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## HUMAN RIGHTS HISTORIES<sup>+</sup>

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**Abstract** - This review article considers Samuel Moyn's book *The Last Utopia: Human Rights in History* in the context of recent trends in the writing of human rights history. A central debate among historians of human rights, in seeking to account for the genesis and spread of human rights, is how far current human rights practice demonstrates continuity or radical discontinuity with previous attempts to secure rights. Moyn's discontinuity thesis and the controversy surrounding it exemplify this debate. Whether Moyn is correct is important beyond the confines of human rights historiography, with implications for their meaning in law, as well as their political legitimacy. This review argues that Moyn's book ultimately fails to convince, for two broad reasons. First, a more balanced judgment would conclude that the history of human rights is both one of continuity and discontinuity. Second, and more importantly, Moyn fails to offer a convincing account of the normativity of human rights. Undertaking a history of human rights requires a deeper engagement with debates on the nature and validity of human rights than Moyn seems prepared to contemplate.

**Keywords:** human rights, human dignity, constitutional rights, international human rights, legal history

### 1. Introduction

The history of human rights is a relatively new scholarly discipline, although one that is rapidly expanding.<sup>1</sup> Recent debates within the discipline have tended to focus on identifying the sources of human rights. There are various contenders, each with different proponents. Are the roots of human rights in Stoicism, or do human rights date from the Renaissance and the Reformation?<sup>2</sup> Does human rights discourse have

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<sup>+</sup> A review of Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap Press, hb 2010; reprint ed. pb, 2012).

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<sup>1</sup> See Samuel Moyn, 'Substance, Scale, and Salience: The Recent Historiography of Human Rights' (2012) 8 *Annual Review of Law and Social Science* 123 (hereafter "Moyn, Recent Historiography"), 124: 'Scarcely a decade ago, the field [of human rights history] did not exist at all.'

<sup>2</sup> John M. Headley, *The Europeanization of the World: On the Origins of Human Rights and Democracy* (Princeton University Press, 2007), 67-69.

its origins in the idea of natural rights in the Middle Ages, with the canonists and Roman law to the fore?<sup>3</sup> Is the Enlightenment, culminating in the French and American Revolutions of the late eighteenth century, the critical period,<sup>4</sup> or does our understanding of human rights have its origins in the abolition of the slave trade,<sup>5</sup> or in humanitarian interventions in the latter half of the 19<sup>th</sup> Century?<sup>6</sup> Or is its development an even more modern idea, emphasizing the 1940s and the development of the Universal Declaration of Human Rights in 1948?<sup>7</sup> In *The Last Utopia: Human Rights in History*,<sup>8</sup> Samuel Moyn, an American historian at Columbia University, rejecting all of these explanations, sees developments in the decade of the 1970s as marking the emergence of what we now consider ‘human rights’, constituting a significant break from past understandings.

The history of human rights is now one of the most contested and interesting areas of human rights scholarship. For Philip Alston, ‘there is a struggle for the soul of the human rights movement, and it is being waged in large part through the proxy of genealogy’.<sup>9</sup> That may be an exaggeration (there is also an important debate in political philosophy which might be described in much the same terms, as we shall see), but Alston is right to point to the importance of the historiographical debate for those interested in human rights more broadly.

Many issues swirl around in these recent debates about the origins of human rights. The principal debate at the moment is between continuity and rupture: to what extent is our understanding of human rights a reflection of past uses or is it something new, representing a radical break from these past uses? In this debate, Moyn is firmly in the discontinuity camp. Moyn resists the notion, which he finds in ‘orthodox’

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<sup>3</sup> Contrast Michel Villey, *Critique de la Pensée Juridique Moderne* (first published 1976, Dalloz, 2009) with Brian Tierney, *The Idea of Natural Rights* (Scholars Press, 1997).

<sup>4</sup> Lynn Hunt, *Inventing Human Rights: A History* (Penguin, 2008) (hereafter ‘Hunt, *Inventing Human Rights*’), 64-65.

<sup>5</sup> Jenny Martinez, *The Slave Trade and the Origins of International Human Rights Law* (OUP, 2012) (hereafter ‘Martinez, *Slave Trade*’).

<sup>6</sup> Gary Bass, *Freedom’s Battle: The Origins of Humanitarian Intervention* (Knopf, 2008).

<sup>7</sup> Mary Ann Glendon, *A World Made New* (Harvard University Press, 2001); Johannes Marsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, 2000)

<sup>8</sup> Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap Press, 2010) (hereinafter referred to as ‘Moyn’).

<sup>9</sup> Philip Alston, ‘Does the Past Matter? On the Origins of Human Rights’ (2013) 126 *Harvard Law Review* 2043, 2077.

histories of human rights, that the development of human rights should be seen as linear. In particular, he argues that it is mistaken to see the development of human rights in the late twentieth century as inevitable, resisting a teleological explanation, and pointing to the many contingencies and choices that arose along the way when a different road could have been taken. In Part 2, Moyn's argument is set out and contrasted with 'orthodox' human rights historical accounts.

Moyn's book is refreshingly written, iconoclastic, passionate in advancing its arguments, rightly critical of many past histories of human rights, and provocative. Moyn's work is also an influential contribution to debates about the nature of human rights within the discipline of history and the social sciences.<sup>10</sup> Several scholars of history have regarded it as a 'must read' for those who are concerned to understand the genesis of human rights.<sup>11</sup> Moyn's book has also attracted the attention of legal scholars, some of whom have tended to be broadly sympathetic to the thrust of his argument.<sup>12</sup> The book has also resulted in at least one colloquium, in which Moyn has responded to critics.<sup>13</sup>

In this review article I argue that, even with Moyn's subsequent clarification, *The Last Utopia* ultimately fails to convince, for two broad reasons. First, a more balanced judgment would conclude that the history of human rights is both one of continuity *and* discontinuity; second, undertaking a history of human rights is an enterprise that requires a deeper engagement with debates on the nature and validity of human rights than Moyn seems prepared to contemplate.

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<sup>10</sup> *ibid* 2045.

<sup>11</sup> See, e.g. Devin O Pendas, 'Towards a New Politics? On the Recent Historiography of Human Rights' (2012) 21 *Contemporary European History*, 95, 104 ('the indispensable starting point for any discussion of the history of human rights for many years to come'); William Scheuerman, (2011) 9(1) *Perspectives on Politics* 170 (hereafter 'Scheuerman') ('incisive and sometimes brilliant'); Francesca Klug, (2012) 3(1) *Global Policy* 119 (hereafter 'Klug, *Global Policy*'), 120 ('compelling and original'); John Gray, 'What Rawls Hath Wrought' *National Interest*, January/February 2011, available at <<http://nationalinterest.org/bookreview/what-rawls-hath-wrought-4570>>, (last accessed April 25, 2014) ('brilliantly illuminating', 'seminal study').

<sup>12</sup> E.g. as detailed by Justin Zaremby, 'On the Uses and Disadvantages of History for Human Rights Law' (2012) 15(1) *Yale Human Rights and Development Law Journal* 155, 158.

<sup>13</sup> The colloquium is in (2013) 22(1) *Qui Parle: Critical Humanities and the Social Sciences*, with articles by Pheng Cheah, at 56, Antony Anghie, at 63, and Seyla Benhabib, at 81. Moyn's response, 'The Continuing Perplexities of Human Rights' (hereafter 'Moyn, Perplexities'), is at 96. Thanks to Ananda Burra for this reference.

These criticisms are set out in Parts 3 and 4 respectively. In Part 3, it is argued that the ‘continuity versus discontinuity’ debate presents us with a false dichotomy. Although Moyn is correct to identify several important discontinuities, he underestimates several important continuities. He underestimates the role of dignity in human rights practice (past and present); he underestimates the universal character of ‘constitutional’ and revolutionary, rights; he underestimates the primary importance of domestic actors and mechanisms in the current practice of international human rights; and he underestimates the continuity of human rights borrowing as a prime methodology of how human rights is diffused.

In Part 4, it is argued that Moyn’s greatest failure lies in the absence of any convincing account of the normative power that human rights appear to possess. Human rights history-writing of the kind exemplified by Moyn’s book problematically separates questions to do with the origin and diffusion of human rights from questions to do with their nature and validity. The answer to why human rights became so important lies in part in their normativity. Efforts to locate the origins and explain the trajectory of human rights (to write a history of human rights, in other words) need the orientation that comes from engagement with debates about what human rights are, and how we are to understand their normative force. Historical and philosophical inquiry are inseparable in this regard.

Part 5, concluding, seeks to explain why the debate is important beyond the confines of human rights historiography, considering *en passant* Moyn’s recent defence of *The Last Utopia* against criticisms similar to those made in this review.

## 2. *Competing Human Rights Narratives*

It will be useful to begin by contrasting two competing human rights’ narratives. The first I shall term the ‘orthodox’ narrative. The second, which sums up the main elements of Moyn’s argument in *The Last Utopia*, is appropriately termed a ‘revisionist’ narrative, because its aim is to present an account that challenges what Moyn considers to be the previously dominant (or ‘orthodox’) narrative.<sup>14</sup> Whether

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<sup>14</sup> Moyn is not alone. See, e.g., Stefan-Ludwig Hoffmann (ed), *Human Rights in the Twentieth Century* (Cambridge University Press, 2010) (hereafter ‘Hoffmann’), and a recent symposium on human rights in (2013) 4(2) *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 183-288.

any historian actually presents precisely such a narrative is beside the point;<sup>15</sup> what Moyn is reacting against is a narrative, which he considers to be prevalent, and which he considers to be flawed. Having a sense of what this ‘orthodox’ historical narrative consists in will help us understand how Moyn understands his project.

*A. The Orthodox Narrative: Human Rights’ Foundation Myth*

The bare bones of an ‘orthodox’ narrative (‘foundation myth’ would be another term) might look something like this: in the beginning was the Enlightenment which led to the American and French Revolutions, which led in turn to the adoption of human rights as a necessary part of modernity. Human rights in the Enlightenment had important antecedents in the idea of natural rights in continental Europe and in English constitutional history, but the French and American Revolutions tore the idea of natural rights away from its religious, metaphysical, and local roots. Instead reason, or even Reason, came to be the basis on which a rational, universalized idea of human rights came to be established and spread.

Several of the most prominent social movements in the 19<sup>th</sup> Century were based on this idea of human rights, and the diffusion of human rights during the 19<sup>th</sup> Century in Europe and beyond culminated in the adoption of human rights after the horrors of the Second World War in a set of internationally-binding, legal instruments which increasingly came to be recognized throughout the world as a basis for how states should behave internally towards both their own citizens as well as externally towards others. Those supporting human rights were a broad coalition of states and civil society groups, including religious groups. Their agreement was influenced in particular by the increasing recognition of the Holocaust, rather than because of any particularly well-formed theoretical consensus on philosophical premises, beyond the universalistic idea that the human person should be protected from such horrors simply in virtue of their humanity, an idea that came to be particularly associated with the concept of ‘human dignity’. Not surprisingly, therefore, the scope of what we

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<sup>15</sup> Jenny S Martinez, ‘Human Rights and History’ (2012) 126 *Harvard Law Review Forum* 221 (hereafter ‘Martinez, Human Rights and History’), 237: ‘in a certain sense, Moyn is taking aim at a strawman. No serious scholar subscribes to a narrative of inevitable progress, in which all the streams of the past converge in a mighty river of human rights triumphalism.’

consider to be protected as human rights will expand, as we develop a greater understanding of what it means to be human. The progress of the human rights idea has not, however, been matched by the implementation of human rights in practice, and this is the principal concern on which those who support the idea should now focus.

