

STATE OF THE FIELD ESSAY

LAW, RELIGION, AND HUMAN RIGHTS: SKEPTICAL RESPONSES IN THE EARLY TWENTY-FIRST CENTURY

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BOOKS DISCUSSED

Twilight of Human Rights Law. By Eric A. Posner. New York: Oxford University Press, 2014. Pp. 200. \$23.95 (cloth). ISBN: 978-0199313440.

Christian Human Rights. By Samuel Moyn. Philadelphia: University of Pennsylvania Press, 2015. Pp. 264. \$24.95 (cloth). ISBN: 978-0812248180.

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Disputes over the nature, basis, and enforceability of human rights go back to early 1947, when the drafting of the Universal Declaration of Human Rights (UDHR) first began. Nor were the disputes limited to the drafting process. Intense arguments emerged among social scientists, philosophers, religious leaders, legal thinkers, and public figures around the very idea of human rights, namely, the notion that human beings possess legally enforceable entitlements to certain protections and opportunities simply because of their common humanity.

Much skepticism was expressed: For purposes of prescribing and enforcing universal standards of behavior, could anything hard and fast be made of a term like “common humanity,” especially in face of the vast diversity of cultural, religious, ethnic, and national traditions present in the world? If the drafters agreed, as they eventually did, that some settled list of standards is useful, how was that agreement reached? Despite their differences, did they share some common convictions? If so, what were those convictions, and how seriously should they be taken in the debates over the validity and applicability of human rights? Furthermore, since human rights standards are intended to be legally enforceable, what happens if the conditions of enforceability are unrealistic and impractical?

A particularly sensitive problem that arose during the drafting period and after was the role of religion in human rights. One part of the problem concerned the place of religion in justifying human rights. Drafters differed sharply over whether references to a deity and the spiritual destiny of the human race should be included in the preamble to the UDHR, and commentators took similarly opposing positions on the subject. The other part of the problem involved deciding exactly which beliefs should be covered by Article 18, the provision in the UDHR guaranteeing religious freedom. The drafters expanded the range of coverage to include “freedom of thought, conscience and religion” “or belief,” words implying the protection of theistic, nontheistic, and atheistic belief,

as well as the disposition not to profess any religion or belief at all. The very expansiveness of the language, however, raised questions as to how to draw meaningful boundaries between beliefs that were protected and those that were not. Another issue, of greater consequence as time went on, was whether the very language of Article 18, with its emphasis on “conscience” and “belief,” was itself culturally parochial and biased, thus unfairly favoring protection of certain forms of religious expression over others.

Skepticism toward the nature, basis, and enforceability of human rights in general, and, in particular, over the role of religion in relation to human rights, both as warrant for and target of protection, was by no means limited to the drafting period and its immediate aftermath. It has, in fact, continued to find ardent expression right up to the present. Each of the two volumes before us gives voice, in one way or another, to the skeptical side of some of the long-standing debates over human rights. Eric Posner’s *Twilight of Human Rights Law* attacks the very foundations of human rights in general, while Samuel Moyn’s *Christian Human Rights* challenges conventional ideas about the role of religion in the formation and foundation of human rights. Criticism of the way religion is understood in applying human rights standards, strongly expressed in the recent anthology, *Politics of Religious Freedom*, edited by Winnifred Sullivan and colleagues, and *Beyond Religious Freedom*, by Elizabeth Shakman Hurd, is dealt with elsewhere in this issue.¹

HUMAN RIGHTS LAW: MISSION IMPOSSIBLE

The central theme of Posner’s *The Twilight of Human Rights Law* is readily grasped: Despite the fact that human rights language has achieved global currency, including the incorporation of that language into all but a few national constitutions or basic laws, the ratification of numerous human rights treaties by a large majority of states, and the development of international and regional supervisory institutions, “human rights law has failed to achieve its objectives.” Posner’s key explanation for the failure “is that human rights law reflects a kind of rule naiveté—the view that the good in every country can be reduced to a set of rules that can then be impartially enforced” (7). Thinking that any single set of legal rules can be designed to apply effectively to a world made up of so many different nation-states, animated by so many divergent ideas of “the good,” is “not so much an act of idealism as an act of hubris, with more than passing resemblance to the civilizing efforts undertaken by governments and missionary groups in the nineteenth century, which did little good for native populations while entangling European powers in countries they did not understand” (148).

According to Posner, a specialist in international and constitutional law, the ideas underlying the UDHR, and the subsequent instruments aimed at elaborating and implementing it, rest on a profound mistake. They imply that human rights law is able to overcome disputes about the human good on the assumption that enough can be known concerning “the undesirability of certain types of government behavior” as to rule them out once and for all.

