. 483 (2014); NEIL STAMMERS, HUMAN RIGHTS AND SOCIAL MOVEMENTS 1–7 (2009); UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS 22–23 (3d ed., 2008).

[60] *See* ROBERTS, *supra* note 1, at 53–71; Ralf Dahrendorf, *Out of Utopia: Toward a Reorientation of Sociological Analysis*, 64 AM. J. SOC. 115, 120–21 (1958).

[61] *See* Hafner-Burton & Tsutsui, *supra* note 9.

consensus does not exist—it is a central part of the overall human rights equation. The human rights concept, itself, takes a great deal off the table. This is part of its power. But for the empirical scholar or historian, the key is to not allow it to shield from view the most relevant aspects of its creation. By presuming conflict and explaining consensus, the standard framework is flipped around. Doing so puts conflict on the table for empirical examination as to how consensus emerges, as human rights, with time and great struggle, so often become obvious, taken for granted and seemingly *natural* over time.

IV. THE NORMATIVE AND THE EMPIRICAL

A. Human Rights as a Normative Inquiry

The idea of human rights enjoys a strong association with normative *good*.[62] It is not difficult to see why this is the case. It is difficult to refute the claim that human rights are a good thing and that nations should strive to honor and protect them. It is difficult to challenge an idea such as human rights that is based on ideas of dignity, universal equality, respect for humanity, and so forth.[63] Much of the work in the field of human rights, not surprisingly, begins with the normative assumption that human rights are inherently good.[64] Although the presumption that human rights are a good thing is one of the most obvious and seemingly innocuous starting points in the study of human rights, it represents a starting point that has great potential to route an empirical study far from its analytic moorings.

A brief bit of history explains much. In the years following the end of the Cold War, the study of human rights took on new salience for activists, leaders, and scholars alike.[65] Ideas surrounding democracy, the rule of law, and human rights appeared to possess the power to alter the behavior of governments, challenge autocrats, and even unseat repressive regimes.[66] Human rights surged in international and domestic politics around the world as well as in the popular lexicon. The optimism for human rights and the hopeful future they seemed to

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[62] *See, for example,* LAUREN, *supra* note 1, at 1 (associating human rights with "the long struggle for the worth and dignity of the human person throughout history"); ISHAY, *supra* note 1, at 2 (calling human rights "humankind's noblest aspirations").

[63] Critics of human rights, however, often challenge such suppositions. *See, for example,* ERIC POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW 140–48 (2014); MAKAU MUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE (2002).

[64] *See, for example,* Martha C. Nussbaum, *Capabilities and Human Rights,* 66 FORDHAM L. REV. 273, 275–78 (1997).

[65] *See generally* THOMAS, supra note 1; HENKIN, THE AGE OF RIGHTS, *supra* note 1; ARYEH NEIER, THE INTERNATIONAL HUMAN RIGHTS MOVEMENT (2012).

[66] *See* THOMAS, *supra* note 1, at 220–56.

offer spurred scholarly interest and normative support across the disciplines. But alongside the positive normative assumptions that have characterized much of the scholarly attention on human rights, various strands of scholarship have raised questions about the numerous and varied problems that are associated with contemporary international human rights. For example, many studies have begun to recognize that domestic human rights violations often accompany a state's international support for human rights.[67] Repressive governments, for instance, often take an active role in the creation and ratification of human rights treaties despite their own violations.[68] This seemingly paradoxical relationship between the "rhetoric" and the "reality" of human rights has spurred some to question whether human rights treaties amount to nothing more than "empty promises" or pious sounding "window dressing" to conceal domestic abuse.[69] By showing this other side of human rights—characterized by problems, deficits, and shortcomings—this important work raised the possibility that the modern international system of human rights was not living up to the noble principles that defined it. In doing so, it has spurred numerous conversations and debates about which side—the rhetoric or the reality—best defines the modern system of human rights. In raising these questions, this literature has been extremely influential. In recent years it has spurred scholars to offer more nuanced inquiries into the subject of human rights while recognizing that human rights practice is not free from its own internal problems.[70] Still, those who readily concede that human rights are of course not free from their own deficits generally remain supportive of the idea and the practice of human rights.[71] Questioning how well they work

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[67] *See, for example*, Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1940 (2002); Hafner-Burton & Tsutsui, *supra* note 9, at 1374–78; Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RESOL. 925, 941 (2005).