### *B. A 'Revisionist' Foundation Myth*

Moyn's book is an example of the 'discontinuity school' of human rights history that has emerged since 2000. This school emphasizes the 1970s as marking a decisive shift in the development of human rights theory and practice, rather than any previous period. There are several elements in Moyn's argument that need to be disaggregated. The following sets out the gist of his argument.

It is necessary, first, to distinguish between *international* protection of human rights and the protection of rights at the domestic level, and thus between international law and domestic law. Previous regimes of rights, such as those that flowered in the 19<sup>th</sup> Century, had certain common characteristics that distinguish them from the 'new' human rights that came to fruition in the 1970s. In previous periods, rights were 'part of the authority of the state, not invoked to transcend it.'<sup>16</sup> These rights 'only appeared through the state, and there was no forum above it, or even at times in it, in which to indict the state's transgressions'.<sup>17</sup> '[R]ights were to be achieved through the construction of spaces of citizenship in which rights were accorded and protected.'<sup>18</sup> 'In a sense, every declaration of rights at the time (and until recently) was implicitly what the French openly labeled theirs: a declaration of the rights of man *and citizen*.'<sup>19</sup> They therefore had local meaning rather than universalistic meaning. They were 'deeply bound up with the construction, through revolution if necessary, of state and nation.'<sup>20</sup> 'The 'rights of man' were about a whole people incorporating itself in a state'.<sup>21</sup> States and nations 'became the formative crucible of rights, and their

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<sup>16</sup> Moyn (n 8) 6.

<sup>17</sup> *ibid* 26.

<sup>18</sup> *ibid* 13.

<sup>19</sup> *ibid* 25-26 (emphasis in original).

<sup>20</sup> *ibid* 20.

<sup>21</sup> *ibid* 26.

indispensable ally and forum'<sup>22</sup> '[T]he main remedy for the abrogation of revolutionary rights remained democratic action up to and including another revolution.'<sup>23</sup> Rights 'mainly provided for citizen mobilization not judicial action.'<sup>24</sup> These rights did not provide a 'rationale for foreign or "human" claims against states.'<sup>25</sup> '[I]n the nineteenth century the often heartfelt appeal to the rights of man always went along with the propagation of national sovereignty as indispensable means, entailed precondition, and enduring accompaniment.'<sup>26</sup>

For Moyn, the 'severe interruption in the historical trajectory of the rights of man between the age of revolution and the founding of the United Nations is always omitted from attempts to reconstruct their history as one of uplift because it is an episode that simply will not fit.'<sup>27</sup> There was an exception to this decline of the rights of man: the development of 'another rights tradition between revolutionary rights and human rights ...: civil liberties.'<sup>28</sup> However, civil liberties were 'as different from each of them as they were from one another.' Like 'revolutionary-era rights, civil liberties drew their ideological authority and cultural premises from the nation-state. All of these groups rooted their claims not in universal law but in allegedly deep national traditions of freedom.'<sup>29</sup> Moyn recognizes that '[c]ivil libertarians were part of a common phenomenon that sprouted in different places around the same time, and they were frequently internationalist in their sentiments', but 'they were enough the inheritors of revolutionary-era rights to overwhelmingly restrict not simply their rhetorical appeals to national values but their activism to the domestic forum ... civil libertarians mostly gazed within.'<sup>30</sup> He seeks, but fails to find 'when and why rights incorporated any sort of impulse beyond the nation-state'.<sup>31</sup>

Although the campaign against the slave trade and slavery at home is a possible candidate, it was one among a number of nineteenth century causes that were

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<sup>22</sup> *ibid* 23.

<sup>23</sup> *ibid* 27.

<sup>24</sup> *ibid* 32.

<sup>25</sup> *ibid* 27.

<sup>26</sup> *ibid* 29.

<sup>27</sup> *ibid* 36.

<sup>28</sup> *ibid* 37.

<sup>29</sup> *ibid* 38.

<sup>30</sup> *ibid* 38.

<sup>31</sup> *ibid* 36.

‘almost never framed as rights issues’.<sup>32</sup> Rather, they were the occasion for ‘compassionate aid’.<sup>33</sup> Treaty-based protection of minorities in the nineteenth and twentieth centuries did not provide ‘direct international assurance of individual rights’ but were ‘conceived as group based’.<sup>34</sup> ‘[P]roperty protections remained by far the most persistent and important rights claim in theory and law (including constitutional law) throughout the nineteenth century and modern history’.<sup>35</sup> In the early twentieth century, campaigns in the League of Nations against slavery and forced labour, and trafficking in women and children were ‘culturally specific and politically selective campaigns’<sup>36</sup>. They were not ‘conceptualized around notions of universal rights, and were typically philanthropic causes deployed in a hierarchical world to beat back the illicit practices of foreign peoples, religions, and empires cast as brutal and uncivilized.’<sup>37</sup> Later in the twentieth century, anti-colonialism focused on national liberation and collective economic development, not classical liberties or social rights.

The post Second World War ‘wave of rights in the constitutions of the new states [was] sometimes directly influenced by the Universal Declaration’s catalogue,’ but ‘no immediate postwar rights revolution, in which the history of the constitutions and the history of international human rights were deeply intertwined and drew authority from each other, took place.’<sup>38</sup> The new constitutions, such as that in India, focused on ‘domestic protection of rights, according to traditions of state citizenship.’<sup>39</sup>

‘The main purpose of these constitutions ... was the constitution of sovereignty. (...) The confluence between an earlier tradition of declaring rights and post-colonial constitution-making ... persuasively illustrates the persisting national framework for rights that defined the modern history of the subject ... [This] worked as much to ward off as to prepare the legalization of rights on the international scene. In particular, there is no sense in which these postcolonial constitutional rights interfered with hard-won sovereignty from without.’<sup>40</sup>

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<sup>32</sup> *ibid* 33.

<sup>33</sup> *ibid* 33.

<sup>34</sup> *ibid* 33.

<sup>35</sup> *ibid* 35.

<sup>36</sup> *ibid* 72.

<sup>37</sup> *ibid* 72.

<sup>38</sup> *ibid* 111.

<sup>39</sup> *ibid* 112.

<sup>40</sup> *ibid* 113.

Moyn argues that human rights, properly so-called, concern the protections that individuals receive at the *international* level.<sup>41</sup> The rights involved are *individual* rights, not collective rights. Human rights protections concentrate on ‘classical liberties’ and not collective economic development. The protections accorded protect *rights*; they are not simply attempts to further ‘philanthropic causes.’<sup>42</sup> The idea of human rights also implies ‘an agenda for improving the world, and bringing about a new one in which the *dignity of each individual* will enjoy secure international protection.’ This international protection is achieved through the authority of ‘international law’, and does *not rely on state authorization or enforcement*.<sup>43</sup> The norms in play constitute ‘superordinate rules to which [states] must defer.’<sup>44</sup> They ‘transcend [the] state forum for rights’.<sup>45</sup> Human rights ‘as an idea and a practice’ ‘set[s] itself against’ the idea of states and nations as ‘the formative crucible of rights, and their indispensable ally and forum’.<sup>46</sup> The rights are ‘*universalistic*’.<sup>47</sup> They imply ‘a politics of suffering abroad,’<sup>48</sup> rather than one that focuses internally in a particular state.

It was only in the decade after 1968, according to Moyn, that human rights in this sense became *embedded in people’s consciousness* and in their consciences. The most important institutional manifestation that was both the cause and effect of these developments was the growth of international or transnational social movements revolving around individual rights, creating a ‘popular language of international human rights on the ground.’<sup>49</sup> Most importantly, and central to Moyn’s general thesis about the growth of human rights, is that the idea of human rights as a minimalist utopian project succeeded because it filled a vacuum left after the collapse of previous universalistic, utopian movements, including Christianity, socialism, and anti-colonialism.

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<sup>41</sup> *ibid* 1.

<sup>42</sup> *ibid* 72.

<sup>43</sup> *ibid* 1. See also *ibid* 3: ‘an international law of human rights as the steward of utopian norms, and as the mechanism of their fulfillment.’

<sup>44</sup> *ibid* 111.

<sup>45</sup> *ibid* 20.

<sup>46</sup> *ibid* 23.

<sup>47</sup> *ibid* 7.

<sup>48</sup> *ibid* 12.

<sup>49</sup> *ibid* 66.

Moyn insistently tells his readers that the term ‘human rights’ was invented in the 1970s or, more precisely still, in 1977. The 1970s, he asserts, marked a sea change in our understanding of human rights, both conceptually and as practiced. It is the coming into existence of Amnesty International in 1961, its adoption of a minimalist human rights agenda based on the international legal protection of individuals outside one’s own country, its development (together with other non-governmental organizations) of an ‘anti-politics’ of human rights, its creation of a mass movement of engaged individuals, and its transcendence of past causes and ideologies, ‘severing obvious links to the immediate postwar framework’, that characterize the ‘new’ human rights.<sup>50</sup> For Moyn, Amnesty International, and President Jimmy Carter’s adoption of an ethical foreign policy based on securing human rights, brought into existence the human rights ideal that would become, as Moyn has subsequently put it, ‘hegemonic’.<sup>51</sup>

### 3. *A Critique of Moyn’s Discontinuity Thesis*

In this section of the review article, I turn to consider Moyn’s approach more critically. I argue that the ‘continuity versus discontinuity’ debate presents us with a false dichotomy. Although Moyn is correct to identify several important discontinuities, he underestimates several critically important continuities. He underestimates the role of dignity in human rights practice (past and present); he underestimates the universal character of ‘constitutional’ and revolutionary, rights; he underestimates the primary importance of domestic actors and mechanisms in the current practice of international human rights; and he underestimates the continuity of human rights borrowing as a prime methodology of how human rights is diffused.

#### *A. Moyn’s Utopia*

We need to begin, however, with a brief consideration of Moyn’s argument that the human rights project ‘is a recognizably *utopian* program: for the political standards it champions and the emotional passion it inspires, this program draws on the image of a

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<sup>50</sup> *ibid* 131.

<sup>51</sup> Moyn, *Perplexities* (n 13), 110.

place that has not yet been called into being.’<sup>52</sup> John Gray has suggested that it is unclear which sense of utopianism Moyn adopts. Gray distinguishes between two different senses: a utopian project that aims to bring about a different society than exists at the moment, but is nevertheless achievable, such as the abolition of slavery in the 19<sup>th</sup> Century; and an alternative project which is such that ‘it can be known in advance that its central objectives cannot be realized ... [either] because these aims are impossible in any human society, or because they cannot be achieved in particular communities in any future that can reasonably be anticipated.’<sup>53</sup>

Beyond describing human rights as ‘utopian’, however, Moyn is not forthcoming about his own theoretical perspectives, and seems particularly unreflective as regards the preconceptions about the nature of the concept of human rights that he brings to his project. In his (relatively few) references to current human rights theory, he skates over the finely grained distinctions currently entertained by philosophers. These might be entirely forgivable limitations in an historical essay of a purely narrative variety, were it not for the fact that we have seen that there are elements in his description that already hint at an underlying philosophy of human rights. Indeed, from a close reading of the book, a relatively clear philosophy emerges, although it must be conceded that there is a significant degree of reconstruction necessary in order to formulate the elements of his theory.