But conceptions of the human good change, and ideas about how best to trade off human values and how to implement them through government policy are constantly evolving as people gain information, test and discard proposals, observe experiments in other places, and so on. Because of the peculiar requirements of international cooperation, the international human rights instruments lack authoritative agencies that can modify

1 Daniel Philpott and Timothy Samuel Shah, “In Defense of Religious Freedom: New Critics of a Beleaguered Human Right,” *Journal of Law and Religion* 31, no. 3 (2016) (this issue).

rights in response to changing mores and the growth of empirical knowledge. The result is a system that is both rigid and vague, unresponsive to the needs of governments and populations, and thus ultimately plagued by circumstances on the part of states it is supposed to bind.” (115)

Posner refers to his skepticism about the instability and revisability of human values as the “problem of epistemic uncertainty,” namely, the difficulty of knowing what a people’s values are in different national and cultural settings (108–15). He contends that even in a relatively well-ordered democratic system like the United States, the courts are in a much poorer position to perceive the true “interests of the people” than politicians, who in seeking reelection, “have a strong incentive to learn from their constituents what they care about and how much, and to embody those views into policy” (111). But at least American judges are part of a national community and, however imperfectly, have some natural grasp of national values. How much worse is the uncertainty of identifying “what people really care about” under human rights law, as in the case of the European Court of Human Rights or the International Criminal Court, or of officials like the UN Special Rapporteurs or members of committees authorized by international covenants to apply human rights law.

There is no opportunity under the top-down system of human rights rules, administered by unaccountable judicial officials, for the peoples affected to voice their views as to whether it is better “to help a country build a reliable road system than to force it to abolish torture” (145). Human rights advocates try to assist by getting countries to conform to human rights law—“fewer detentions, less torture, more free speech—which do not necessarily advance the well-being of the citizens in the target country” (144). “Foreign countries really are foreign. It is hard for [an outsider] to understand their peoples, customs, institutions, and pathologies. It is often hard to tell whether efforts to help those countries improve the well-being of people or just create new problems” (146). China, for example, has made large strides in improving the lot of its citizens economically. “A human rights treaty that required China to grant political rights might make it more difficult for the government to manage the economy” (121).

Posner argues against the proposition that human rights treaties promote democracy and thereby provide an opportunity to find out what citizens truly value, since authoritarian governments at whom the treaties are especially aimed regularly fail to enforce them. That is not so much because authoritarian leaders derive significant advantages for themselves from repressing their citizens. “Many states with authoritarian governments [like China] are responsive to the needs and interests of their populations” (121), leading to the conclusion that “it is impossible to divide the world into (good) democratic states and (bad) authoritarian states” (120). The real culprit is not authoritarianism, but human rights treaties. It is they more than anything else that prevent the discovery of peoples’ true needs and interests either because, if the treaties were implemented, “they are too vague and conflicting” or because “in a diverse array of very different authoritarian countries ... the interests, values, and needs of the populations cannot be captured in a single list of rights” (121).

Posner’s attack on human rights is thoroughly unconvincing for several reasons. One obvious point: Merriam-Webster, for example, defines *authoritarian* as “of, relating to, or favoring a concentration of power in a leader or an elite not constitutionally responsible to the people”²; by definition, authoritarian governments are not in the business of giving primary consideration to the interests and values of their citizens. Posner himself seems to concede the point by admitting that

2 Merriam-Webster Dictionary online, s.v. “authoritarian,” accessed December 13, 2016, <https://www.merriam-webster.com/dictionary/authoritarian>.

if human rights treaties did in fact “promote democratic participation and other public goods in authoritarian states” that would be a good thing (121), presumably because it would increase the degree of government responsibility to its citizens, much as he believes happens in the United States.

As a matter of fact, Posner seems to violate his own theory by telling us that authoritarian governments like China are in reality “responsive to the needs and interests of their populations.” How does he know that? Democratic procedures for expressing the popular will are obviously lacking, and, according to Posner’s idea of epistemic uncertainty, foreigners like him are otherwise incapable of perceiving another people’s interests and values. On his own terms, there is simply no way to know whether or not China is sensitive to the values of its citizens. Furthermore, exactly what he can conclude from the fact that human rights treaties do not advance democracy in authoritarian states is unclear. If, as he says correctly, authoritarian governments regularly do not enforce human rights treaties they have ratified, how can one tell whether or not the treaties advance democracy within authoritarian states?

It is undoubtedly true, as Posner claims repeatedly, that the mere act of ratifying human rights treaties does not by itself advance democracy or the well-being of citizens in other ways. Though enforcement is not everything, it is certainly critical to the enjoyment of human rights, even for human rights advocates. What is much more debatable is Posner’s assertion that human rights are anti-democratic by imposing an alien straightjacket in the form of a fixed set of rules that stifles and distorts the discovery of a population’s true interests and values.