[68] *See* FRANS VILJOEN, HUMAN RIGHTS LAW IN AFRICA 306–308 (2007).

[69] *See* Hafner-Burton & Tsutsui, *supra* note 9.

[70] *See generally, for example*, Zachary Elkins et al., *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT'L L.J. 61 (2013); RYAN GOODMAN & DEREK JINKS, SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW (2013); SALLY ENGLE MERRY, THE SEDUCTIONS OF QUANTIFICATION: MEASURING HUMAN RIGHTS, GENDER VIOLENCE, AND SEX TRAFFICKING (2016).

[71] The literature on enforcement and accountability speaks to a host of related concerns. *See generally, for example*, BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999); Philip Alston, *Hobbling the Monitors: Should U.N. Human Rights Monitors be Accountable?*, 52 HARV. INT'L L.J. 561 (2011); Tom Ginsburg & Gregory Shaffer, *How Does International Law Work*, *in* THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 753 (Peter Cane & Herbert M. Kritzer eds., 2010); Geoff Dancy & Kathryn Sikkink, *Ratification and Human Rights Prosecutions: Toward a Transnational Theory Of Treaty Compliance*, 44 N.Y.U. J. INT'L L. &

and whether they live up to their promises is simply an avenue for figuring out how to improve their performance.[72]

Though most of the work on human rights generally takes it as a given that human rights are a good thing, not all of the work begins from such a normative starting point. There are various strands of critical human rights scholarship that tend to reject the premise that human rights represent a universal good.[73] Some scholars, for example, challenge the notion that human rights are universal and argue that they stem from a Western, colonial tradition.[74] This particular critique runs far deeper than considering the effectiveness of enforcement mechanisms, treaty ratification, and the apparent gap between the rhetoric and the reality of human rights. Instead, this literature cuts to the core of the very concept itself, suggesting that the notion of human rights is not universal, but instead represents a fundamentally Western set of ideas and values.[75] Clothed in the universal language of human rights and buttressed by global institutions, these critics argue that human rights are actually *impositions*—or, more forcefully, a hegemonic ideology—foisted on non-Western nations and peoples, who despite having shed the yoke of colonialism, nevertheless remain bound by Western power.[76]

Interestingly, the back and forth between supporters and critics is actually part of a much longer pattern in rights scholarship. In fact, if one traces patterns of debate within rights and human rights literature over the past several decades, one sees that there have been many cycles of scholarly support that are followed by critical work that questions whether rights—or the law in general—are as beneficial as mainstream scholarship assumes.[77] Thus, the back and forth

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POL. 751 (2012); Beth A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POL. SCI. REV. 819 (2000).

[72] See *supra* note 71.

[73] *See* TONY EVANS, THE POLITICS OF HUMAN RIGHTS: A GLOBAL PERSPECTIVE 14 (2d ed. 2005); DAVID N. STAMOS, THE MYTH OF UNIVERSAL HUMAN RIGHTS: ITS ORIGIN, HISTORY, AND EXPLANATION, ALONG WITH A MORE HUMANE WAY 1–7 (2013).

[74] *See generally, for example*, Arjun Chowdhury, *"The Giver or the Recipient?": The Peculiar Ownership of Human Rights*, 5 INT'L POL. SOC. 35 (2011); Makau Mutua, *Conflicting Conceptions of Human Rights: Rethinking the Post-Colonial State*, 89 AM. SOC'Y INT'L L. PROC. 487 (1995); DECOLONIZING ENLIGHTENMENT: TRANSNATIONAL JUSTICE, HUMAN RIGHTS AND DEMOCRACY IN A POSTCOLONIAL WORLD (Nikita Dhawan ed., 2014); BONNY IBHAWOH, IMPERIALISM AND HUMAN RIGHTS: COLONIAL DISCOURSES OF RIGHTS AND LIBERTIES IN AFRICAN HISTORY 8 (2007); Adamantia Pollis & Peter Schwab, *Human Rights: A Western Concept with Limited Applicability*, *in* HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES 1 (Adamantia Pollis and Peter Schwab eds., 1979).