Moyn’s (implied rather than articulated) philosophical understanding of human rights is essentially this: The human rights project consists of a *utopian* and *moralistic* movement seeking to advance a set of *minimalist* standards, the aim of which is to secure the advancement of *human dignity*. The human rights project seeks to achieve this through essentially international, anti-political, non-programmatic activity, transcending the nation state as the central source and guarantor of a set of rights, which are global, legally enforceable, and framed in universalistic terms.

Based on this, Moyn’s thesis appears to depend on an understanding of human rights as utopian in the first of Gray’s two senses. Moyn refers to the ‘minimalism’ of human rights as central to its success in the 1970s.<sup>54</sup> The minimal nature of human rights, according to Moyn, has to do with their representing a set of limited standards

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<sup>52</sup> Moyn (n 8) 1 (emphasis added).

<sup>53</sup> Gray (n 11).

<sup>54</sup> Moyn (n 8) 135, 148, 172, 221, 223, 226.

for political conduct on the part of the state, rather than a complete or rich social ideal (such as nationalism or socialism) that would require massive social upheaval. We know that Moyn's minimalist approach to human rights would exclude a right to development, and a right to self-determination, and probably (although not so clearly) socio-economic rights; it would also not seek to be programmatic or to set out a comprehensive political agenda. Moyn's minimalist approach focuses primarily on particular civil and political rights, and on preventing genocide.

### *B. Moyn and Human Dignity*

There is a significant debate in the current philosophical literature as to whether any foundational principle is necessary in order to provide a full description of these or any other list of human rights.<sup>55</sup> This is not the place to debate that question. My point here is that, whether or not a foundational principle is *necessary*, Moyn appears in practice to identify such a principle as central to his thick description. That is, he appears (at least on one reading of the book) to indicate that there is a way of identifying the appropriate core of human rights minimalism on the basis of a meta-principle underpinning the minimal.

Furthermore, he appears (on this reading of his book) to consider that the best candidate for such a meta-principle is the concept of 'human dignity.' A persistent aspect of his narrative depends on there being a foundational principle of some sort. In his Prologue, Moyn identifies what he considers 'people' think about when they hear the phrase 'human rights'. We have already seen that the phrase implies, for Moyn, 'an agenda for improving the world, and bringing about a new one in which the *dignity of each individual* will enjoy secure international protection.'<sup>56</sup> A little later he writes that: 'There is no way to reckon with the recent emergence and contemporary power of human rights without focusing on their utopian dimension: the image of another, better world of *dignity* and respect that *underlies their appeal*.'<sup>57</sup> Moyn recognizes that the rights included in the UDHR were based 'on the foundation

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<sup>55</sup> John Tasioulas, 'Human Dignity and the Foundations of Human Rights' in Christopher McCrudden (ed), *Understanding Human Dignity* (Proceedings of the British Academy 192, Oxford University Press for the British Academy, 2013) (hereinafter McCrudden, *Understanding Human Dignity*) 291.

<sup>56</sup> Moyn (n 8) 1 (emphasis added).

<sup>57</sup> *ibid* 4 (emphasis added).

of human dignity,<sup>58</sup> and at several points either he (or others whom he quotes) uses the term in this foundational sense. ‘Dignity’ features fourteen times in various formulations throughout the book, by itself, or as ‘human dignity’, or as ‘personal dignity,’ in each place as a meta-principle that unpins human rights and not simply as another term to describe ‘human rights’.<sup>59</sup> Indeed, several of the key individuals that Moyn identifies as central to the ‘break through’ of human rights in the 1970s in the United States, appear at that time to have adopted the concept of ‘human dignity’ as their favoured foundational principle, including Alice Henkin, whom Moyn describes, somewhat surprisingly, as ‘influential’ in the new movement.<sup>60</sup>

On this reading, the concept of ‘dignity’ met an (unarticulated) intuition that there was a need to identify a foundational utopian principle, and the human rights movement uses the concept of human rights instrumentally to achieve the realization of this more foundational principle. It is clear that if ‘human dignity’ is the foundation for the ‘new’ human rights, and if dignity was also the basis for earlier understandings of rights, that would provide a strong connection between the human rights movements of the 1970s, the post-War push for the Universal Declaration on Human Rights in which the concept of dignity played such a significant role, and the development of emancipatory campaigns in the 19<sup>th</sup> Century. Indeed, the linkage between human rights and human dignity arguably also provides a connection between human rights and the much older concept of ‘natural rights’. Moyn refers to Myres McDougal’s use of ‘dignity’ as an example of ‘old fashioned naturalism in disguise’.<sup>61</sup>

This is only one reading of Moyn’s argument. This reading is not consistent with other parts of the book in which he appears to suggest that no foundational principle is identifiable, and that the substance of human rights was a contingent patchwork of diverse claims.<sup>62</sup> Indeed, his emphasis in the main is on the varied

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<sup>58</sup> *ibid* 63.

<sup>59</sup> E.g. *ibid* 82, 118, 128, 163.

<sup>60</sup> *ibid*, 204. The title of a book edited by Alice Henkin in 1978 was *Human Dignity: The Internationalization of Human Rights* (New York, 1978), although ‘dignity’ does not feature in the text of the book itself, and my argument does not depend on ‘dignity’ being central to the US human rights developments of the 1970s.

<sup>61</sup> *ibid* 195.

<sup>62</sup> *ibid* 17: ‘the concerns now addressed through a unified package of “human rights” have their own histories, with different chronologies and geographies, incubated as they were in separate traditions and for different reasons.’

nature of the political projects that rights discourse serves, a functional analysis of human rights. This reading is also inconsistent with Moyn's principal thesis that the human rights movement of the 1970s was a new movement, one whose development was characterized by discontinuity, rather than continuity. There is an alternative reading, therefore, one that Moyn himself appears to have adopted subsequently: that he had no well worked out theoretical understanding of human dignity prior to writing the book, and that his reference to dignity is largely inadvertent and shows no serious commitment to viewing it as foundational.<sup>63</sup> On this reading, it was only after the book was published that Moyn seriously turned to consider the role of human dignity and its place in the history of human rights. After the book was published, Moyn's argument has been much more straightforwardly rejectionist of the use of dignity as a significant element in the historical narrative,<sup>64</sup> and there are indications of Moyn's subsequent position in the latter portions of the book itself.

Accepting the second reading as the more accurate reading, even if makes his earlier resort to dignity somewhat confusing, how then does Moyn explain away the uses of human dignity in human rights discourse, since a strong role for dignity as a thread cannot coexist with Moyn's discontinuity thesis? While Moyn accepts that 'human dignity' was the basis for movements in the past that might look to the uninformed eye like proto-human rights movements, and featured in the drafting of the Universal Declaration on Human Rights, he argues that the dominant use of dignity in human rights discourse arose from the influence of Catholic personalism in Europe in the 1930s and 1940s. Thus, after the first two references to dignity in the Prologue of *The Last Utopia*, dignity is subsequently referred to almost entirely in the

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<sup>63</sup> In correspondence arising from his comments on an earlier draft of this article (email correspondence on file with author), Professor Moyn accepts 'that there is a residue of reference to "dignity" in which I inadvertently register its importance ... it would be wrong to saddle me with any serious commitments in regards to the relation between dignity and rights or the history of human dignity since my thinking about it was non-existent when I wrote the book.'

<sup>64</sup> Moyn has subsequently published several articles and comments on the history of 'human dignity' which further illustrate his hardening of attitude towards the use of dignity, based on his view that dignity may have become 'too controverted to be available ... for useful invocation.' See Samuel Moyn, *The Secret History of Constitutional Dignity*, in McCrudden, *Understanding Human Dignity* (n 55) 95 (reprinted in a longer form in Samuel Moyn, 'The Secret History of Constitutional Dignity' *Yale Human Rights and Development Law Journal* (forthcoming)), and Samuel Moyn, *Dignity's Due*, *The Nation*, October 15, 2013, available at: < <http://www.thenation.com/article/176662/dignitys-due#>>, last accessed April 25, 2014 (hereafter 'Moyn, Dignity's Due').

Catholic personalist<sup>65</sup> or European contexts,<sup>66</sup> enabling him to confine and cabin the concept. Catholic personalism was conservative and ‘spiritualist’<sup>67</sup> and thus incapable of grounding the human rights movement of the 1970s that was progressive and secular.<sup>68</sup> Emphasizing the European context also enables Moyn to develop clear blue water between the flowering of the *global* human rights movement in the 1970s and the earlier growth of the European human rights movement built on the European Convention on Human Rights, seeing the latter as a throwback to the Catholic personalist past, and therefore distinct from the new international movements of the 1970s.

His argument that there is a sharp distinction between the earlier uses of dignity and the later uses of dignity is, however, unconvincing,<sup>69</sup> in at least two respects. First, the Catholic personalist use of dignity and its use in ensuring Catholic support for human rights did, indeed, play a significant role in the development of the Universal Declaration and its subsequent understanding, and it was indeed a potentially conservative movement. But it also had the potential to become a progressive movement, and its progressive side did indeed emerge after the Second Vatican Council in the 1960s, and this, in turn, fed into the developing (secular) human rights movement that came to fruition in the 1970s. It is not coincidental that several of those that Moyn himself identifies as icons of the ‘new’ human rights movement in the 1970s were influenced by Catholic social thought, notably the founder of Amnesty International (Peter Benenson<sup>70</sup>), the founder of the International

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<sup>65</sup> Moyn (n 8) 50, 65, 67.

<sup>66</sup> *ibid* 209-10; 218.

<sup>67</sup> *ibid* 209-10.

<sup>68</sup> That this is indeed a reasonable reading of his book is confirmed by his subsequent discussion of the distinction between the ‘original’ meaning of dignity in the Preamble of the 1937 Constitution of Ireland - *Bunreacht na hÉireann*, and its current use in human rights discourse, see Moyn (n 64), in McCrudden, *Understanding Human Dignity* (n 55).

<sup>69</sup> There is now a growing literature on this issue, to which I have contributed, see Christopher McCrudden, ‘Human dignity and judicial interpretation of human rights’ (2008) 19 *European Journal of International Law* 655. For an overview of the current debates, see Christopher McCrudden, ‘In Pursuit of Human Dignity: An Introduction to Current Debates’ in McCrudden, *Understanding Human Dignity* (n 55) 1.

<sup>70</sup> Fredrick M. Shepherd, Introduction, in Fredrick M. Shepherd (ed), *Christianity and human rights: Christians and the struggle for global justice* (Lexington Books, 2009), xiii, describing how ‘strong religious convictions were central to Peter Benenson’s decision to engage in human rights activism and, ultimately, to found Amnesty International.’

Commission of Jurists and one of the leading lights of Amnesty (Séan MacBride<sup>71</sup>), as well as leading lights in the human rights movements in central Europe in the 1980s (Václav Havel<sup>72</sup>).