There is compelling empirical evidence linking democracy, well-being, and human rights precisely around the issue of governmental responsibility. In a rigorous study of these matters, one author concludes that liberal democratic institutions, based on the rule of law, constitutionalism, and human rights, provide “formal constraints on state action through vertical and horizontal mechanisms of accountability,” adding that “higher levels of wealth are associated with lower levels of human rights violations.”³ In a more recent investigation, the same author confirms and elaborates these findings. He contends that because they encourage increased participation in valid elections and enforce the widespread enjoyment of rights to freedom of speech, movement, assembly, and conscience, liberal democracies, compared to non-democracies, reduce the level of lethal repression and improve the yield and distribution of economic benefits, thereby expanding the opportunity for citizens to express and realize their interests and values.⁴

Although Posner claims that there is no reason to think that countries where human rights are respected will develop faster than where they are ignored (145), the conclusions just mentioned regarding the connection between human rights and development have been robustly reaffirmed in a recent UN report, “Extreme Poverty and Human Rights,” which chastises the World Bank for deliberately and mistakenly divorcing human rights from its development efforts around the world.⁵ The bank’s failure to make the connection “contradicts and undermines the consistent recognition by the international community of the integral relationship between human rights and development. It also prevents the bank from putting into practice much of its own policy research

3 Todd Landman, *Protecting Human Rights: A Comparative Study* (Washington, DC: Georgetown University Press, 2005), 168–69.

4 Todd Landman, *Human Rights and Democracy: Precarious Triumph of Ideals* (London: Bloomsbury, 2013), 131–39.

5 Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, U.N. Doc. A/70/274 (August 4, 2015).

and analysis, which points to the indispensability of the human rights dimensions of many core development issues.”⁶

Of special interest is a quotation in the report from a recent study by William Easterly, since Posner cites an earlier work of Easterly’s as warrant for rejecting the idea that “the West can impose a political and economic blueprint (read: human rights law) that will advance well-being in other countries” (141). To the contrary, Easterly now holds emphatically that “the cause of poverty is the absence of political and economic rights, the absence of a free political and economic system that would find solutions to the poor’s problems,” and he dismisses policies, the report says, that “seek to artificially separate human rights from development as technocratic illusions.”⁷ In sum, there is strong reason to doubt Posner’s assertion that when it comes to discovering and realizing a people’s interests and values, it is “impossible” to distinguish between authoritarian regimes and human rights-oriented democracies.

The weakness of Posner’s position outlined so far is related to a deeper failure to appreciate the nature and basis of human rights, at least as they were presented to the world in the late forties and after. In particular, his first chapter on the history of international human rights law suffers from reliance on Samuel Moyn’s book *The Last Utopia: Human Rights in History*,⁸ which he enthusiastically commends (Posner, 9). As with Moyn’s book, there is no serious discussion by Posner of the legislative history of the UDHR, or of its specific contents, or of the likely rationale underlying the drafting, all of which is authoritatively available in Johannes Morsink’s indispensable study, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*.⁹

Posner’s charge that the rights contained in the UDHR “were described in vague, aspirational terms” (17), with no hint of a way of prioritizing them (92), echoes Moyn’s characterization of human rights language as merely utopian, as “an empty vessel that could be filled by a wide variety of different conceptions,” and as having nothing to do with the Holocaust.¹⁰ Unlike Moyn, Posner does mention fascist atrocities in passing, but minimizes their significance implying that allied practices—Jim Crow laws in the United States and political repression in the colonies by the United Kingdom—were not much different from fascist practices, and that by letting those abuses stand during the forties and fifties, the allies showed how little human rights meant to them (15). Indeed, Posner and Moyn agree that human rights language had altogether no public impact in the United States and no practical effect on its policies, domestically or internationally, until the 1970s and the advent of the Carter administration.

However, as Morsink shows indisputably, it was the common “outrage” of the drafters, prompted by the “horrors of the war,” and dramatized particularly by the unspeakable experience of the Holocaust that energized and guided the drafting of the UDHR.¹¹ In his careful analysis of a

6 Ibid., 2. For details on World Bank studies, see *ibid.*, 8–9, paras. 23–28.

7 Ibid., para. 59, quoting William Easterly, *The Tyranny of Experts: Economists, Dictators, and the Forgotten Rights of the Poor* (New York: Basic Books, 2013).

8 Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Belknap Press of Harvard University Press, 2010).

9 Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999). In *The Last Utopia*, Moyn calls Morsink’s book “a fine drafting history,” but completely ignores it, and Posner seems unaware of the book. It does not appear on his list of volumes that “played a role in my thinking.”

10 Moyn, *The Last Utopia*, 51. See David Little, “Critical Reflections on *The Last Utopia: Human Rights in History* by Samuel Moyn,” in *Essays on Religion and Human Rights: Ground to Stand On* (New York: Cambridge University Press, 2015), chapter 2, for an extensive rehearsal and critique of Moyn’s discussion of human rights language.

11 Morsink, *The Universal Declaration of Human Rights*, 27, 91, 300.

number of the articles of the UDHR, Morsink shows how the final wording was deliberately and specifically formulated in reaction to what were regarded as incontestable violations of the basic standards of human decency,¹² a reaction that obviously inspired the ringing words of the Preamble to the UDHR: “Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind.”¹³ Far from being “vague” or “an empty vessel,” the enumerated rights only made sense against a painfully concrete record of quite specific practices visited unforgettably on millions of people before and during World War II.