[75] *See* IBHAWOH, *supra* note 74, at 17; Pollis & Schwab, *supra* note 74, at 2–4.

[76] *See generally* Karen Engle, *From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947–1999*, 23 HUM. RTS. Q. 536 (2001); Ellen Messer, *Anthropology and Human Rights*, 22 ANN. REV. ANTHROPOLOGY 221 (1993); MUTUA, *supra* note 63.

[77] *See* STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (2004); Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal*

dialogues are part of an ongoing process in which supporters and critics spar over the nature and effect of rights and human rights. The scholarship often comes down to presenting an either/or proposition with respect to the nature of human rights: "Are human rights simply 'empty promises' or 'window dressing' for repressive regimes?" "Are rights "prizes" or "myths?"[78] The important point for the purpose of the present discussion is the fact that both sides of these debates generally begin from a normative position, conduct the analyses from that position, and generally stay true to it in their conclusions.

In the historical study of human rights, depending on where a scholar sits with respect to any one of the above debates, their normative position as a starting point for an historical inquiry will dramatically affect the nature of the study, the questions that are posed, the data that is sought, as well as the resulting historical narrative.[79] But when collecting historical data, the reality is that either side of these debates will always be able to find relevant—even abundant—data to support their underlying normative position.[80] The normative underpinnings of a study also dictate how the data is interpreted as well as the conclusions that are drawn from them. For example, the gap between the rhetoric and the reality will most likely appear as evidence of the need to make human rights stronger. But for critics, the very same facts are often used as evidence for the need to refocus our efforts on alternatives other than human rights.[81] The underlying normative convictions of the scholar that are present from the start soon become inseparable from the supposedly "neutral" facts.

Within the context of advocacy work, beginning with a normative position is expected. When representing a client, for instance, a lawyer must highlight the evidence that best supports one's position. To do otherwise likely would be malpractice. But this stands in marked contrast to the role of data in social scientific or empirical scholarship where selecting evidence based on one's desired conclusions immediately discredits the entire undertaking.[82] The danger of relying on an unstated normative position to guide an historical inquiry into the origins

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Change, 9 L. SOC. REV. 95, 122 (1974); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984); ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 36–40 (1986); Donald Black, *The Boundaries of Legal Sociology*, 81 YALE L.J. 1086, 1088 (1972); DONALD BLACK, THE BEHAVIOR OF THE LAW (1976); Philip Selznick, *The Sociology of the Law*, in SOCIOLOGY TODAY: PROBLEMS AND PROSPECTS 115 (Robert K. Merton, Leonard Bloom & Leonard Cottrell, Jr. eds., 1959).

78   *See* Hafner-Burton & Tsutsui, *supra* note 9.

79   Buergenthal explores questions surrounding the normative nature of historical narratives of human rights, for instance. *See* Cmiel, *supra* note 1, at 33.

80   Recall the canine ancestry examples from case law discussed above.

81   *See, for example*, POSNER, *supra* note 63, at 137–48.

82   *See* Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 2–3 (2002).

of human rights is that the resulting historical narrative can become a proxy for one's own underlying normative commitments.[83] The historical account then is likely to simply follow—rather than settle—established normative fault lines.

B. Dealing with Normativity

For the historical empirical study of human rights, we can actually build off the largely normative existing literature discussed above—as long as the debates, findings, and objects of study are shifted into a factual realm where the history can be studied empirically. It is not that offering a normative appraisal is wrong or should be avoided. But if one is going to conduct an empirical study and use factual evidence within the study, the normative aspects of the inquiry must be kept separate from the empirics—at least within the context of the analysis. Put another way, the criteria used for making a normative assessment should be able to be framed in a way that the empirics can speak separate and apart from the normative assessment. A basic example from the policy domain is instructive.