Second, there is also historical evidence (I put it no higher than that) that the linkage between the use of dignity language and rights was not limited to the mid-twentieth century European and Catholic personalist contexts to which Moyn seeks to confine it.<sup>73</sup> Although the history of dignity has yet to be written, there is evidence that grass roots movements for reform in the 19<sup>th</sup> and 20<sup>th</sup> Centuries, in places as diverse as the United States, Russia, and South America, and arising in such different contexts as the labour, abolitionist, feminist, anti-racist, and anti-colonial movements, all used the concept of dignity, sometimes combining it with references to human rights. These movements spread well beyond the European theatre, and were not confined primarily to the 1930s and 1940s. In concentrating on elite texts and orthodox politics, Moyn underestimates the extent and depth of this connection. His bold claim that ‘when the French Revolution and the struggle for the freedoms of blacks, women and workers won across the nineteenth century, no one said it was because of human dignity’,<sup>74</sup> is patently false. There are numerous examples of the language of dignity being used in support of the abolition of the slave trade in France<sup>75</sup> and Latin America,<sup>76</sup> the emancipation of the serfs in Russia,<sup>77</sup> women’s

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<sup>71</sup> Anthony J. Jordan, *Seán MacBride: A Biography* (1993, Dublin: Blackwater Press).

<sup>72</sup> Allan White OP, ‘Magna est Veritas et praevalerebit’ (1990) 71, Issue 837, *New Blackfriars* 194, 199, discussing at length ‘Havel’s personalist programme’.

<sup>73</sup> Rebecca J Scott, ‘Dignité/Dignidade: Organizing against Threats to Dignity in Societies after Slavery’ in McCrudden, *Understanding Human Dignity* (n 55) 61.

<sup>74</sup> Moyn, *Dignity’s Due* (n 64).

<sup>75</sup> Preamble to the 1848 Decree abolishing slavery in the French Empire, 27 April 1848, *Moniteur universel*, 2 May 1848, 921 (‘Considering that slavery is an assault on human dignity ...’).

<sup>76</sup> Simon Bolivar, Message to the Congress of Bolivia (Lima, 25 May 1826): slavery was denounced as a ‘shameless violation of human dignity’, quoted in Paolo Carozza, ‘From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights’ (2003) 25 *Human Rights Quarterly* 281, 300

<sup>77</sup> See, e.g., ‘Declaration of Alexander II Emancipating the Serfs (March 3, 1861)’, reprinted in translation in James Harvey Robinson and Charles Beard (eds), *Readings in Modern European History* (Boston, Ginn and Company, 1908), vol. 2: ‘Russia will not forget that the nobility, actuated solely by its respect for the dignity of man and its love for its neighbours, has spontaneously renounced the rights it enjoyed in virtue of the system of serfdom now abolished.’

rights in Europe,<sup>78</sup> workers' rights in France<sup>79</sup> and Russia,<sup>80</sup> socialism,<sup>81</sup> and in the context of the anti-colonial struggle in South America.<sup>82</sup>

Indeed, there is some support for the idea that 'dignity' may have provided a conceptual 'lynch pin' between rights and their legal protection as human rights at this much earlier period than Moyn cares to acknowledge.<sup>83</sup> Moyn writes that the 'emergence of specific rights by no means explains how they were reinterpreted as part of a fused list, and then made into 'human rights' later still.'<sup>84</sup> But it is in the period between the early 1800s and the end of World War II that we see the development and spread of the concept of human dignity that Moyn sees as having come to define the underlying purpose of human rights, when he identifies the aim of the 'new' human rights as being to achieve the protection of 'the dignity of each individual'.<sup>85</sup> That concept is, as we have seen, a *leitmotiv* of his book. But he fails to join the dots. In particular, when he writes, speaking of the 'broken history' of human rights (meaning the supposed retreat from rights in the 19<sup>th</sup> Century), that the 'true key' 'is the move from the politics of the state to the morality of the globe' he fails to recognize that this move can be identified in the nineteenth and early twentieth centuries using 'dignity' as a common language in which to express normativity.<sup>86</sup>

Ignoring the domestic history of rights during the nineteenth and early twentieth centuries means missing out the development of a critical concept that itself

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<sup>78</sup> Sylvia Palatschek and Bianka Pietrow-Ennker (eds), *Women's Emancipation Movements in the Nineteenth Century* (Stanford University Press, 2004) 88, 177, 260.

<sup>79</sup> John M Merriman, *The Red City: Limoges and the French Nineteenth Century* (OUP, 1985) 75.

<sup>80</sup> Mark D Steinberg, 'Vanguard Workers and the Morality of Class' in Lewis H Siegelbaum and Ronald Grigor Suny (eds), *Making Workers Soviet: Power, Class and Identity* (Cornell University Press, 1994), 66, 69, 72, 74, and 75. For examples of the importance of 'dignity' in 19<sup>th</sup> Century Russian literature and philosophy, see G.M. Hamburg and Randall A Poole (eds), *A History of Russian Philosophy 1830-1930: Faith, Reason, and the Defence of Human Dignity* (Cambridge University Press, 2010).

<sup>81</sup> Garibaldi expressed sympathy for incipient socialism in 1871, seeing it mainly as "a sentiment of justice and human dignity", quoted in Alfonso Scirocco, *Garibaldi: Citizen of the World: A Biography* (Princeton University Press, 2007), xi.

<sup>82</sup> Jeremy Adelman, *Sovereignty and Revolution in the Iberian Atlantic* (Princeton University Press, 2006) 187, 208.

<sup>83</sup> Jeffrey Flynn, 'Human Rights in History and Contemporary Practice: Source Materials for Philosophy' in C. Corradetti (ed.), *Philosophical Dimensions of Human Rights: Some Contemporary Views* (Springer, 2012), 1, 17 discussing Jürgen Habermas, 'The concept of human dignity and the realistic Utopia of human rights' (2010) 41(4) *Metaphilosophy* 464.

<sup>84</sup> Moyn (n 8) 17.

<sup>85</sup> *ibid* 1.

<sup>86</sup> On 'normativity', see below, section 4.

embodies both continuity and discontinuity: continuity, in embodying a core understanding of the value of the human person; discontinuity, in the different ways in which that value is understood and protected. Indeed, to generalize the point, with some notable exceptions,<sup>87</sup> human rights histories appear not to recognize sufficiently the connection between the concept of human dignity and the concept of human rights and therefore miss the critical importance of the nineteenth and early twentieth centuries in the spread of this central pillar in the ideology of human rights activism that flowered in the later part of the twentieth century. More recent historical work is beginning to generate support for this hypothesis,<sup>88</sup> but my purpose here is not to argue that any necessary foundational connection between human rights and dignity has been established, nor (again) to suggest that one or more foundational meta-principles are a necessary part of the architecture of understanding human rights. Instead, I aim merely to highlight how Moyn underestimates the extent to which the ‘new’ human rights in practice share significant value continuities with what went before, and thus to point to a potential path of inquiry that could be more thoroughly explored in further work.

### C. Moyn and Internationalism

For Moyn, upholding human rights requires ensuring that ‘the dignity of each individual will enjoy secure *international protection*.’<sup>89</sup> Moyn’s approach here, as we shall see subsequently is the case in other respects as well, is strongly reminiscent of John Rawls’ view that breaches of rights become *human rights* violations only in so far as they justify *international intervention*, leading to Rawls’ strong distinction between ‘constitutional rights’ and ‘human rights’, with only the latter having the

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<sup>87</sup> A prominent recent example is Hans Joas, *Die Sakralität der Person. Eine neue Genealogie der Menschenrechte* (Suhrkamp, Berlin 2012) translated as *The Sacredness of the Person: A New Genealogy of Human Rights* (Washington DC, Georgetown University Press, 2013) (hereafter ‘Joas, Sacredness’). See also Jean H Quataert, *Advocating Dignity: Human Rights Mobilizations in Global Politics* (Philadelphia, University of Pennsylvania Press, 2009).

<sup>88</sup> Joas (n 87), chapter 3 ‘Violence and Human Dignity: How Experiences Become Rights’.

<sup>89</sup> Moyn (n 8) 1, emphasis added.

requisite degree of international involvement.<sup>90</sup> But Moyn's (unintentional?) adoption of the distinction that Rawls sought to emphasize between 'constitutional' rights and 'human' rights means that Moyn's argument falls into some of the same problems that Rawls' approach encounters. James Griffin is surely right that 'the point of human rights' go beyond Rawls' idea of human rights as merely establishing 'rules of war and conditions for justified intervention.'<sup>91</sup> For Griffin, human rights 'quite obviously have point intra-nationally,' as I shall now explain.

The 'new' human rights practice that Moyn argues came into existence in the 1970s never operated under Moyn's constraint that it be 'international' in the sense of aiming to transcend the nation state as guarantor of human rights. The distinction between 'international human rights' and 'constitutional rights' has become fuzzy and indistinct, particularly in those jurisdictions that enacted their constitutional rights protections after World War II (which is the bulk of states). Since 1945, 'domestic constitutional orders [are] shaped in part by demands that state reconstruction be negotiated within a framework that recognizes and implements particular forms of the range of available transnational human rights'.<sup>92</sup> At least in these states, it is clearly envisaged that the first port of call for effective implementation of *international* human rights norms is to be at the *domestic* level. In several human rights treaties, there are provisions that require the ratifying state to implement the treaty effectively in the country's domestic law.<sup>93</sup> Also, whilst some human rights treaties provide for independent international supervisory mechanisms and procedures for ruling on complaints, as a general rule those complaining must have exhausted domestic remedies before being able to complain successfully. Increasingly, too, in several jurisdictions, domestic courts have regard to international legal norms that have not even passed the test of formal validity for that legal system.

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<sup>90</sup> John Rawls, *The Law of Peoples* (Harvard University Press, 1999) (hereafter 'Rawls'). Rawls is not alone. Joseph Raz and Charles Beitz also appear to focus on human rights as operating in the context where international intervention would be justified, see Joseph Raz, 'Human Rights Without Foundations' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP, 2010), chapter 15, 321; Charles Beitz, *The Idea of Human Rights* (OUP, 2009) (hereafter 'Beitz').

<sup>91</sup> James Griffin, *On Human Rights* (OUP, 2009), at 343.

<sup>92</sup> Heinz Klug, 'Transnational Human Rights: Exploring the Persistence and Globalization of Human Rights' (2005) 1 *Annual Review of Law and Social Science* 85, 93.

<sup>93</sup> E.g. International Covenant on Civil and Political Rights (1966), article 2.

Moyn generally underestimates the extent to which international human rights law currently depends, and is seen to depend, on building successful *national* processes. International human rights have consistently been seen as complementing national developments rather than transcending them. Practices that are central to the operation and interpretation of human rights at the international level, such as the requirement to exhaust domestic remedies, the wide discretion given by those interpreting and enforcing international human rights law to state decision-making, the ability of states through reservations to tailor the obligations being taken on to their local situation, all these indicate the important continuing role of the state, and also their role as the appropriate first line of defence of human rights.

Nor is the resort to ‘international protection’, when it does occur, one primarily driven by an ideology that seeks to ‘transcend’ the nation state. Although international movements have undoubtedly played a critical role in popularizing and embedding human rights, Moyn tends to ignore the significant instances where major developments in international human rights were made by the adoption by local and international organizations of international human rights tools, not because of any commitment to utopian internationalism, but as a practical response to the failure of the domestic institutions to address their complaints. In practice, with the exception of a handful of individuals and groups, the use of international human rights law is a pragmatic response to the failure of domestic remedies, and not based on any principled desire to ‘transcend’ the nation state.

Are these points compatible with Moyn’s claim that the ‘new’ human rights are essentially international rights, in the sense that they are rights that individuals have to international protection, even though that protection may be seen as a last resort, and even though states are accorded a primary role in protection, and even though resort to international standards is often pragmatic rather than ideological?