Nor, contrary to Posner’s claim, does human rights law lack a “hierarchy of rights”—a priority list of the most basic protections, readily formulated in the light of that record and designed to make unmistakably clear “prior” state obligations in regard to human rights policy. It is the list of “nonderogable rights” identified in Article 4 of the International Covenant on Civil and Political Rights, mandating that none of the rights on the list may be suspended or abridged even under a state of emergency. The list is intended to protect everyone against discrimination based on race, sex, language, religion, and the like; extrajudicial killing; torture; “cruel, inhuman, or degrading treatment or punishment;” enslavement; denials of certain forms of due process; and violation of the freedom of conscience, religion, or belief. Callous assertions about the utopianism and emptiness of such provisions are readily refuted by recalling vivid examples from the mid-twentieth century of the violations the provisions prohibit.

By denying or minimizing the importance of the fascist background, Moyn and Posner obscure the central message of human rights law: States that replicate the kinds of violation perpetrated by the fascists of the most basic protections are, in effect, at war with their populations, and are thus in no position to apprehend, let alone help realize, the true interests and values of their citizens. The fact that Western democracies, or any other states, can be found to disregard or violate the standards in various ways and degrees does not indict the standards. It indicts the violators.

Lastly, it is by no means historically accurate that human rights were a dead letter in the United States until the advent of the Carter administration in the seventies. In the fifties and early sixties, a concerted effort on the part of Southern politicians, a burgeoning, very vocal cohort of Evangelical Protestants, and leaders of the American Bar Association to thwart Senate ratification of human rights treaties succeeded by causing the Eisenhower administration to withdraw the treaties from Senate consideration. Far from regarding the language of the treaties as “vague and conflicting” or an “empty vessel,” members of the opposition were intensely fearful that ratification of the treaties spelled the end of racial segregation in the South, among other disadvantages to the United States. Accordingly, the civil rights campaign, emerging in the late fifties and aimed at overturning racial segregation, was part of a broader human rights movement, as Martin Luther King, Jr. himself made unmistakably clear.¹⁴

HUMAN RIGHTS AS A PROPAGANDA TOOL OF CONSERVATIVE CHRISTIANS IN EUROPE

With his latest book, *Christian Human Rights*, Samuel Moyn expands on his skepticism about the nature and basis of human rights evident in his earlier work, *Last Utopia: Human Rights in*

¹² Ibid., chapter 2.

¹³ G.A. Res. 217 (III)A, Universal Declaration of Human Rights (Dec. 10, 1948), preamble.

¹⁴ See Little, “Critical Reflections on *The Last Utopia*,” 72–76; David Little, “Martin Luther King, Jr.: Civil Rights, Human Rights, and Peace” (unpublished lecture).

History, cited above. Moyn leaves no doubt about his central intention in this book, an intention also present in *Last Utopia*. It is “to study the history of human rights not as *intellectual history* but as *ideological history*”—much more a matter of propaganda and “political slogan” than “philosophical finesse or legal doctrine,” and to do that so as to uncover the “unsuspected legacies” that until Moyn came along had remained, he believes, totally hidden from view (Moyn, 243; original emphasis). He wants to cut our understanding of human rights down to size, to unmask the faulty “teleology, tunnel vision, and triumphalism that has so deeply affected current historiography” (Moyn, 67).

In discussing the origins of human rights language, Moyn, in this book as in *Last Utopia*, dismisses the relevance of fascist atrocities and anti-Semitism for the composition of the UDHR, as well as much of its legislative background and its Enlightenment antecedents, according to which standard human rights histories are typically written. As in *Last Utopia*, Moyn assumes in *Christian Human Rights* that the language of the UDHR and subsequent instruments was intrinsically vague, an “empty vessel,” and that our conventional understanding of it as guaranteeing universal protection of individual civil and political as well as economic and social rights came later, as the product of illusory idealism associated with the Carter administration in the seventies.

The problem is that the alternative, distinctly “ideological,” account he elaborates in this book is seriously distorted precisely because he disconnects it from the actual historical and complex legislative setting in which the language cannot but be understood. To be fair, Moyn’s proposal does shed light on some aspects of Western European thinking about human rights in the forties and fifties, and on the lingering influence of that thinking right up to the present. Also, his account does provide a plausible, if still controversial, explanation of the source of certain terms that appear in the UDHR and the United Nations Charter, and he adds interesting detail to the contributions of *a few* of the individuals who participated in the two-year process of deliberation over drafting the UDHR. At best, however, Moyn’s conclusions are starkly one-sided and in that way very much at odds with the available evidence.

