DEFINING THE HUMAN RIGHT AGAINST CRUEL PUNISHMENT

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INTRODUCTION

The seventy-fifth anniversary of the Universal Declaration of Human Rights (UDHR)[1] is an opportunity to reflect upon the successes and failures of the movement that document inaugurated. It is, on the one hand, indisputable that human rights are more widely respected today—not just in the West, but throughout the world—than they were in 1948. As measured by several criteria, respect for human rights has never been higher.[2]

On the other hand, those very successes have drawn attention to the many disappointments and failures endured by those who have, inspired by the UDHR, championed human rights. In his 2014 book, *The Twilight of Human Rights Law*, Eric Posner argues that "there is little evidence that human rights treaties, on the whole, have improved the well-being of people, or even resulted in respect for the rights in those treaties."[3] Although the lot of men and women has, overall, greatly improved since World War II, Posner and others have argued that the human rights movement deserves little credit.[4] The spread of capitalism and collapse of Communism are far more responsible for generally improved conditions than "human rights" lawyers, plying their trade in offices in New York City and Brussels. Some critics have further argued that the human rights movement has impeded development in parts of the world by ignoring tradeoffs and imposing standards that are, in context, inappropriately exacting.[5] Indeed, it is often startling to discover the breadth of human rights claimed today.

For example, do visually impaired people have a human right to have Braille on every ATM machine? This was the claim in a 2005 lawsuit in Hungary.[6] Two visually impaired people brought their claim under Article 9.2 of the Convention on the Rights of Persons with Disabilities, which

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[1] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 19, 1948) [hereinafter UDHR].

[2] *See, e.g.,* STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED 134 (2011) (arguing that respect for human rights has soared since the passage of the Universal Declaration of Human Rights and the "cascade of Rights Revolutions" that followed).

[3] ERIC A. POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW 7 (2014).

[4] Eric A. Posner, *The Case Against Human Rights*, THE GUARDIAN, Dec. 4, 2014.

[5] *See*, *e.g.*, NIGEL BIGGAR, WHAT'S WRONG WITH RIGHTS (2020).

[6] Committee on the Rights of Persons with Disabilities, *Views of the Committee on the Rights of Persons with Disabilities under article 5 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities (ninth session)*, UN Doc CRPD/C/9/D/1/2010 (Apr. 16, 2013) [hereinafter CRPD].

derives in part from UDHR Article 25.[7] The ensuing litigation resulted in three written opinions in Hungarian courts and then, in 2013, an 8,000-word decision—after a four day hearing—of the United Nations (UN) Committee on the Rights of Persons with Disabilities.[8] After prevailing in the trial court, the plaintiffs were largely unsuccessful in the Hungarian Intermediate Appellate and Supreme Courts.[9] The UN Committee, however, ruled in their favor.[10] Rejecting arguments that retrofitting every ATM was prohibitively expensive, and spurning offers to accommodate the visually impaired in other ways (such as special bank cards), the UN Committee held that the plaintiffs had a human right to Braille-equipped ATMs: "none of these measures have ensured the accessibility to the banking card services provided by the ATMs . . . for the [plaintiffs] or other persons in a similar situation."[11]

Many people would find this all puzzling. It might be a good idea, certainly in countries as rich as the United States today, to design ATMs to be accessible to the visually impaired. But is this a human right? In 2005, Hungary was not even a generation distant from the debilitating effects of Communism, and its gross domestic product per capita was roughly one-eighth that of the United States today.[12] Might its limited resources be more profitably deployed than retrofitting ATM machines? And might the members of the UN Committee on the Rights of Persons with Disabilities, which today includes representatives from Guatemala and the Ivory Coast, with disappointing human rights records,[13] devote their energies in ways other than badgering Hungary about accessible ATMs?

Over the past decade, there have been mounting criticisms of human rights both as an ideology and as a banner for a crusade. Besides Posner's 2014 book, several books and articles have raised doubts about the methods adopted by human rights lawyers. A recent article in *Foreign Affairs*, "Why

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[7] *Compare* Convention on the Rights of Persons with Disabilities, U.N. Doc. A/RES/61/106, (Dec. 12, 2006), art. IX(2), *with* UDHR, *supra* note 1, at art. XXV.

[8] *See generally* CRPD, *supra* note 6.

[9] *See id.* at para. 2.13-2.17.

[10] *Id.* at para. 10.