Suppose one wants to study a particular social welfare policy in order to determine whether or not it is a good policy. If the investigation begins with the normative premise that all social welfare policies are good and desirable, there is little need for any factual evidence. Yes, facts can be gathered to support the underlying normative position. But there will always be facts that support virtually any position; just because one can locate examples does not mean they are representative or tell the whole story. This latter point is particularly important in the historical study of human rights. But if, on the other hand, at the outset it is determined that a good social welfare policy must distribute its resources to at least eighty-five percent of those individuals who live below a certain income threshold, it is possible to operationalize this and address whether or not it is a good social welfare policy with the data. Of course, we are free to argue about the percentage of individuals who should be reached, what the particular economic threshold should be, and whether a fifteen percent gap in coverage is acceptable or not. That is fine; this is the normative aspect of the study. But there should be much less room, if any, to argue about the *fact* of how many people are reached and what their particular social economic status is. The underlying research logic raised in this example applies similarly to the historical study of human rights and the literature that identifies a wide "gap" between the abundance of inspiring *rhetoric* supporting human rights and the stark *reality* that human rights are regularly violated with impunity.

Within the empirical study of human rights, evidence of a gap between the rhetoric and reality of human rights is not sufficient evidence to support a

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[83] *See generally* Claude Lefort, *Politics and Human Rights, in* THE POLITICAL FORMS OF MODERN SOCIETY: BUREAUCRACY, DEMOCRACY, TOTALITARIANISM 239 (John B. Thompson ed., 1986); Moyn, *supra* note 1, at 124.

normative claim about whether human rights are good—just as evidence of full compliance does not imply that they are good. It is therefore unnecessary to begin the analysis with a normative proposition about human rights—at least not *within* the research framework. The literature that establishes that there is a gap actually can be used as an empirical starting point for an historical analysis, as long as it is not used to arrive at a normative conclusion that human rights are "prizes" or "empty promises," for example. Nor must the researcher place herself on one side of the debate or the other. Instead, the gap must simply be taken as a factual proposition. There is a gap. Period. But this is not the end of the story; it is a premise that represents the beginning of many, many new ones.

Accepting the gap as a basic fact rather than a normative indictment actually makes the related history of human rights much easier to study. Instead of having to parse the existing normative claims within the literature as true or false, the researcher can just begin with a factual proposition: the rate of discursive support that states offer for human rights is higher than the rate of actual compliance. This premise, if taken on a normative plane, is troubling for all of the reasons discussed in the literature and noted above. But when received as a factual premise, the proposition is relatively unproblematic, and in fact should be *expected*. There is invariably a gap between the law on the books and the actions of those who are supposedly bound by it. Similar to any law on the books, there will always be violations. One, for example, would be hard-pressed to put forth a reasonable argument for not having speed limits or stop signs on a busy urban thoroughfare. Reasonable people would heartily agree that there should be such laws and would bring protest to the local government if there were not. But anyone who watches traffic for just a few minutes knows that those laws are routinely violated by the very people who support them. This rather mundane example in no way detracts from the gravity of the human rights situation; with over thirty thousand deaths per year, road safety is similarly a vital concern.[84] Moreover, those who would consider themselves to be supporters of the law often find reasons, excuses, or exigencies for skirting the very same laws. On this empirical plane, the fact of a gap is not a paradox in need of reconciliation—it is a given and quite obvious. Within the historical study of human rights, it should be taken as a research expectation.

C. A New Object of Study

If the gap between the rhetoric and the reality is something to be expected, to make note of its existence is no longer the most interesting part of the analysis. Within the analytic framework being developed in this Article, the gap simply

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84   *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T HEALTH & HUMAN SERV., NAT'L VITAL STAT. REP. NO. 65-04, DEATHS: FINAL DATA FOR 2014 (2016).