In a nutshell, the original language of human rights was, he says,

best associated neither with a revolutionary or republican heritage. For almost nobody [was it] the essence of post-Holocaust wisdom, not least since the worst crimes of the Nazi evildoers were not yet understood to be the ones specifically directed against the Jewish people. Instead, human rights were most closely associated with an epoch-making reinvention of [European Christian] conservatism.” (67)

European Christians—mainly Roman Catholics but also Lutherans and other Protestants—were profoundly shaken in the forties by what they perceived as the mortal threat to Christian civilization represented by the rise of secular totalitarianism in the form of fascism and communism. Rights language, long rejected by European Christians as the deposit of completely materialistic and anti-religious ideas associated with the French Enlightenment, took on a new cachet. Carefully reformulated on an “explicitly Christian” basis, so as to cleanse the language of its secularist and politically revolutionary Enlightenment connotations, it might serve well as a bulwark against the anti-Christian collectivist peril that appeared to them to be looming everywhere.

This new, thoroughly reconstructed language of human rights was basically a “Christian invention” (Moyn, 4), revolving around the principal idea of “Christian personalism,” closely tied to the notion of human dignity, and made famous by figures like the French Jesuit, Jacques Maritain and the German Lutheran historian, Gerhard Ritter. Moyn cites Pope Pius XII’s Christmas Message of 1942 as early evidence of the idea’s impact. The message heralded the connection of “human dignity” and “respect for the practical realization of fundamental personal rights” with “the consciousness of a juridical order resting on the supreme domination of God” (cited at Moyn, 2).

Though Christian personalism had “generally reactionary and always illiberal origins,” it came in its new incarnation to be “linked quickly to spiritualism and humanism and not infrequently to European identity,” and to stand for “a repudiation of the rival materialisms of liberalism and communism” (Moyn, 69). Consequently, the notion became part of the “restabilization of bourgeois Europe after World War II,” involving “a moderate form of capitalism” and the “conservative maintenance of middle-class rule.” All this occurred “under the auspices of Christian politics,” as manifested, for example, in postwar Germany with the ascendancy of the Christian Democrats led by “a pious Roman Catholic,” Konrad Adenauer, as well as with “the rise of an influential Cold War liberalism,” strongly anti-secular in character (Moyn, 18, 171).

As the European human rights regime matured with the adoption of a charter in 1950, it continued to radiate the Cold War trappings. “The European Convention [of Human Rights] involved a stark departure from the welfarist premise” of the UDHR, “as social and economic rights still prominent [in the UDHR] were dropped [while] the right of religious freedom—along with that of private property—surged as among the central symbols of what made Western Europe distinct from the encroaching communist foe” (Moyn, 159). And in a chapter called, “From Communist to Muslim,” Moyn traces what he regards as the transformation of the early emphasis on the right to religious freedom as a way of advancing the cause of Christianity against communism into an effective legal tool, as now applied by the European Court of Human Rights in a series of recent rulings unfavorable to Muslims, to justify “the exclusion or marginalization of those from non-European cultures . . . whose systems of belief [do not fit Western patterns]” (140). Moyn goes so far as to suggest that the norm concerning the right to religious freedom itself is possibly “poisoned at the root” (139).

When it comes to the specific influence of Christian personalism on the language of the UDHR, Moyn singles out the phrase, “reaffirm faith in the fundamental human rights, in the dignity and worth of the human person” (cited at 55), and he alludes to Article 1 of the UDHR, which reads, “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood” (cited at 153). The pope was important in providing inspiration, but so were Charles Malik and Carlos P. Romulo, both prominent drafters. Moyn quotes Malik as emphasizing often that “in Christianity, the individual person possesses an absolute value,” and “the ultimate ground of all our freedom is the Christian doctrine of the absolute inviolability of the human person” (cited at 92). Moreover, because of Malik the “Thomist formula,” “endowed with reason and conscience,” found its way into Article 1.¹⁵

It should be added that in a major speech supporting the UDHR before its adoption, Malik left no doubt that in his mind human rights “need to be grounded, not on a Supreme Being, but on a ‘Lord of History,’” namely, Jesus Christ,¹⁶ a conviction consonant with his emphasis on the right to religious freedom not just as a weapon against communism, but also as the means “for the conversion of the entire Mediterranean basin to Christianity” (Moyn, 149). Romulo added further support by declaring explicitly that “the dignity of the human person” be based on “the Christian belief in a brotherhood of men equally precious in the eyes of God” as the foundation of human rights (Moyn, 56).

There is no doubt that, in this book, Moyn describes some interesting material regarding the character and outlook of an influential segment of Christian thought about human rights in

15 Moyn mistakenly states that the words appear in the preamble (Moyn, 153).

16 John S. Nurser, *For All Peoples and All Nations: The Ecumenical Church and Human Rights* (Washington, DC: Georgetown University Press, 2005), 165 (paraphrasing Malik’s speech).

postwar Western Europe. Nor is there reason to doubt that such thought had, for a time, considerable impact on the politics of the region, and on Cold War thinking in Europe and elsewhere, especially in the forties and fifties. He makes a strong case that human rights language, from the perspective of these “Christian inventors,” must rest on a religious foundation, and becomes for them an indispensable vehicle for the advancement of the Christian message.