Moyn might respond that his argument can accommodate the idea that the requisite international protection may be protection as a last resort, but this seems unconvincing: with the notable exception of the European regional arrangements (which, ironically, he marginalizes), the role of international action has become so minimal in actual practice in the vast majority of cases that it makes little sense to think of them as primarily rights to international protection in any strong sense of intervention that seeks to trump national sovereignty. Moyn might respond further,

however, that since (as I've suggested) his argument in general is similar to that of Charles Beitz and Joseph Raz, and since they include within the idea of 'intervention' an expansive idea that would include formal criticism, that is all he (Moyn) meant to include also. As John Tasioulas has pointed out in his criticism of Raz, however, it is hard to understand how mere criticism gives rise to any challenge to national sovereignty,<sup>94</sup> bringing us back to my criticism that the view that human rights 'transcend' the state in general or in (most) particular cases seems a misguided understanding of current human rights practice.

There is another possible response to my argument, which is that I have misunderstood what, precisely, Moyn means by 'international' protection. There is an important ambiguity as to what is meant by 'international' in much of the book, despite its centrality to his thesis. There are several possible meanings. In the first meaning, for protection to be 'international' may require that it be provided by other than a particular nation state; 'international' in that sense means more like 'supra-national,' and in the previous paragraphs that is the sense that I have assumed that Moyn intends. In the second meaning, 'international' envisages some form of arrangement between nation states; it is 'inter-national'. In the third sense, 'international' means something more like 'transnational', in the sense that there is a movement across borders, but without any need for any 'international' element to be involved in the first or second senses of the term. Lastly, 'international' can mean something closer to 'global', in the sense that coverage stretches round the world.

Moyn glides too easily between these different uses of the term, leaving a significant degree of uncertainty in his wake. In most cases, he refers to the human rights development he regards as 'new' as one arising at the 'international' level (undefined). On other occasions, however, he refers to the 'utopia of *supranational* governance through law',<sup>95</sup> to the '*supranational* values encapsulated in the new human rights',<sup>96</sup> to 'the evolution of *supranational* human rights mechanisms, for example at the United Nations and in the European region'.<sup>97</sup> On yet other occasions,

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<sup>94</sup> John Tasioulas, 'Towards a Philosophy of Human Rights' (2012) 65 *Current Legal Problems* 1, 22-24 (hereafter 'Tasioulas, Towards a Philosophy of Human Rights').

<sup>95</sup> Moyn (n 8) 81.

<sup>96</sup> *ibid* 90.

<sup>97</sup> *ibid* 122.

he refers to ‘human rights as a powerful *transnational* ideal’,<sup>98</sup> as ‘a set of *global* political norms providing the creed of a *transnational* social movement’,<sup>99</sup> the ‘crystallization of *transnational* human rights activities’ around the Helsinki process,<sup>100</sup> and the ‘*transnational* human rights movement’.<sup>101</sup> Perhaps the best example of the way in which these terms are used willy-nilly, interchangeably, but without clear definition, is where he refers to the ‘role [of] *international* rights norms’ in ‘how nation-states and *supranational* organizations sought public legitimacy’, then referring to the ‘*global* human rights revolution’.<sup>102</sup>

This shifting between terms that are clearly related but potentially distinct may seem just like slippery-ness, but it is a rather calculated slippery-ness. It enables Moyn to adopt different senses of ‘international’ when it suits his purposes. Historical evidence of a strong *transnational* movement of rights consciousness across borders in certain periods is available, such as in the mid-19<sup>th</sup> Century,<sup>103</sup> the inter-War years, and after 1945, but these do not, apparently, amount to an ‘international’ development of the type that Moyn argues happens in the 1970s. But the ‘transnational’ relationship between NGOs that occurs in the 1970s does. The incorporation of universalistic norms (such as religiously-based principles) in European constitutions in the 1930s is not ‘international’ presumably because it depends on national enforcement, but sustained NGO activity to secure the enforcement of universal norms by the United Nations is part of the developments that are seen as developing ‘international’ human rights in the 1980s, even though the UN bodies that were appealed to were often made up of representatives of the nation states.

As in the previous section, my aim in this section is not to argue for a particular conceptual relationship between ‘human rights’ and ‘international protection’, but rather to point to the difficulties that Moyn faces in justifying his argument that the ‘new’ human rights has a different relationship with the notion of ‘international protection’ to that adopted in earlier understandings of human rights.

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<sup>98</sup> *ibid* 7.

<sup>99</sup> *ibid* 11.

<sup>100</sup> *ibid* 172.

<sup>101</sup> *ibid* 174.

<sup>102</sup> *ibid* 218.

<sup>103</sup> Martinez, *The Slave Trade* (n 5); Martinez, *Human Rights and History* (n 15), 235; Joas (n 87).

#### D. Moyn and Universalism

I have suggested in the previous section that the ‘new’ international human rights movement is less ‘international’ in its orientation than Moyn supposes. In this section, I suggest that the ‘old’ systems of rights protections were also less ‘local’ and particularistic than he asserts. These older developments didn’t presage the human rights developments of the 1970s, Moyn says, because ‘no one has so far discovered any additional, popular language of international human rights on the ground in these years anywhere in the world.’<sup>104</sup>

This is highly questionable. We have already seen that ‘dignity’ may have played an important role in supplying a language of universality but, leaving that aside, there is also evidence in the United States<sup>105</sup> and Haiti<sup>106</sup> of significant universalistic human rights language not explicitly using ‘dignity’, but embracing something close. Perhaps the best example is also the most obvious. In speaking of slavery and related issues, it was not uncommon to speak of human rights.<sup>107</sup> Indeed, in 1806 Thomas Jefferson, in his message to Congress, referred explicitly to ‘the violation of *human rights*, which has been so long continued on the unoffending inhabitants of Africa, and which the morality, the reputation and the best interests of the country have long been eager to proscribe.’<sup>108</sup> If this is hardly vernacular use, then consider how, in 1836, Reuben Crandell was indicted for publishing libels tending to

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<sup>104</sup> Moyn (n 8) 66.

<sup>105</sup> Richard A Primus, *The American Language of Rights* (Cambridge University Press, 1999) 88-89 examines in detail American debates at the beginning of the 19<sup>th</sup> Century on the place of natural rights and natural law as sources of the U.S. Constitution, considering how far they were based on universalistic understandings. For an important example of this debate in the U.S. courts, see *Calder v Bull*, 3 U.S. 386 (1798).

<sup>106</sup> See, especially Robin Blackburn, *The American Crucible: Slavery, Emancipation and Human Rights* (Verso, 2013), chapter 14. See also Ada Ferrer, ‘Haiti, Free Soil, and Antislavery in the Revolutionary Atlantic’ (2012) 117(1) *American Historical Review* 40, 52, where local Haitian courts are described as having been given the role of applying ‘the rights of man’. Ferrer comments: ‘national law would have a duty to universalize rights.’

<sup>107</sup> Moyn, *Substance, Scale, and Salience* (n 1) 131 repeats the argument that ‘rights claims figured only very marginally in’ anti-slave activism, although this claim now seems to refer to international legal rights claims. The ambiguity of what ‘international’ means in this context is explored below.

<sup>108</sup> Sixth Annual Message of President Jefferson to the Ninth Congress, December 2 1806, available at: <<http://www.presidency.ucsb.edu/ws/index.php?pid=29448>> (last accessed April 25, 2014). This is not to suggest that the term ‘human rights’ as Jefferson uses it is simply synonymous with current understandings of the term, on which see Hunt, *Inventing Human Rights* (n 4) 22.

excite sedition among slaves and ‘free coloured persons’.<sup>109</sup> This consisted of a plan to ‘promulgate the *doctrine of human rights* in high places and low places, ... till it forms one of the foundation principles and parts indestructible, of the public soul.’ He ends his plea: ‘I desire peace; the peace of universal love; of catholic sympathy; the peace of *common* interest; a *common* feeling, a *common* humanity. But so long as slavery is tolerated, no such peace can exist.’

In the courts, too, the relationship between universalistic ‘rights’ language and slavery was particularly evident, and it is surprising that Moyn pays so little attention to this rich resource. Three examples must suffice. *The Amistad* case (one of the most important cases in the 19<sup>th</sup> Century United States Supreme Court) concerned a freedom suit by a group of Africans.<sup>110</sup> The group comprised kidnapped Africans who had taken over a slave ship that was transporting them across the Atlantic. The vessel was discovered in American waters and the Africans brought to shore. Various parties sought to have the federal courts restore the Africans to them as their property. The Africans denied that they were slaves or property, and that the court should refuse the claims. One of the lawyers, Roger Sherman Baldwin, argued that ‘delivering them up to their oppressors’ would make the United States ‘accessories to ... atrocious violations of *human rights*’. John Quincy Adams, also acting for the Africans, drew likewise on a human rights argument, mentioning the term ‘human rights’ three times, twice as central elements in critical sections of the speech.<sup>111</sup>

The second example concerns the *Quock Walker case (Commonwealth v. Jennison)*, one of the earliest Massachusetts cases concerning the status of slavery under state law. In his instructions to the jury, Chief Justice William Cushing held that the constitution granted rights that were incompatible with slavery. His instructions were formulated in clearly universalistic terms, contrasting the approach before and after American independence:

‘...whatever sentiments have formerly prevailed in this particular or slid in upon us by the example of others, a different idea has taken place with the people of America,

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<sup>109</sup> *U.S. v. Crandell*, 4 Cranch C.C. 683, 25 F.Cas. 684 (1836).

<sup>110</sup> *United States v Libellants and Claimants of the Schooner Amistad*, 40 U.S. 518 (1841).

<sup>111</sup> Argument of John Quincy Adams, Before the Supreme Court of the United States in the Case of the United States, Appellants, vs. Cinque, and Others, Africans, Captured in the schooner Amistad, by Lieut. Gedney, 1841, available at: < [http://avalon.law.yale.edu/19th\\_century/amistad\\_002.asp](http://avalon.law.yale.edu/19th_century/amistad_002.asp) > (last accessed, February 18, 2014).

more favorable to the natural rights of mankind, and to that natural, innate desire of Liberty, with which Heaven (without regard to color, complexion, or shape of noses--features) has inspired all the human race. (...) I think the idea of slavery is inconsistent with our own conduct and Constitution; and there can be no such thing as perpetual servitude of a rational creature ...'<sup>112</sup>

In the 1824 English case of *Forbes v Cochrane and Cockburn*,<sup>113</sup> several slaves had escaped from 'a foreign country,' where slavery was legally permitted, and succeeded in getting on board a British warship on the high seas. To protect them from being reclaimed by a British subject, resident in that country, the court held that *these men, who clearly were not citizens, 'when on board an English ship, had all the rights belonging to Englishmen ...'*

Finally, Bradley Miller has provided a persuasive reading of the famous 1860 *Anderson* case in Canada,<sup>114</sup> in which the Canadian courts had to decide whether to send back a fugitive slave to the United States, and in which the claim was explicitly framed in universalistic language.<sup>115</sup> Not least, Miller makes clear that the arguments were framed in this way not primarily to persuade the judges in the case, but to establish a clear basis for subsequent political activism should the judges decide to extradite him. The dissent by Justice McLean (subsequently Chief Justice of Upper Canada) even uses the term 'human rights' to denote the issues at stake.