[11] *Id.* at para. 9.6. The author was in Budapest recently and does not recall seeing any ATM with Braille, so the millions of dollars spent litigating this matter seem to have borne no fruit, notwithstanding the nominal success at the United Nations.

[12] Hungary's GDP per capita was $11,211 in 2005. *Hungary: Gross domestic product (GDP) per capita in current prices from 1988 to 2028 (in U.S. dollars)*, STATISTA, https://www.statista.com/statistics/339875/gross-domestic-product-gdp-per-capita-in-hungary/ [https://perma.cc/8VUA-F26Q] (last visited Mar. 28, 2024). America's GDP per capita in 2023 is $80,412. *Gross domestic product (GDP) per capita in the United States in current prices from 1987 to 2028 (in U.S. dollars)*, Statista, https://www.statista.com/statistics/263601/gross-domestic-product-gdp-per-capita-in-the-united-states/ [https://perma.cc/RUR3-A4ER] (last visited Mar. 28, 2024).

[13] *See Côte D'Ivoire 2022*, AMNESTY INT'L, https://www.amnesty.org/en/location/africa/west-and-central-africa/cote-divoire/report-cote-divoire/ [https://perma.cc/3MNU-J2SC] (last visited Mar. 28, 2024); *see also Guatemala 2022*, AMNESTY INT'L, https://www.amnesty.org/en/location/americas/central-america-and-the-caribbean/guatemala/report-guatemala/ [https://perma.cc/V4G5-XTJY] (last visited Mar. 28, 2024).

the Human Rights Movement is Losing," observes that "[h]uman rights activists do better when they work to strengthen people's capacity to fight for their own rights, rather than browbeating oppressive leader in ways that help them mobilize nationalist backlash."[14] On a similar note, Hurst Hannum has argued in his book, *Rescuing Human Rights*, that "[e]xpanding the formal scope of human rights is likely only to distract from the woefully unfinished task of protecting existing rights."[15] Many political conservatives have lambasted the human rights movement as partisan, and at the most extreme, some observers have expressed doubts about rights-based activism altogether. In a 2016 essay, *Against Human Rights*, Rusty Reno argued that "[e]xalting human rights as the epitome of social responsibility short-circuits collective judgment and stymies action for the sake of the common good."[16] Furthermore, in *What's Wrong With Rights?*, Nigel Biggar catalogs many problems he identifies with the human rights movement.[17] He acknowledges that "the human goods that rights seek to protect are universal," but adds that "[t]here are . . . many different ways in which a good can be protected by a legal right, and the way chosen by a particular society will be shaped by its historical, cultural, and other circumstances."[18] Although many scholars and lawyers have been roused to a defense, it is clear that the human rights movement is in the throes of a crisis of self-confidence.

This article argues that some of the most acute challenges to the human rights movement arise from overconfidence and parochialism on the part of human rights advocates. It is today commonplace to make "rights" claims that are unmoored from the philosophical progenitors of that tradition, such as Hobbes, Locke, and Montesquieu. The extravagance of those claims inspires doubts about the viability of human rights as a universal criterion to judge political actors throughout the world, given the vast differences in wealth and culture. What purports to be "human rights" issues often seem more like "First World" or Western concerns than anything fundamental to the human condition.

The article sketches a possible road map to recasting human rights in a way that might garner broader support. It begins, in Part I, with the observation that the rights in the UDHR can be broadly distinguished between those that have a counterpart in American constitutional law and those that do not. The latter rights, which have an aspirational character, are

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[14] Jack Snyder, *Why the Human Rights Movement Is Losing*, FOREIGN AFF. (July 21, 2022), https://www.foreignaffairs.com/world/why-human-rights-movement-losing [https://perma.cc/8765-WNR3].

[15] HURST HANNUM, RESCUING HUMAN RIGHTS: A RADICALLY MODERATE APPROACH 158 (2019).

[16] R.R. Reno, *Against Human Rights*, FIRST THINGS (May 2016), https://www.firstthings.com/article/2016/05/against-human-rights [https://perma.cc/UH5T-NUKN].

[17] BIGGAR, *supra* note 5.

[18] *Id.* at 218.

the ones that most often excite criticism. As described in Part II, these are generally framed as positive rights—that is, rights (such as the right to a Braille-equipped ATM) that individuals can demand and seek government intervention to enforce. When conceived of in this way, human rights are most vulnerable to the aforementioned critiques.