Moyn also provides suggestive evidence for concluding that Christian personalism, in the hands, particularly, of Malik and Romulo, influenced the use of “human dignity” and its juxtaposition with human rights in the UDHR and the UN Charter, and influenced, as well, the reference to “endowed with reason and conscience” in Article 1. Furthermore, if we mean by “ideology,” a politically oriented set of strong beliefs, then Moyn has succeeded in showing that Christian personalism, as described, did constitute a theologically grounded conservative ideology with some noticeable general effects. His passing worries about the continuing effects of that ideology on contemporary human rights jurisprudence in Europe are also of interest.

However, the idea that this account of “Christian human rights” supplies the definitive lens through which to view human rights language as expressed in the UDHR and subsequent instruments like the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights is far-fetched in the extreme. In the light of the available evidence, Moyn’s account is flatly mistaken in the following four critical respects.

Salience of the Holocaust

First, as shown in the above critique of Posner’s book, and contrary to Moyn’s repeated statements to the contrary, it is impossible to deny the salience of the fascist record of atrocities, including the Holocaust, on the formation of the UDHR. It is only in the light of that record that we can possibly understand the selection and actual wording of a number of the articles, or why, as in Article 4 of the ICCPR, there appears a list of nonderogable rights prohibiting especially egregious acts not to be tolerated under any circumstances.

Religious Grounding of Human Rights

Second, the key principle of “Christian human rights,” namely, the insistent emphasis on a theistic, sometimes Christological, grounding of human rights, was definitively rejected in the drafting process leading up to the adoption of the UDHR. Proposals by some delegates that references be included in the Preamble to the UDHR declaring that human rights depend on a belief in “divine origin” or “immortal destiny” were decisively voted down. That decision was consistent with the commitment underlying human rights language to universal accessibility and accountability regardless of religious conviction or identity, made clear in Article 2: “There is no presumption in the Declaration that the morality of human rights requires any kind of religious foundation . . . [as the] drafters [went out of their way to make clear].”¹⁷

While Moyn’s account of Christian personalism may shed light on the appearance of the word “dignity” in the UDHR and the UN Charter, even that, on his own account, is debatable. Charles Beitz, whose discussion of the subject Moyn calls persuasive,¹⁸ describes the decision to include the word as “offhanded” and as giving no grounds whatsoever to infer that the idea had “any common

¹⁷ Morsink, *The Universal Declaration of Human Rights*, 263.

¹⁸ Charles R. Beitz, “Human Dignity in the Theory of Human Rights: Nothing but a Phrase?,” *Philosophy and Public Affairs* 41, no. 3 (2013): 259–90.

substantial” meaning for the drafters (Moyn, 56). Beitz’s comments lend support to the conclusion that, after all, the idea, as it appears in the UDHR, may be a bit of a wax nose. Moreover, the original understanding of the phrase, “endowed with reason and conscience,” in Article 1, which Moyn rightly associates with Malik, is also controversial. Because of certain suspicious metaphysical assumptions surrounding the phrase, the drafters found it “quite problematic,” “and only kept it out of respect for Malik.”¹⁹

Much more importantly, Moyn provides a woefully incomplete account of the full range of Christian thinking and influence in regard to the drafting of the UDHR. His discussion of the role of Frederick Nolde, American Lutheran activist with a record of important influence on the drafting process, is especially inadequate.²⁰ Twice Moyn gives the false impression that Nolde and Malik took the same position on the role of religion, both as regards the justification of human rights, and the rationale underlying the right to religious freedom (Moyn 149, 152).

As to the justification of human rights, Nolde consistently opposed the religious grounding of human rights. He stated that “freedom demands a broader base than can be offered by religion alone,”²¹ and “the Declaration is intended to affirm that man has the right to believe as he sees fit; it is not intended to declare what man should believe”—this latter against strong pressure from the Vatican for including a reference to the deity in the Preamble to the UDHR.²² Clearly, Nolde’s thinking, as opposed to Malik’s, was in line with, and may well have influenced, the majority of drafters who voted against the religious justification of human rights.