There is a danger that attempting to address Moyn's argument merely descends into simply looking for counterexamples that either involve a specific phrase or trans-state morality, and there is much fruitful work to be done in attempting to determine which is the rule and which is the exception. But at least we can say that it is difficult to understand from these examples how Moyn can be quite so dismissive of the emancipation movement as a precursor of the 'new' human rights movement

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<sup>112</sup> Albert P Blaustein and Robert L. Zangrando (eds), *Civil Rights and the Black American: A Documentary History*, (Washington Square Press, a Division of Simon & Schuster, Inc., 1968). The jury found Jennison guilty of assault and battery. No opinion was ever written in the case, nor was it set down in the law reports.

<sup>113</sup> *Forbes v Cochrane and Cockburn*, (1824) 2 Barnewall and Cresswell 448, 107 E.R. 450.

<sup>114</sup> *In the matter of John Anderson, committed under the Extradition Treaty with the United States*, Upper Canada Queen's Bench Reports, 20 (Q.B., 22 Dec., 1860), 124.

<sup>115</sup> Bradley Miller, 'The joy of the fugitive for ages past': Refugees, Asylum, and Extradition in British North America, 1833-1865, [http://www.yorku.ca/laps/huma/cdns/documents/Miller\\_Anderson\\_Paper.pdf](http://www.yorku.ca/laps/huma/cdns/documents/Miller_Anderson_Paper.pdf) (last accessed February 18 2014).

post 1970.<sup>116</sup> It challenges Moyn's view that 19<sup>th</sup> Century humanitarianism (the 'politics of suffering abroad') diverged from extending human rights ('the politics of citizenship at home'), and that it was only much later, in the 1970s, that the two approaches came together. The emancipation movement demonstrates how these traditions came together, at least to some extent, during the 19<sup>th</sup> Century. Nor was this type of universalistic language restricted to slavery.<sup>117</sup>

What emerges from the history of the development of rights in the nineteenth and the twentieth centuries is, indeed, both a radical discontinuity between different understandings of rights, and evidence of the political contingency of the extent and type of protection accorded. But we also see, in Alston's phrase, 'indispensible elements of continuity',<sup>118</sup> important flashes of the transnationalization of rights-talk, the use of rights in political and legal argument to generate solidarity across borders, and the adoption of rights that are not tied to citizenship. This challenges Hoffmann's (and Moyn's) exclusion of 'historical struggles for concrete rights and privileges – which were not intended to be universal, but rather tied to specific groups.'<sup>119</sup> Including these would not, as Hoffmann argues, 'amount to rewriting the entire legal history as a history of human rights', but it would enrich the writing of history of human rights.

### *E. Moyn and Human Rights Borrowing*

I now move to examine the fourth reason for being sceptical about Moyn's radical discontinuity thesis: that the 'new' and the 'old' rights both share an important *methodology*. A strong tradition of *comparative* human rights developed in the nineteenth and in the first half of the twentieth centuries that significantly shaped the conception of human rights that we see today. Moyn acknowledges 'that the catalogue of items in the [Universal Declaration] drew from domestic constitutions around the

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<sup>116</sup> See the similar argument in Robin Blackburn's review of Moyn, 'Reclaiming Human Rights' (2011) 69 *New Left Review* 135, and Gary J. Bass, 'The Old New Thing' *The New Republic*, October 20, 2010 (hereafter 'Bass, New Republic'), 37.

<sup>117</sup> See, e.g., *U.S. v Buntin*, 10 F. 730, 739 (1882), in which judicial decisions protecting Chinese under the Fourteenth Amendment were described by the court as 'admirable illustrations of the substantial progress made towards broad and enlightened views of *human rights* and equality.'

<sup>118</sup> Alston (n 9), 2052.

<sup>119</sup> Hoffmann (n 14) 4.

world, and notably in Latin America ... Rights talk in the sense of domestic constitutionalism and the citizenship struggles it allows were familiar in many parts of the world, Latin America not least ...<sup>120</sup> A little later he writes that: ‘The domestic agenda of the Latin American states in these debates, especially Cuba, was to bring the new declaration into conformity with the American Declaration of the Rights and Duties of Man, passed in Bogotá, Columbia in spring 1948 ...’<sup>121</sup> As regards the European Convention on Human Rights, ‘the content of rights catalogues seemed domestically uncontroversial, secured either time out of mind or in recent memory.’<sup>122</sup> When Moyn describes the content of the Universal Declaration of Human Rights, and the inclusion of social rights, he notes that ‘[t]here was little conceptually new about them, especially given their prominence in interwar European constitutions (first in the Weimar Constitution of 1919, and most expansively in the new Soviet Constitution of 1936 ...’<sup>123</sup> He quotes the Yugoslav delegate speaking just before the vote on the Universal Declaration in the General Assembly who said that the Universal Declaration ‘simply ‘codified’ long since secured political and civil rights’.<sup>124</sup>

The development of international human rights law in the 1940s by some of its major practitioners often seemed to presuppose, however, a fundamental methodological break from the way that rights protection had been developed prior to that time, in attempting to move away from the use of a comparative methodology. When Sir Hersch Lauterpacht drafted his international charter of rights in 1945, he excised much of the comparative constitutional material in the accompanying commentary. He appears to have considered that the development of international human rights should get beyond the traditional comparative method. As the late A.W.B. Simpson explained:

‘In [Lauterpacht’s] discussion there is only the scantiest reference to the various other draft Bills of Rights then in existence. He mentions H. G. Wells’s chaotic draft, the French Declarations of 1789 and 1793, the American National Resources Planning Board draft and a number of provisions in national constitutions. (...) His bill is in no sense a paste and scissors job. Nor does it represent an attempt to deduce from State

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<sup>120</sup> Moyn (n 8) 66.

<sup>121</sup> *ibid* 66.

<sup>122</sup> *ibid* 78.

<sup>123</sup> *ibid* 64.

<sup>124</sup> *ibid* 71.

constitutions, and other sources, a consensus as to the basic individual rights requiring protection.<sup>125</sup>

Lauterpacht is an important example of how some attempted to create a ‘new’ human rights after World War II, one that broke away from the previous emphasis on consensus and explicit comparison.

For someone like Lauterpacht, the purpose of developing an international law of human rights was to enable a universal standard to replace the methods based on comparison used previously. There should be no need to resort to these because the international standard would substitute for them. We can legitimately speak of the ‘rise and fall’ of comparative human rights, meaning that from the period roughly beginning in the late eighteenth century until the 1930s, one significant way in which human rights thinking was spread was through the comparative method, and the way in which international human rights was defined was largely by consensus. From the 1940s, attempts were made, partly successfully, to replace this comparative and consensus method with a process of internationalization based on foundational principles. For a brief period, then, the international standard appeared to substitute for a comparative standard.<sup>126</sup> Determined though this attempt was, the comparative method has remained stubbornly pervasive. Gradually, the ‘pure’ international influence moderated significantly and the use of comparison alongside the international norms, where they are used at all, emerges. The development of the comparative method was and is still one of the foundations of human rights, although that comparison takes place in different forums in somewhat different ways.

One example must suffice. Human rights activists in the United States, and many American academic international lawyers, have increasingly taken the position that adherence to international treaties is not necessary in order for the state to be legally bound in international law, seeking in particular to base human rights norms on *customary* international law rather than treaty. Customary international law is based on *opinion juris* but also on a fluid concept of consensus, based partly on state practice (involving a strong element of comparative analysis). Moyn’s singling out of this development as an important move in the American academic acceptance of ‘international human rights’ in its 1970s form is part of his story of how the

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<sup>125</sup> A.W. Brian Simpson, ‘Hersch Lauterpacht and the genesis of the age of human rights’ (2004) 120 *Law Quarterly Review* 49, 61.

<sup>126</sup> See, e.g. *Hurd v Hodge*, 162 F.2d 233 (1947); *Oyama v California*, 332 U.S. 633 (1948).

underpinnings of his conception of this ‘new’ human rights transcended the nation state.

That is one possible reading, but there is another: that legal scholars in the 1970s were (intentionally or unintentionally) reflecting an older approach to the identification of rights, not only providing a clear link between the ‘new’ human rights and regional approaches, such as under the European Convention on Human Rights, but earlier still. Moyn accepts the basic point that *comparative* human rights developed in the nineteenth and in the first half of the twentieth centuries in a way that significantly shaped current conceptions of human rights. And, as we have seen, Moyn does, in fact, clearly understand that comparison and consensus-based approaches played, and continued to play, an important role in the development of human rights thinking in the United States in the ‘new’ human rights, from the 1970s onward, but he underestimates the significance of this practice: that there is significantly greater continuity over the past two hundred years than Moyn appears willing to accept in the *way* in which human rights are identified and interpreted in practice, identifying consensus from the practice of comparison, by lawyers, human rights activists, international negotiators and judges (what we might call their ‘human rights methodology’).

This provides an important element of continuity between Moyn’s ‘new’ human rights and previous approaches, a continuity that further undermines Moyn’s principal thesis. Appreciating the importance of agreement-based theories challenges Moyn’s downplaying of the relevance of the period between the early nineteenth century and the 1940s. In particular, a key method by which the content and interpretation of human rights takes place now is through the use of comparative human rights methodologies, and that this is as true now, as it was the nineteenth centuries. What has changed, and it is a significant change, is who does the comparison, and what the purpose of the comparison is. But beneath these differences, comparison remains a key indication of continuity from the early nineteenth century to the present. In both cases, there is a degree of bounded universalism, although the degree of boundedness will differ from time to time, and place to place.

Understanding the development of rights comparatively during the nineteenth and early twentieth centuries emphasizes the need to integrate the histories of international and domestic protection of rights.<sup>127</sup> A continuing feature of contemporary international human rights law and practice is that it not only significantly relies on domestic implementation to be at all effective (as we saw in the previous section), but that it is also constantly refreshed by developments at the domestic level, and vice versa. Indeed, the relationship between the domestic and the international is often symbiotic, not distinct, and certainly not top-down. This complex inter-relationship has its roots in the neglected period.

A fuller recognition of the importance of comparative rights developments would, for example, have enabled Moyn to address the question of why international human rights adopted the particular *legal* dimension that it does. One of the critical problems in current human rights histories is their failure to fully account for the move from political to legal conceptions of human rights.<sup>128</sup> As Francesca Klug has pointed out, Moyn ‘does not provide an adequate account of why international human rights took the legal form they did following World War II.’<sup>129</sup> This is not the place for a fully developed argument, but, for example, the idea that human rights might be enforced through *courts*, including by international courts, appears to have grown, in part, out of the critical early twentieth century invention of constitutional courts. It was the spread of the idea of constitutional courts through the emerging discipline of comparative law that may have helped pave the way for courts being seen as an appropriate, indeed as a critical, mechanism for enforcement post-1945. Some of these courts engaged in the interpretation and enforcement of constitutional rights. Had the idea that constitutional rights could be enforced in courts not caught on, it is unlikely that equivalent institutions, in which subjective rights could be asserted, would have been thought conceivable at the regional or international levels.

#### 4. *Moyn’s Failure to Account for the Normative Power of Human Rights*

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<sup>127</sup> See also Alston (n 9) 2069.

<sup>128</sup> For example, Hunt, *Inventing Human Rights* (n 4) does not fully explain how the move from empathy to legal rights protection took place.

<sup>129</sup> Klug, *Global Policy* (n 11) 121.