becomes a new object of study. Human rights are still the subject of inquiry, though now conceived as a very particular contemporary phenomenon. The gap between the rhetoric and the reality is one of many important aspects of their present form that is possible to explain historically. Receiving the gap at an empirical level leads to new research questions and new directions in the historical study of human rights. Instead of examining the origins of "human rights"—an exceedingly broad concept prone to conflicting interpretations and guises—the inquiry here is much more specific and grounded in a contemporary reality that none would disagree with or dismiss its importance. How the gap came to be becomes a matter of historical inquiry. In the historical study of human rights, this means inquiring about and investigating the origins of the gap. The gap itself becomes the object of historical inquiry. To do so, the researcher would look for various empirical indicators within the historical record that demonstrate a simultaneous display of rhetorical support and opposition, denial, or resistance, for example. Most histories of human rights do not seek to look at both sides at once, and most take a normatively supportive position. But with the gap as a new object of study, this approach necessitates looking at both sides of the gap simultaneously and it precludes taking a normative position on one side or the other.

Such an approach that takes the *gap* as the object of study and seeks to uncover its origins is much more directed towards a substantive, important issue in the study of human rights, rather than simply being a matter of when it began. It is an empirical inquiry designed to explore and answer a factual question. And this resulting historical inquiry provides important new insights about the nature of human rights as well as the literature on human rights.

The initial studies that showed that human rights were often used by repressive regimes as window dressing to bolster their images in the international community caused a huge stir within the both the scholarship and practice of international human rights.[85] If true, it seemed that human rights and those who support them—be they scholars, governments, international non-governmental organizations, or activists—might have to rethink their approaches. It was an earthshaking supposition. But at the same time, a major reason why the proposition was so earthshaking relates to a pervasive and generally unquestioned underlying presumption about the nature of human rights: namely, that they are there to protect the poor, the powerless, the dispossessed, and those otherwise suffering abuse at the hand of their government. But the empirics show that the

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[85]   *See, for example*, Oona Hathaway, *supra* note 67, at 1940; Hafner-Burton & Tsutsui, *supra* note 9, at 1374–78; Neumayer, *supra* note 67, at 941.

disempowered are not the only ones who make use of human rights.[86] Human rights laws and ideas can and do advance the interests of governments, the wealthy, elites, and other holders of power.[87] Any law or policy can become a tool for the powerful to maintain older social hierarchies, to lock in social, economic, cultural, and political gains achieved over decades and centuries. The simple fact of the matter is that there are often considerable gains to be had by states for offering nominal support for human rights without actually following through on their implementation.[88] Again, from a normative perspective, one might take exception to the premise. But from an empirical perspective, this premise—like the aforementioned premise that there is in fact a gap—should appear somewhat intuitive, even though it might be contrary to standard normative a priori assumptions within the study and practice of human rights.

The preceding discussion leads to a new assumption: human rights are not just for the downtrodden and oppressed; those with great power can also harness them and mold them to their suit own interests.[89] This new premise makes the long-studied and debated gap between the rhetoric and the reality of human rights even more obvious. This new premise also motivates new questions and new lines of inquiry about the history of human rights by opening up opportunities to ask empirical questions and to seek empirical answers for these new questions. In doing so, it opens up for empirical study a broad range of historical events that have not been given much attention. Instead of debating the normative consequences of the gap, by charting its development empirically and tracing it back to its origins, one is able to witness its creation—and along with it, the historical origins of one of the most important, ongoing quandaries of contemporary human rights. Importantly, the data and the historical narratives that result from such inquiries should be much more able to neutralize the partisan divisions in normative scholarship that so often prevent communication between supporters and critics. Ultimately, the analytic framework advanced here is actually fairly simple: it merely takes what is generally framed as a normative dilemma in human rights scholarship and makes it a factual premise. Thus, when thinking about human rights historically, it is simply an historical outcome in need of a historically-informed, empirically-grounded explanation.

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[86]   *See* ROBERTS, *supra* note 1, at 160–70 (discussing how during the 1940s and 1950s white southern segregationists in the U.S. sought to shape the emergent idea of human rights to accommodate existing discriminatory practices and institutions); Roberts, *supra* note 8, at 211.

[87]   *See* ROBERTS, *supra* note 1, at 160–70; Roberts, *supra* note 8, at 211.