Perhaps, then, human rights should be limited to those that are less ambitious. Part III examines rights in the UDHR that seem to have a counterpart in American constitutional documents. The argument could be made that these rights have been implemented, more or less successfully, in the American tradition, and there is thus no reason they cannot be recognized elsewhere in the world. If human rights are more conservatively framed as negative rights—that is, rights that can be asserted against state actors—a consensus is possible. One difficulty suggested in Part III, however, is that the "human rights" embodied in American constitutional law are nonetheless rooted in a history and tradition which span several centuries and channel the scope of those rights. Is it possible for human rights, even cast simply as limits on state power, to be removed from a particular tradition?

This is the test posed in Part IV. The case considered is the human right to be free from cruel punishment. This right is codified in the U.S. Constitution's Eighth Amendment and the Fifth Article of the UDHR. It captures an intuition that human beings possess an intrinsic dignity that state actors, when inflicting judicial punishment, cannot violate. But even here, where the moral claim is compelling, it proves difficult to define cruelty in a way that does not draw upon a particular tradition. The Article concludes with the suggestion that the human rights movement should be more cautious in its demands of other nations and more tolerant of practices that have been rejected in Western Europe.

I. TWO KINDS OF HUMAN RIGHTS

The UDHR is widely regarded as the foundational document of the modern human rights movement.[19] Among its progeny are seven central human rights treaties and dozens more conventions of a secondary status.[20] Besides the many UN committees tasked with monitoring human rights throughout the world, there are hundreds of non-governmental organizations

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[19] *See*, *e.g.*, WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 23 (William A. Schabas, ed., Cambridge U. Press 3d ed. 2002) (describing the Universal Declaration of Human Rights as "the cornerstone of contemporary human rights law").

[20] *See The Core International Human Rights Instruments*, GEO. L. HUM. RTS. RSCH. GUIDE, https://guides.ll.georgetown.edu/c.php?g=273364&p=6066284 [https://perma.cc/7Y48-CWFK] (last visited Mar. 25, 2024).

(NGOs) dedicated to proselytizing and litigating the cause.[21] Many of these NGOs are lavishly funded, and they are often prepared to insert themselves into controversial political debates. Moreover, the catalog of "human rights" identified by the lawyers who practice in this arena seems to grow by the year.

It is useful to begin with the starting point of this movement: the UDHR itself. An American lawyer not immersed in the practice of human rights law will likely find some articles of the UDHR familiar, and others quite strange. To start with the familiar, there are many articles in the UDHR that track quite closely with provisions in the United States Constitution:

Table 1
Universal Declaration of Human Rights
with Counterparts in the United States Constitution

Universal Declaration of Human Rights	**United States Constitution**
Article 2 Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.	**Amendment XIV** No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.
Article 4 No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.	**Amendment XIII** Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

[21] *See IGOs and NGOs Concerned with Human Rights*, GEO. L. HUM. RTS. RSCH. GUIDE, https://guides.ll.georgetown.edu/c.php?g=273364&p=1824737 [https://perma.cc/VYB4-DFJ5] (last visited Mar. 25, 2024).

Article 5 No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.	**Amendment VIII** Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
Article 7 All are equal before the law and are entitled without any discrimination to equal protection of the law.	**Amendment XIV** No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.
Article 9 No one shall be subjected to arbitrary arrest [or] detention	**Amendment IV** The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated . . . .
Article 10 Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.	**Amendment XIV** No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .
Article 13 Everyone has the right to freedom of movement and residence within the borders of each state.	**Article IV, Section 2, Clause 1** The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.
Article 17 No one shall be arbitrarily deprived of his property.	**Amendment V** [N]or shall private property be taken for public use, without just compensation.

Article 18 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.	**Amendment I** Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
Article 19 Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.	**Amendment I** Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
Article 20 Everyone has the right to freedom of peaceful assembly and association.	**Amendment I** Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Table 1 presents the many articles of the UDHR that should trigger, in an American lawyer, the shock of recognition. In some instances, the U.S. Constitution and the UDHR seem to provide for protection of the same right, and in virtually identical language. The most striking example is Article 4 of the UDHR, which, exactly like the Thirteenth Amendment, prohibits

slavery.[22] Other correspondences are quite close, although the language is slightly different in ways that may correspond to differences in scope. For example, UDHR Article 9 prohibits "arbitrary arrest and detention."[23] This points to the same idea as the Fourth Amendment, but the latter introduces an evidentiary standard (i.e., "probable cause") and a mode of protection (i.e., a "warrant") that tap into a specific cultural heritage.[24] Likewise, Article 5 of the UDHR provides that "[n]o one will be subjected to torture or to cruel, inhuman or degrading punishment."[25] This seeks to accomplish a goal similar to the Eighth Amendment. Again, however, the latter uses the oddly evocative language of "cruel and unusual punishment," which traces its provenance to an English tradition dating back over a century.[26] To what extent these linguistic differences introduce substantive differences will be taken up later in the Article.[27]