The question of why human rights became important (in the sense of spreading so far and so fast) lies in part in the normativity of human rights, in their claim to speak truth to power. But what is the truth that they claim to embody? A significant failing of *The Last Utopia* is Moyn's inability to provide a historically convincing account of the normative power of the human rights idea. We have seen how, in his initial identification of the concept of 'dignity' as foundational, and his subsequent dismissal of the idea, Moyn seems to be both attracted and repelled by the normativity at the heart of human rights, seen from the perspective of those who adopt human rights discourse. In the first reading that I attributed to him, Moyn appeared to see the need to identify its normative heart and used the language of 'dignity' to do that but, if the second reading is correct, he subsequently sought to undermine its persuasiveness without replacing it with some other concept, and this has left a vacuum.

In this Part, it is argued that human rights history-writing of the kind exemplified in Moyn's book problematically separates questions to do with the origin and diffusion of human rights from questions to do with their nature and validity. This is where Moyn's lack of engagement with the more theoretically inclined literature on human rights is most telling. Efforts to locate the origins and explain the trajectory of human rights need the orientation that comes from engagement with debates about what human rights are and why they are valid, because the philosophical analysis both identifies that there is an important normative element and, at the same time helps us to structure the different types of normative appeal. Historical and philosophical inquiry are inseparable in this regard.

#### *A. Genesis and Validity*

There are two strands of recent human rights scholarship that need to be distinguished at this point, strands which tend to operate in separate intellectual silos. On the one hand, an historical strand seeks to account for the *genesis* and spread of human rights, in which the central debate is how far current human rights practice demonstrates continuity or radical discontinuity with previous attempts to secure rights. Moyn's discontinuity thesis in *The Last Utopia*, and the controversy surrounding it, can be seen as exemplifying this debate.

On the other hand, a philosophical strand seeks to consider claims regarding the *nature and validity* of human rights, in which a central question is whether and to what extent the normative power that human rights are claimed to possess is justified. Just as in the historiography of human rights, so too in the philosophy of human rights there are ‘orthodox’ theories, and theories that challenge this orthodoxy. The ‘orthodox’ philosophical account (it is equally uncertain whether any philosophers actually believe this) is that human rights derive their normative power because they are based on an understanding of the human person as one possessed of value, simply in virtue of their humanity, and that the value placed on the human justifies the extensive protection of rights. This philosophical approach is sometimes called ‘naturalistic’, in part because it harkens back to the idea of ‘natural’ rights. This approach then becomes not only a basis on which ‘human rights’ may be seen to be justified, it also becomes an independent basis on which human rights practice can be normatively assessed (and may be found to be wanting, not only in not going far enough, but also in going too far).

Moyn adamantly appears to reject this ‘naturalistic’ understanding, but he does so without setting out his own theoretical account of what ‘human rights’ involve. Charles Beitz has usefully distinguished between three conceptions of human rights that have been proposed to address the puzzling question of their normative basis: first, the ‘naturalistic’ account, which we have encountered already; Beitz terms the second the ‘practical’ (or ‘political’) account, which was also discussed previously; the third is what he terms ‘agreement’-based accounts.<sup>130</sup> On the basis of our earlier reconstructive sketch of Moyn’s theory of human rights, we can say that it is the second, based on an initial sketch by John Rawls in *The Law of Peoples*,<sup>131</sup> which is particularly apposite. For Rawls, ‘human rights’ should be distinguished from other types of rights. ‘[S]ome think of human rights,’ he wrote, ‘as roughly the same rights that citizens have in a reasonable constitutional democratic regime; this view simply expands the class of human rights to include all the rights that liberal

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<sup>130</sup> Beitz (n 90). Adam Etinson has noted that Beitz’s taxonomy ‘falls well short of a complete overview of the contemporary philosophical landscape’ of human rights, but for present purposes that need not trouble us here, see Etinson, ‘To be or not to be: Charles Beitz on the Philosophy of Human Rights’ (2010) 16 *Res Publica* 441 (hereafter ‘Etinson’), 441.

<sup>131</sup> Rawls (n 90).

governments guarantee.’<sup>132</sup> By contrast, for Rawls, human rights ‘express a special class of urgent rights, such as freedom from slavery and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide.’ For Rawls, human rights, are ‘distinct from constitutional rights, or from the rights of liberal democratic citizenship, or from other rights that belong to certain kinds of political institutions, both individualist and associationist.’<sup>133</sup>

For Rawls, one of the roles of human rights, in this sense, is that, when a state accords these human rights, this is ‘sufficient to exclude justified and forceful intervention by other people, for example, by diplomatic and economic sanctions, or in grave cases by military force.’<sup>134</sup> Joseph Raz has a similar idea in mind. Raz argues that international human rights are best seen as setting the (very limited) conditions under which international intervention in another state (otherwise unjustified) would be justified to prevent action by a state against those on the territory of that state, including its own citizens.<sup>135</sup>

I have focused on the ‘political conception’ because it is this that most appears to capture the theoretical understanding of human rights that Moyn has brought to his genealogical reconstruction, not least in emphasizing minimalism and internationalism. This is not to say that Moyn is operating on the same theoretical terrain as Rawls or Raz. The latter have *normative* reasons, for example, for being human rights minimalists, whilst Moyn has *sociological* reasons; that is, he maintains that by taking this form in the 1970s human rights were able to displace other more maximal but discredited utopian visions.<sup>136</sup> Nevertheless, this difference aside, the resemblance between Moyn’s approach and that of those adopting a ‘political conception’ of human rights is striking.

A central concern that ‘political’ conceptions of human rights share is an attempt to develop a normative conception of human rights that is in tune with ‘human rights practice’. Raz, who is frequently cited as a significant exponent of a

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<sup>132</sup> *ibid* 78.

<sup>133</sup> *ibid* 79-80.

<sup>134</sup> *ibid* 80.

<sup>135</sup> Raz (n 90) 327. Tasioulas has rightly pointed out that Raz has a very expansive idea of intervention, which would include mere formal criticism of the state but that if this is so, it seems hard to reconcile with Raz’s understanding of human rights as limits on sovereignty as criticism in practice is not regarded as an attack on sovereignty, Tasioulas, *Towards a Philosophy of Human Rights* (n 94) 22-23.

<sup>136</sup> I am particularly grateful to Jeff Flynn for pointing out these distinctions.

political conception building on Rawls, has identified the task of a ‘political’ theory of human rights consisting of two elements:<sup>137</sup> ‘(a) to establish the essential features which contemporary human rights practice attributes to the rights it acknowledges to be human rights; and (b) to identify the moral standards which qualify anything to be so acknowledged.’<sup>138</sup> Beitz has also suggested something similar.<sup>139</sup> The second of Raz’s elements is where the issue of validity is considered, and (broadly speaking) we have seen that from their perspective the normative power of human rights is morally justified because they comprise a set of norms that allow international ‘intervention’ only in limited contexts where such intervention is necessary.

### *B. Relationship Between History and Philosophy of Human Rights*

A relatively unexplored issue is what the implications are of the historical debates on genesis for the philosophical debates on validity, and vice versa. Does it matter whether an historian of human rights, interested in genesis, has a theoretical understanding of the validity of human rights, and *vice versa*? Orthodox human rights theories in history and philosophy tend to share a strong ‘naturalistic’ understanding of human rights. ‘Orthodox’ history sees the idea of the inherent value of the human person as having strong explanatory power in why human rights were recognized and spread over time. Beyond such ‘orthodox’ histories, however, a significant portion of the scholarly literature on human rights in the disciplines of history and philosophy do not appear to touch one another. Some philosophers produce rational justifications examining claims regarding the *validity* of human rights, involving, as Hans Joas argues,<sup>140</sup> attempts to develop ‘a moral philosophical argument that entails an unconditional, universal validity claim *entirely independent of history*.’<sup>141</sup> Some historians produce narrative histories of the *genesis* and spread of human rights, untouched by any reflection on the philosophy of human rights. In adopting these approaches, Joas argues, ‘the disciplines of history and philosophy reinforce the

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<sup>137</sup> Raz (n 90) 321.

<sup>138</sup> *ibid* 327.

<sup>139</sup> Beitz (n 90).

<sup>140</sup> Joas (n 87).

<sup>141</sup> *ibid* 97 (emphasis added).

distinction between genesis and validity.’<sup>142</sup> We can call this the ‘separation’ approach.

For others, this attempted separation of the history and philosophy of human rights is impossible. The general problem, as Joas puts it, ‘of how to mediate between history and normativity’,<sup>143</sup> is one that is particularly acute in the relationship between the history of human rights and the philosophy of human rights because in dealing with ‘human rights’ we are dealing with a phenomenon that is quintessentially normative. The alternative approach to separation is to accept that the history of human rights cannot be segregated from its philosophy, and that the philosophy of human rights cannot be segregated from its history. A ‘linkage’ approach to the study of human rights in both philosophy and history seeks to ensure that the fruits of the historical study of the genesis of human rights are considered relevant to philosophical consideration of the validity of human rights, and vice versa.

For Mahlmann, historians engaging in an historical examination of the genealogy of human dignity and (by extension, human rights) will, indeed *must*, come to the project with a pre-existing hypothesis as to what human rights are. Even those who come to the historical project innocent of any *philosophical* understanding of the debates on validity, because they confront the problem of how to mediate between history and normativity will have to develop, Mahlmann predicts, ‘a theoretical understanding of what one is actually looking for’, however sketchy and preliminary that hypothesis may turn out to be, as a ‘crucial *precondition* of any historical reconstruction’.<sup>144</sup>

A radically different approach is possible. For Joas, the question of source and diffusion can, indeed *must*, be intimately bound up with validity, and vice versa, but an historical approach to human rights in which philosophical understanding of the concept comes *before* historical inquiry, is highly problematic. Philosophy will generate an understanding of ‘human rights’ that then determines what should be looked for historically. As Joas puts it, ‘if we obtain an ideal through a nonhistorical moral philosophy, our relationship to history can only consist in evaluating all

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<sup>142</sup> *ibid* 2.

<sup>143</sup> *ibid* 102.

<sup>144</sup> Mahlmann (n 163) 599 (emphasis added).

historical phenomena according to the degree to which they approach the ideal ...'<sup>145</sup> Joas' alternative approach is one in which the relationship is not linear in this sense. His aim is to 'construct the history of the genesis and dissemination of values in such a way that narrative and justification are interwoven within the history.'<sup>146</sup> For Joas, genesis and validity 'become intertwined in a way that cannot be conveyed by a simple distinction between is and ought, facts and values'.<sup>147</sup> He continues: 'In cases where the *is* in question itself contains an ought, as with historically originating norms and values [such as human rights], we position ourselves not only with respect to facticity, but also the validity claims of historical constructs.'

### C. Moyn's Central Problem

Despite their differences, what these accounts have in common is the view, which I share, that in order to understand why human rights became such a powerfully attractive basis for mobilization, we need, at least in part, to understand its normativity. We will not only fail to account for its powerful appeal, we will also fail to recognize an important thread of continuity. Moyn appears particularly concerned to undermine claims that the human rights movement that emerged after 1970 is underpinned by similar normative values that led, for example, churches or religious individuals to support human rights in previous generations, and that a theological explanation may underpin current normative claims. Moyn's assumption that religiously influenced beliefs cannot be the basis for progressive movements seems more ideological than historical. More importantly, Moyn's concern to distance the new human rights from the old leads him to throw the normative baby out with the theological bathwater, for it leads him to underestimate and be unable to account for the historical attractiveness of the normativity which human rights claims to promote.