[88]   *See* THOMAS, *supra* note 1, at 262–66; Hathaway, *supra* note 67, at 1945–51; Emilie Hafner-Burton et al., *International Human Rights Law and the Politics of Legitimation: Repressive States and Human Rights Treaties*, 23 INT'L SOC. 115, 123 (2008)

[89]   *See* ROBERTS, *supra* note 1, at 160–70; *see also* Roberts, *supra* note 8, at 211.

V. Constructing a New Framework

Section V of the Article focuses on synthesizing and organizing the new and old assumptions in a way that provides the conceptual scaffolding to guide the historical study. In this Section the topic returns to the broad point-of-entry questions put forth in the Introduction, to see where their answers get us in terms of the historical study of human rights. First, instead of asking which version of the origins story is the correct one, the initial question should be: *Why are there so many vastly divergent founding stories?* Second, before asking *When did human rights emerge?*, it is necessary to ask *When do human rights emerge?* The very process of exploration of these questions actually produces a new analytic framework to guide the historical study of human rights. Ultimately, the end result will be that we are not using historical "facts" as proxies for the third and most important yet generally veiled question: *What are human rights?*

By now it should be clear that a major part of the reason that there are so many vastly divergent founding stories has much to do with the multiplicity of underlying assumptions that guide each of the historical studies in this field. So asking which version of the history is correct and which is incorrect is not actually a question that has much meaning or use until before one looks at the underlying assumptions. For instance, if one is to begin with the starting premise that human rights are interests,[90] the resulting founding story will look quite different than one that begins with the premise that human rights are moral truths.[91] To put another example in chronological terms, if human rights are timeless and universal within one story, that story's historical point of origin will clearly be different than another story in which human rights are presumed to be creations of the mid- or late-twentieth century. The narrative follows the concept. Whether those assumptions are appropriate and whether the historical narrative follows from those assumptions are quite different matters—and are extremely important for evaluating different historical accounts. But simply asking whether or not one version of origins is correct or not does very little if one does not consider *why* and *how* that story of origins was created in the first place.

On the other hand, if scholars are to begin the inquiry with a question about why there are so many vastly divergent stories, the question—as a point of entry—requires us to think about the methods and the assumptions used in the present to construct one of any innumerable pasts. It requires the acknowledgement that histories are always products of past events and present construction. It demands that they look broadly at the body of literature and examine the shared assumptions that unite it, while also taking stock of the specific assumptions that

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[90]   *See* John Finnis, Natural Law and Natural Rights 203–205 (1980)

[91]   *See* Johannes Morsink, Inherent Human Rights: Philosophical Roots of the Universal Declaration 98–111 (2009).

are unique to individual studies that are in question. This new question requires scholars to examine both present methods of construction as well as how they align with the past. The new question also requires us to take each study on its own terms. Doing so, however, is not to put forth the proposition that every study is necessarily "correct" by its own terms. The historical narrative must be a logical outgrowth of the underlying premises and assumptions, which in turn must be appropriate for the purposes of the study. So there is another change in the direction of inquiry that should be incorporated into these debates.

Instead of asking, "When *did* human rights emerge?," it is more productive to begin by asking, "When *do* human rights emerge?" This seemingly subtle shift in the question represents a momentous transformation in how we go about finding the answer. The slight modification in tense transforms the entire inquiry at this point from one that focuses on historical and chronological matters to one that focuses on general principles. Another way of articulating the new question is "Under what conditions do human rights emerge?" or more to the point: "*How* do human rights emerge?"

It is necessary initially to consider the question of origins in theoretical and conceptual terms. Although past events are crucial aspects of any historical narrative, focusing on chronology at the expense of the underlying processes through which human rights are created threatens to stall the production of knowledge. Any inquiry into the past is more than just "doing history." Doing history always requires an underlying theoretical infrastructure that informs the inquiry and guides the narrative. An underlying causal theory, for instance, provides research expectations about sequencing, the influence of historical events, and the important (and unimportant) aspects of the history on which to focus one's attention (or not). Theory and concept, therefore, must rise to the foreground in the historical study of human rights—a need that is amplified by the existence of so many conflicting accounts. It is therefore necessary to approach the many contemporary obstacles we face today in both the practice and the study of human rights in a reflexive capacity. That is, we should address not just the problems themselves, but our own roles in how we collectively and individually define and address those problems as well. This means thinking much more generally about *how* human rights develop and emerge, in general, in order to outline an underlying theory of causation.