The rights reflected in Table 1 all seem to have deep roots in the modern philosophical tradition. The natural rights tradition—of which Hobbes and Locke are widely regarded as the sources—recognized the protection of life, liberty, and property as the primary goals of government.[28] All the rights in Table 1 are thus best understood as rights to be asserted against a potentially overreaching state. The only exception—the right to be free from enslavement—is *sui generis* in that it is a right that one can assert against both private and state actors. With the exception of UDHR Article 4 and the Thirteenth Amendment, the rights in Table 1 are all best understood as rights that exclusively limit the powers of government.

But there are also rights in the UDHR that do not resemble rights in the U.S. Constitution:

Table 2

Universal Declaration of Human Rights without Counterparts in American Founding Documents
Article 6 Everyone has the right to recognition everywhere as a person before the law.

[22] UDHR, *supra* note 1, at art. IV; U.S. Const. amend. XIII, § 1.
[23] UDHR, *supra* note 1, at art. IV.
[24] U.S. Const. amend. IV. *See infra* at text accompanying notes 60-64.
[25] UDHR, *supra* note 1, at art. V.
[26] U.S. Const. amend. XIII. *See infra* at text accompanying notes 95 and 96.
[27] *See infra* Part IV.A.
[28] *See generally* THOMAS G. WEST, THE POLITICAL THEORY OF THE AMERICAN FOUNDING (2017).

Article 12 No one shall be subjected to . . . attacks upon his honour and reputation.
Article 22 Everyone, as a member of society, has the right to social security and is entitled to realization . . . of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.
Article 23 Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
Article 24 Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.
Article 25 Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
Article 26 Everyone has the right to education. . . . Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.
Article 27 Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 29 Everyone has duties to the community in which alone the free and full development of his personality is possible.

One general impression of the rights listed in Table 2 is that they do not derive from the philosophical "social contract" tradition. It would be hard to say that men and women in the famously violent state of nature contracted with the purpose of ensuring their right to "rest and leisure"[29] or a "renumeration [consistent with] an existence worthy of human dignity"[30]; their aims were more modest. Moreover, the rights listed in Table 2 are what might be called "positive rights" in the sense that they create expectations that individuals can demand the state to satisfy.[31] If there is indeed a human right to an education that facilitates the "full development of the personality,"[32] that necessarily means that the government must provide it. Whether the rights listed in Table 2 can sustain the level of respect and universal agreement that are an essential component of human rights is the topic to which we now turn.

II. HUMAN RIGHTS AS POSITIVE RIGHTS

Several of the provisions in the UDHR are cast not as rights *against* the government, but as rights owed to individuals *by* governments and other individuals.[33] Some of these provisions are staggering in the nature of the obligation imposed. As already mentioned, Article 26 of the UDHR codifies the human right to an education that is "directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms."[34] It is unclear how many human beings are so fortunate as to achieve the "full development of the personality." At a minimum, however, the attainment of this goal presupposes an education not simply in reading and writing, but also in music and gymnastics.[35]

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[29] UDHR, *supra* note 1, at art. XXIV.

[30] *Id.* at art. XXII.

[31] *See*, *e.g.*, Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 858 (2001) (describing the "gaining popularity" of positive rights).

[32] UDHR, *supra* note 1, at art. XXVI.

[33] The distinction between "positive rights" and "negative rights" is "intuitive," as Frank Cross has argued, but it is vulnerable to many theoretical challenges. *See* Cross, *supra* note 31, at 864-68. It is, nonetheless, useful in framing the discussion.

[34] UDHR, *supra* note 1, at art. XXVI.

[35] *See*, *e.g.*, PLATO, THE REPUBLIC bk. III, at 403c-d (Allan Bloom, trans. 1991) (in both gymnastics and music,

Subsequent treaties and conventions—as well as academic literature—have expounded upon what is entailed in an education that fosters the development of each "personality."[36] An education in this sense entails costs that would strain the public coffers of even the world's richest countries. Moreover, an education that fosters "respect for human rights" has been interpreted to require an exposure to "different viewpoints," such that students are trained to be "global citizens."[37] But don't cultures have a right to preserve their identities as specific and closed cultures? Do yeshiva schools violate Article 26 of the UDHR by failing to incorporate the Pauline letters in their curriculum? This seems ridiculous, but the human rights literature is often oblivious to the elementary concept of trade-offs.