It is precisely this question of what may have underpinned its diffusion that those who consider issues of human rights validity can help us understand. We must be careful here. I am not arguing that we must develop a *philosophically* convincing understanding of validity in order to appreciate the origins and diffusion of human

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<sup>145</sup> Joas (n 87) 103.

<sup>146</sup> *ibid* 1.

<sup>147</sup> *ibid* 124.

rights, or that the historian must share the normative commitments identified as important, only that in understanding the debate over validity we can gain a fuller understanding of the normative power that contributed to its origins and diffusion. We do not have to *share* the normative ideas that drive human rights mobilization; we may even want to reject these normative ideas philosophically; but we do have to be able to articulate which normative ideals drive these actors, if we seek to give a convincingly rounded account of the power of human rights in history. In calling it ‘utopian’ Moyn identifies the need to explain more precisely in what that utopianism lies, but he signally fails to rise to the challenge he has set himself.

Joas, to his credit, tackles this difficult question head on. We may feel uncomfortable with the language in which Joas does this; we may reject the attractiveness of the norms he identifies as at the core of human rights normativity; we may even share Hannah Arendt’s skepticism as to whether human rights is capable of meeting the challenge of safeguarding the sacredness of the human person;<sup>148</sup> but we cannot fail to be impressed by attempts to identify the power of human rights to move countless individuals to act in their name. More importantly, for the purposes of this article, Joas’ work highlights the absence in *The Last Utopia* of anything remotely powerful enough to serve as a convincing explanation of why human rights have proven to be so attractive.

##### 5. *A Conclusion, and Moyn’s Defence*

Moyn has argued that his approach has a major advantage: emphasizing the radical discontinuity between previous rights’ developments and what happened in the 1970s disrupts the overly teleological approach to the development of human rights that he sees as characteristic of earlier ‘orthodox’ scholarship on the history of human rights. This orthodox narrative is one in which current human rights standards are seen as the culmination of an inexorable trend of historical development from the late eighteenth century to the present day – what Hoffmann characterizes as ‘the rise and rise of

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<sup>148</sup> Moyn (n 8) 42 quotes Arendt as worrying that the concept of human rights developed in the 1940s ‘presupposed nothing comparable, and would therefore provide nothing comparable – that as in prior history, there would continue to be ‘nothing sacred’ in the ‘abstract nakedness of being human’.

moral sensibilities',<sup>149</sup> and what Moyn characterizes as 'naturalistic', meaning that it is based on an idea of the innate worth of the human person. Instead, current human rights are 'the unpredictable results of political contestations'.<sup>150</sup>

I have suggested that Moyn's 'revisionist'<sup>151</sup> historical analysis falls short of providing a convincing alternative narrative in several ways. I have sought to challenge Moyn's central thesis of radical discontinuity by stressing the extent to which Moyn underestimates several important continuities. Before concluding, however, it is only fair to consider Moyn's recent responses, in which he addresses some similar points put by other critics.<sup>152</sup> Moyn has recently conceded that he may underestimate several important continuities.<sup>153</sup> In his defence, however, he has argued that even accepting that such continuities exist, 'the fact remains that the discontinuities are both more massive and more interesting.'<sup>154</sup>

A much more moderate, and careful version of his underlying thesis (shared, I suspect by human rights practitioners) is that something important did occur to human rights in the 1970s. The period since the 1970s had important distinguishing characteristics, both in the increased scale of activity labelled as 'human rights' (to which human rights NGOs significantly contributed), and in the increased salience accorded to human rights arguments in international relations (not least because ideological disagreements between the superpowers were partly framed in human rights terms), although in accepting this argument we need to be careful not to view scale and salience only from an American, or a Soviet, or a European perspective. We can also point to the rise, because of this increased scope and salience, of a professional field of human rights practice.

That would be a credible defence of an argument that *could* have been made in the book, but it is not a defence of the book, as written. To see current human rights discourse as qualitatively different at a fundamental level, as the book implies, is wrong-headed.<sup>155</sup> I have argued that Moyn underestimates the role of dignity in

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<sup>149</sup> Hoffmann (n 14) 4.

<sup>150</sup> *ibid* 4.

<sup>151</sup> Scheuerman (n 11) 171.

<sup>152</sup> Moyn, *Perplexities* (n 13); Moyn, *Current Historiography* (n 1).

<sup>153</sup> Moyn, *Perplexities* (n 13) 95, and at 96: 'It is certainly possible that there is much more interesting continuity than I realized.'

<sup>154</sup> *ibid* 96.

<sup>155</sup> See the particularly critical review by Bass (n 116).

human rights practice (past and present); that he underestimates the universal character of ‘constitutional’ and revolutionary, rights;<sup>156</sup> that he underestimates the primary importance of domestic actors and mechanisms in the current practice of international human rights; and that he underestimates the continuity of human rights borrowing as a prime methodology of how human rights is diffused. If these criticisms are correct, then his failure to address these appropriately does more than simply omit the ‘obvious’,<sup>157</sup> it skews the narrative in a fundamentally misleading way.

In seeking to avoid the problem of teleology, Moyn appears to have fallen into the opposite error, where, as Joas puts it, ‘history may fragment into disconnected parts’ and where ‘no connecting thread runs between them.’<sup>158</sup> We have seen that the ‘orthodox’ historical account attempts to explain the spread of human rights as based on reason and the power of rational ideas. That may well be overly simplistic, but if that does not explain the diffusion of human rights, what does? Any history of human rights requires some explanation as to how ideas are transferred between activists and intellectuals, between one set of states and another, and between diverse social movements.<sup>159</sup> How is an historian of human rights to account for diffusion? Why did human rights come to be taken up and spread throughout the globe?

Moyn’s approach appears to have little room for either agreement-based or naturalistic conceptions of human rights, seeing them as residues of a previous understanding of rights displaced by the development in the 1970s of the ‘new’ human rights. We have seen that this leads him to underestimate a characteristic methodology of human rights present in many different historical periods, but it also leads him to underestimate the continuing role of both naturalistic and agreement-based theories in providing the type of connecting thread that Joas seeks. Reading Moyn’s book, there is an strong impression that any argument that hints at continuity, particularly one which incorporates a ‘naturalistic’ element, necessarily descends into teleology; the default position of historians should therefore be to refuse to identify any continuity and to resist, at all costs, any ‘naturalistic’ explanation. In Moyn’s

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<sup>156</sup> Moyn, *ibid* 97, appears to concede ‘the connection between human rights understood as the rights of a supranational humanity and the rights of man that presuppose membership to a political community.’

<sup>157</sup> *Ibid*.

<sup>158</sup> Joas (n 87) 118.

<sup>159</sup> Pendas (n 11) 110.

book, discontinuity risks becoming an ideological starting point rather than an empirical conclusion. He may have retreated from this position subsequently, but to imply that the continuities are so obvious as not to bear repeating, and that they should be already be ‘obvious’ to readers is surprising.

The problem that particularly arises, when we contrast the radically different narratives that are possible, is whether it is the same thing that is being historicized.<sup>160</sup> We can see that there are different ways of thinking about human rights: as something institutional (in which case the issue for historians is when the term was used by particular institutions, such as judicially, legislatively, constitutionally), or as a concept that captures a set of understandings (in which case other words might be used to capture that set of understandings, such as ‘constitutional rights’, or ‘civil liberties’, or ‘civil rights’), or we might be interested simply in the vernacular use of the term (in which case the word might be used for several different purposes and is unlikely to be deeply theorized). A rich history of human rights would combine these differing elements, and we need to be aware that the current histories of human rights, like Moyn’s, are often only fragments of that richer history.

Moyn’s subsequent explanation, that ‘if *The Last Utopia* is a conceptual history, it is not one concerned with the *very idea of* human rights’,<sup>161</sup> is revealing because, as Joas and Mahlmann have argued, an understanding of how ‘the very idea of human rights’ was and is perceived is critical to undertaking the conceptual history of a normative concept. Seeing Moyn’s history partly through the lens of the recent debates about the normative underpinnings of human rights suggests that historians might find it useful to have some greater engagement with the philosophical literature on human rights that I discussed earlier. The range of different normative theories currently on display should lead historians to recognize the contested understanding of what the ‘human rights’ enterprise consists in,<sup>162</sup> how far that debate itself has important antecedents in the history of political thought, and the importance of reflecting that debate in the attempt to set out the histories of human rights. In other words, what the philosophical debates reflect rather well are debates *within* human

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<sup>160</sup> A point recognized subsequently by Moyn in ‘Substance, Scale, and Salience’ (n 1), 124. Alston (n 9) 2078 makes a similar point.

<sup>161</sup> Moyn, *Perplexities* (n 13) 98.

<sup>162</sup> What Etinson (n 130) 445 refers to, in his review of Beitz, as the ‘uncomfortable prospect of having to come to terms with the open-endedness and lack of unity inherent in public deliberation about human rights ...’.

rights practice, both current and historical. This should lead us to question what, exactly, is the understanding of human rights that Moyn considers to be ‘hegemonic’.

Why does it matter that historians gain a proper orientation that comes with such engagement? Is it more than simply a matter of setting the record straight? In my view, it is: there are important implications for the politics of human rights practice in getting the historiography of human rights wrong. We are confronted with an issue that has important socio-political consequences at a time when the legitimacy of human rights is increasingly under challenge. Matthias Mahlmann has correctly argued that the implications of the debate about genealogy go beyond ‘purely historical curiosity about the trajectories of the history of ideas’,<sup>163</sup> and involve deeper questions of both the content and legitimacy of the idea under scrutiny.

Moyn’s narrative has potentially important implications for the legal interpretation of human rights. This is because ‘of the widespread assumption that a genealogical reconstruction will tell us something about the meaning’ of the concept.<sup>164</sup> In those jurisdictions that tend towards a more ‘originalist’ approach to interpretation, as well as in those jurisdictions that adopt a ‘teleological’ approach, the historical debate may prove influential; in the former case, because it may be thought to shed light on the intentions of those who were the ‘founding fathers’; in the latter case, because it may be thought to help us to understand what is the ‘telos’ of human rights. It is appropriate, therefore, to correct Moyn’s narrative, if it is not to take hold in legal practice.

More importantly, how current debates on the history of human rights are resolved is likely to affect perceptions as to whether human rights deserve their special moral status in current political thought and legal practice. Moyn’s argument that the current human rights movement arose primarily from American engagement and NGO activism, filling an ideological gap left by the collapse of other ideologies, leaves nothing other than Great Power *real politik* and opportunistic transnational civil society enthusiasm to explain its current role. His systematic attempts to undermine what occurred before the 1970s, viewing them as contributing nothing of importance to our current understanding of human rights, risks providing important

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<sup>163</sup> Matthias Mahlmann, ‘The Good Sense of Dignity: Six Antidotes to Dignity Fatigue in Ethics and Law’ in McCrudden, *Understanding Human Dignity*), 597, 598, in the context of an equivalent debate about the genesis of ‘human dignity’,

<sup>164</sup> *ibid* 598.

intellectual cover for challenges to the legitimacy of human rights (beyond the United States, at least). In closing off alternative genealogies and sources, including multiple alternative discourses of long-standing, the common complaints of those states and governments who abuse their powers that human rights simply further American (or Western) values and encourage 'foreign' NGO interference in local decision-making, are likely to gain increased traction.

If Moyn's narrative were convincing then we should be prepared to accept its corrosive effects, however unpalatable. I have sought to argue that his narrative is *not* convincing, however, and that the multiple sources that go to make up the genealogy of human rights support a more complex understanding of the history of human rights.