Asking a broader theoretical and conceptual question about how human rights, in general, come into being should not be viewed in any way as transforming an historical inquiry into a philosophical or theoretical one. The reason being that the historical inquiry *requires*—at the very least—a minimally defined conceptual framework to structure it in the first instance. Often, though, this underlying theoretical or conceptual structure is implicit and though an integral part of the study, it is permitted to operate silently below the surface. As this Article has been suggesting throughout, with respect to the definitions,

assumptions, and normative starting points that are also often unspoken, the theoretical and conceptual scaffolding must be explicitly stated at the outset.[92]

One of the most basic ways to create this underlying scaffolding is with a simple path diagram. In its most basic from, the causal model, "$x \rightarrow y$" stands for the proposition that a certain outcome or set of outcomes, labeled "y" is the product or influence of a phenomenon, or set of phenomena, labeled "x." Constructing such a basic analytic blueprint—step by step—for the emergence of human rights will be considered for much of the remainder of this Article. The task is to identify what x and y stand for in a way that permits an empirical investigation by drawing on the conclusions outlined in previous sections of this Article.[93] Crucially, as the scaffolding of the eventual historical inquiry into the emergence of human rights, the path diagram must be constructed to accomplish several things: First, the causal model must account for the multiple guises that human rights manifest. In this respect, it is not entirely up to the researcher to select one mutually exclusive or particular definition from the countless ones that are available and in use. Just because he might disagree about what human rights are, that does not mean that he can jettison all of those notions of human rights that are inconsistent with his own views. After all, the many innumerable and conflicting notions of what human rights are represent a key part of its reality, as well as its strength today. The structural framework of an historical inquiry into the origins of human rights at its broadest level should be able to permit the study of the origins of human rights in general—rather than one particular conceptualization of the phenomenon. So instead of selecting one particular, narrow definition to define the object of study, we are interested in the emergence of the multiple and inevitable conflicting guises of human rights as visible outcomes of some process. And instead of trying to sort through the multiple guises of human rights to identify the "correct" manifestation, this causal model is one that accepts the multiplicity of human rights by incorporating the conflict and indeterminacy of meaning into its very framework by viewing it as an outcome of a process or set of processes that must be defined.

PATH DIAGRAM
[?] $\rightarrow$ [Multiple Guises of HR]

Second, it must be constructed in a way that allows full empirical access to the human rights phenomenon as it exists in all of its power. But recall from the previous sections that the inherent power of human rights is what makes them a

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[92]   *See supra* Section II.A.

[93]   *See* Dembour, *supra* note 10, at 6–7.

challenge to study.[94] The inherent normativity, the associations human rights share with consensus, and its often being received as a natural phenomenon, for instance, often precludes empirical analysis. But the key is not to simply reject these things that make human rights difficult to study from an empirical perspective and exclude them from the study. For they are part of the reality of human rights and must therefore be part of its study. It is crucial, however, to empiricize them rather than allow them to block the crucial parts of the analysis. Again, if these aspects of human rights must therefore be presumed to be outcomes—but outcomes of some readily visible and traceable historical process—they will not be able to explain away or obscure the important empirics, *but* they are still an integral part of the research framework. So what this means in terms of creating a path diagram, is that the path diagram must put forth a process through which human rights emerge that can be seen within the historical record, viewed, measured, and assessed within an empirical framework. The solution is to presume that human rights—in any and all of their guises—are products of *human endeavor*.

PATH DIAGRAM
[Human Endeavor] → [Multiple Guises of HR]

Within the causal path diagram, any conception of human rights is now depicted as an outcome of *human action*, rather than as an a priori definition of human rights. This basic, yet radical methodological move offers to solve a number of extremely important problems that scholars of human rights have been grappling with for a long time. For it places back on the table for examination the process through which a natural concept emerges: human forces, great conflict, and struggle.[95] It also places back on the table the process through which consensus emerges: human struggle.[96] It also puts forth a framework in which normative convictions are also outcomes of struggle. All of the innumerable guises of human rights can find their origins in a process of human action that is here referred to as "struggle."