Secular Context for Freedom of Religion or Belief

The third issue is Moyn’s argument that Nolde’s attitude toward Article 18, the provision for freedom of conscience, religion, or belief, which he probably authored, was similarly opposed to Malik’s position. Nolde argued explicitly that the provision for religious freedom in the UDHR should be placed in “a secular context,” by which he evidently meant a common, religiously impartial moral space shared by peoples of very different fundamental commitments and identities. His views were completely in line with a statement in May 1942 of the Joint Committee on Religious Liberty, a subcommittee of the Federal Council of Churches, to the effect that: “There is a distinction between missionary freedom, which is not a universal right, and religious liberty [which is] . . . [Any internationally legitimate] provision for religious liberty . . . will not be made in . . . a Christian frame The principles will not flow from Christian assumptions, because those assumptions are not universally accepted.”²³

Welfarist Rights and Disputed Muslim Rulings

Fourth, there are two additional reasons for denying Moyn’s suggestion that original human rights language is best understood in reference to European Christian conservatism. One is his own conclusion that the “welfarist premise” of the UDHR, expressed by the prominent emphasis on economic and social rights, was explicitly rejected in working out the European Charter of Human

19 Ibid., 297.

20 See Nurser, *For All Peoples and All Nations*, chapters 2, 8–10.

21 Ibid., 99.

22 Ibid., 171n27.

23 “Extracts from the Minutes of the First Full Meeting of the Joint Committee on Religious Liberty, May 6, 1942,” in *ibid.*, appendix C, 190.

Rights in 1950. Here the understanding *ran against* the unmistakable meaning of the UDHR, as Moyn himself admits. The other is Moyn's dubious assertion in the chapter "From Communist to Muslim" that since human rights language from the beginning was likely "poisoned at the root" by underwriting the advancement of Christian hegemony in the battle with communism, so the recent tendency of the European Court of Human Rights to rule against Muslims is simply a natural extension of that bias.

The assertion is mistaken on both counts. The drafters decided against any religious justification for human rights, and there is strong evidence that those responsible for composing the religious freedom provision explicitly rejected a Christian, or, for that matter, any religious, bias in applying the provision. As to the rulings of the Court against Muslims, Moyn's discussion totally disregards the elaborate controversies surrounding the rulings, and fails to acknowledge thoughtful, systematic efforts to refute those rulings, as, for example, in a recent book by Melanie Adrian, *Religious Freedom at Risk: The EU, French Schools, and Why the Veil Was Banned*.²⁴ In the light of the extensive debate, there are strong reasons to doubt the Court's interpretation of the right to religious freedom as applied to European Muslims.

CONCLUSION

A critical shortcoming of the two books just reviewed is characteristic of much of the recent literature skeptical of human rights. It is the tendency to play down or ignore altogether the close and compelling connection between human rights and anti-authoritarianism. That is to forget that human rights cannot be understood except as a bulwark against authoritarianism, exemplified in extreme form by twentieth-century fascism. To be sure, not all authoritarians are fascists. Fascists want total commitment, consuming devotion, whereas non-fascist authoritarians usually content themselves with a passive and demobilized population. At the same time, fascists and authoritarians share in common a disdain for constitutional democracy and civil rights, and a disposition for inflicting "murderous brutality" when necessary.²⁵

In short, human rights standards, prominently including the nonderogable rights singled out in Article 4 of the ICCPR—prohibitions against discrimination; arbitrary killing; torture, cruel, inhumane, or degrading treatment or punishment; enslavement; denial of certain forms of due process; and against violations of the freedom of conscience, religion, or belief—were all conceived and articulated in scrupulous reaction to the besetting sin of authoritarian governments, fascist or not: *the use of arbitrary force*. That means, at a minimum, having the power to inflict death, physical impairment, extreme pain and suffering, and material destruction for self-serving purposes.

Failing to understand this point causes serious problems, as I have tried to show here, for a book like Eric Posner's *Twilight of Human Rights*, aimed, as it is, at calling into question the entire human rights project. The same might be said of Samuel Moyn's influential *The Last Utopia: Human Rights in History*, discussed above, or Talal Asad's *Formations of the Secular: Christianity, Islam, Modernity*,²⁶ both of which follow suit as wholesale attacks on human rights in general.

24 Melanie Adrian, *Religious Freedom at Risk: The EU, French Schools, and Why the Veil Was Banned* (New York: Springer, 2015).

25 Robert O. Paxton, *The Anatomy of Fascism* (New York: Alfred A. Knopf, 2004), 217.

26 Talal Asad, *Formations of the Secular: Christianity, Islam, and Modernity* (Stanford: Stanford University Press, 2003).

However, the failure also causes special problems for books like Samuel Moyn's *Christian Human Rights*, discussed above, as well as other skeptical books, such as *The Politics of Religious Freedom*, edited by Winnifred Sullivan et al. and *Beyond Religious Freedom* by Elizabeth Shakman Hurd, reviewed elsewhere in this issue.²⁷ By ignoring the specter of arbitrary force, such books, focused especially on the connection of religion and human rights, miss the true nature and full extent of the threat human rights protections of freedom of conscience, religion, and belief were designed to withstand. "Fascism constituted a direct, comprehensive, and systematic assault on [all] five categories of the right to freedom of religion or belief that came to be safeguarded by the UDHR and its progeny: free exercise, nondiscrimination, special protection for minorities, protection against 'religious hatred that incites to discrimination, hostility, or violence,' and the liberty of parents or guardians to select the religious education of their children or wards."²⁸ Hitler's encompassing and relentless attack on the various forms of freedom of religion or belief was an unmistakable example of arbitrary force, and as such was a flagrant violation of the basic principle that coercion is not a justification for believing the truth or rightness of anything.