PATH DIAGRAM
[Struggle] → [Multiple Guises of HR]

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94   *See supra* Section II.A.

95   *See generally* ROBERTS, *supra* note 1.

96   *See id.*

The causal model so far shows that we need to look in the historical record for struggle. Good so far, but the path diagram still must be brought down to a level of greater specificity in order to operationalize it. Struggle over what?

Focusing attention now on converting the "Multiple Guises" portion of the path diagram into an empirically tractable representation, one must work towards identifying a "thin conception." Although the multiple guises that human rights embody are often in tension with one another, it is still possible to place them within a very broad, minimally constrained category. It is not appropriate to simply call them "human rights," for that (1) would put us right back where we started, and (2) would not provide us with any additional analytic purchase for operationalizing the model. But a "thin conception" elevates all of the competing definitions collectively to a level of greater categorical abstraction within which they all fit. So we are now seeking an answer to a new question. Instead of asking "Which definition of human rights is the correct one?" the question is now "What do each of these competing definitions represent?" Human rights are at their most basic level about people and how they exist among one another.[97]

PATH DIAGRAM
Struggle → [Representations of Human Relations]

Finally, at this point we have a barebones, structural framework for the historical study of human rights that permits much greater latitude and interaction with the history. It also places within an explicit framework the answer to the question: "What are human rights?" So now instead of allowing the historical narrative to serve as a veiled proxy for an answer to this question, the answer can now be offered explicitly at the outset: *Human rights are representations of human relations that emerge from struggle*. So as opposed to offering a narrow definition that is bound to provoke dissent, this is an extremely broad conception that is probably better referred to simply as an "orientation" or an "approach" to studying human rights.

VI. CONCLUSION

Human rights are a challenging subject of empirical inquiry for a number of reasons. To study the human rights concept, it must be defined explicitly. But because human rights are an extremely broad, nebulous, highly mutable phenomenon, placing a single definition on them for the sake of analytic traction risks transforming the object of study into something it is not—or at the very least

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[97]   A detailed exegesis of the relational theory of rights is beyond the scope and space constraints of this Article. For in depth discussions of the relational aspects of this analytic framework, see *id.* at 44–45; Somers & Roberts, *supra* note 9, at 28–29; Roberts, *supra* note 8, at 249–57.

mitigating the very features that make it what it is. Another key challenge discussed above relates to the fundamental disagreements among scholars about what human rights—as objects of study—actually are. Defining them explicitly therefore risks showcasing deeper, fundamental differences at the outset. As a result, scholars often leave the concept undefined or under-defined, relying instead on common, taken-for-granted assumptions that implicitly define the object of study while circumventing the deeper divergences that always exist about the nature of the human rights concept. The consequences are not immediately discernable or traceable. The underlying disagreements about the concept, though, are often transferred into debates about the empirics. But unspoken—though widely shared—assumptions often substantially hinder empirical engagement by leaving normative positions to define the nature of the data rather than the other way around.

Under the standard approaches, it is presumed that human rights are good and that they benefit the disempowered. From that premise, the gap requires explanation or appears to run counter to the nature of human rights. But the two new premises outlined here provide a new starting point and a new range of phenomena in need of explanation. These premises are: (1) that there will be a gap between outward support for human rights norms and actual human rights implementation, and (2) that human rights can benefit both the powerless *and* the powerful. Together, these points give reason to question a second common and often taken for granted assumption surrounding human rights: their commonly held premise that modern international human rights emerged from *consensus*.

The framework offered above, as well as the new questions that this Article set forth for the subfield, stand to offer a great deal for developing existing understandings of the history of human rights. It also stands to offer a coherent perspective for better understanding all of the conflicting stories of origin within this now-crowded field of inquiry. Finally, it will bring legitimacy and interest to the field from external sources. In particular, those who wish to use history to inform real-world policy decisions regarding human rights will be able to draw upon a mature field of inquiry that employs rigorous and reliable methods to seek answers to its questions.