The implications are telling. It is true, for example, that Article 18 of the UDHR and the ICCPR guarantees individual freedom of choice in regard to matters of conscience, religion, or belief—something taken by critics to limit its application to a very narrow range of beliefs. However, given the fascist background, the focus is on the right of the individual to choose to follow conscience rather than yield to a set of beliefs defined and coercively imposed by the government. The important thing is not so much what is believed; it is rather the opportunity for anyone—as an individual standing alone or as member of a group—to resist being commanded what to hold dear. A broad range of both religious and nonreligious beliefs and practices is protected. Thus, the judgment of the United Nations Human Rights Committee, mandated to interpret and administer the ICCPR, is thoroughly consistent with this implication. Article 18, it says, "is not limited to traditional religions or to religions or beliefs with institutional characteristics." It rules out "any tendency to discriminate against any religion or belief for any reasons, including the fact that they are newly established or represent religious minorities."²⁹

Speaking of religious minorities, it is also true that, as it stands, Article 27 of the UDHR fails to provide for special protection. A proposal advanced during the drafting period assuring members of religious minorities the right "to establish and maintain schools and cultural and religious institutions and to use their own language in the press, in public assembly and before the courts and other authorities of the State" was rejected in favor of the thorough-going assimilationist formulation that was eventually adopted: "Everyone has the right freely to participate in the cultural life of the [majority] community."³⁰

However, Article 27 as it appears in the ICCPR is radically different. It guarantees that persons belonging to "ethnic, religious, or linguistic minorities" "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."³¹ This statement is much more attuned to the fascist background than the earlier formulation. It is worth remembering that Hitler repressed and

27 Philpott and Shah, "In Defense of Religious Freedom."

28 Little, *Essays on Religion and Human Rights*, 99.

29 U.N. Human Rights Committee, CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion) CCPR/C/21/Rev.1/Add.4 (July 30, 1993), in *Religion and Human Rights: Basic Documents*, ed. Tad Stahnke and Paul Martin (New York: Center for the Study of Human Rights, 1998), 92.

30 Morsink, *The Universal Declaration of Human Rights*, 272.

31 International Covenant on Civil and Political Rights art. 27, Dec. 19, 1966, 999 U.N.T.S. 172.

punished Catholics, Protestants, and other members of the majority for opposing National Socialism. He also systematically abused and liquidated in vast numbers all manner of religious and ethnic minorities regarded as a threat to racial health and purity—most prominently Jews, but also Jehovah's Witnesses, and the Roma and Santi, among others.

The marked evolution of human rights provisions protecting religious minorities still continues with the adoption in 2007 by the General Assembly of the UN Declaration on the Rights of Indigenous Peoples. It underscores the capacity of the human rights code to adjust its protections to the enormous range of beliefs, practices, and attributes critically threatened by the fascist experience.

This failure on the part of the skeptical literature to take seriously the authoritarian background of human rights is especially distressing in the light of the present presidential election in the United States. The president-elect has expressed strongly authoritarian sentiments. He has praised Vladimir Putin and Saddam Hussein and has found little to object to in Russia's nakedly aggressive annexation of Crimea. He has defended the use of torture and collective punishment as techniques of counterterrorism, and has favored explicit acts of discrimination against ethnic and religious minorities, all in clear violation of human rights and humanitarian law standards. These developments in the United States coincide with what some observers have described as a global rise in authoritarianism.³²

Assuming the skeptics do not support proposals of that kind, the burden is on them to show, if they can, how their indifference to the manifest connection between human rights and anti-authoritarianism does not, in effect, strengthen the hand of such authoritarian thinking.

32 See, for example, John Weeks, "A Rising Authoritarian Wave," *openDemocracy.net*, February 3, 2014, <https://www.opendemocracy.net/can-europe-make-it/john-weeks/rising-authoritarian-wave>; Sina Odugbemi, "Authoritarianism Goes Global," *People, Spaces, Deliberation* (blog) (Washington, DC: The World Bank, August 6, 2015), <http://blogs.worldbank.org/publicsphere/authoritarianism-goes-global>; Manu Bhagavan, "We Are Witnessing The Rise of Global Authoritarianism on A Chilling Scale," *Quartz*, March 21, 2016; Pippa Norris, "It's Not Just Trump. Authoritarian Populism Is Rising across the West. Here's Why," *Washington Post*, March 11, 2016; Alexander Cooley, "Authoritarianism Goes Global," *Journal of Democracy* 26, no. 3 (2015): 49–63; Larry Diamond, Mark F. Plattner, and Christopher Walker, eds., *Authoritarianism Goes Global: The Challenge to Democracy* (Baltimore: Johns Hopkins University Press, 2016).