It is sufficient here to observe that the recognition of positive rights entails costs that must be borne by someone. This is ordinarily the stuff of political deliberation and compromise, at least in modern liberal regimes. And given the vast differences in wealth across the globe, it should be expected that those compromises are struck in different ways in different countries. The UDHR speaks, however, of *human* rights, as if there is a trans-political criterion by which these compromises can be judged. In this spirit, Article 23 of the UDHR codifies the right to "just and favourable renumeration."[38] The notion of a "just" wage evokes Medieval Scholastic ideas of a "just price," a concept generally repudiated by modern economics.[39] The market clearing wage is obviously different in Hanoi and Houston, and in Dongguan and Denver. Does "justice" require that employers pay workers an identical wage in all these cities? This is wildly implausible, but one can read a 9,500-word document produced by the UN as an authoritative construal of the requirement of a just wage without a clear acknowledgment of this economic and political reality.[40] Instead, there is

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one must "receive a precise training from childhood throughout life"); UDHR, *supra* note 1, at art. XXVI.

[36] *See*, *e.g.*, G.A. Res. 2200A (XXI), International Convention on Economic, Social and Cultural Rights, art. XIII (Dec. 16, 1966) ("The State Parties to the present Covenant recognize the right of everyone to education. They agree that education should be directed to the full development of the human personality . . ."); G.A. Res. 44/25, Convention on the Rights of the Child, art. XXIX (Nov. 20, 1989) ("State Parties agree that the education of a child shall be directed to the development of the child's personality, talents and mental and physical abilities to the fullest potential"). *See also* Jacqueline Mowbray, *Is There a Human Right to Public Education? An Analysis of States' Obligations in Light of the Increasing Involvement of Private Actors in Education*, 33 HARV. HUM. RTS. J. 121, 123-27 (2020).

[37] *See* UNESCO, GLOBAL CITIZENSHIP EDUCATION: TOPICS AND LEARNING OBJECTIVES at 31, 34 (2015), https://www.gcedclearinghouse.org/sites/default/files/resources/150020eng.pdf [https://perma.cc/7RT5-59LZ].

[38] UDHR, *supra* note 1, at art. XXIII.

[39] *See* William Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 YALE J. REG. 721, 729-49 (2018) (discussing just price); For an intrafamily disagreement, *compare* MILTON FRIEDMAN, PRICE THEORY 10-11 (2008), *with* David Friedman, *In Defense of Thomas Aquinas and the Just Price*, 12 HIST. POL. ECON. 234, 236 (1980).

[40] Comm. on Econ., Soc., and Cultural Rights, *General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, para. 10, U.N. Doc E/C.12/GC/23, (Apr. 27, 2016).

language about a "fair" wage, including "supplements to guard against arbitrariness," the dissemination of information regarding "good hygiene," and equal opportunities for promotion.[41] To be sure, these are rightly understood to be part of the political bargain struck in the richer parts of the world, but might this be a bit premature and optimistic in others?

Which brings us to Article 24 of the UDHR, the human right to "rest and leisure," generally known as the right to a vacation.[42] There is a powerful intuition behind this. Human beings are part animal, part angel. To live a life of drudgery is unfit for human beings, and in that sense, we may all be entitled—in our capacity as human beings—to escape intermittently into private realms of reflection and play. Fair enough, but is this a human *right*? In April 2010, the European Union apparently held that it was, and it unveiled a plan to subsidize vacations for the less advantaged of its citizens.[43] Even observers sympathetic to the human rights movement have lambasted this decision:

> Human rights are basic rights and freedoms to which all humans are entitled, merely by virtue of being human. In the economic sphere, these would include, at a minimum, food, clothing, and shelter. There is no reason why any human being in modern society should go without these basic necessities, and government has an obligation to provide them for those who cannot acquire them for themselves. Beyond that, government arguably has a responsibility to provide medical care and education for every citizen. But certain goods—most of them, in fact—are not strictly necessary to human health and dignity, and are more appropriately described as optional or luxury goods. A vacation is a luxury good if ever there were one, and its classification by the E.U. as a "human right" is laughable in the extreme.[44]

There are many reasons to be skeptical of human rights as positive rights. They make human rights appear to be "First World" goods masquerading as human rights. They are often advanced in disregard of competing considerations, including the costs that would be necessary to fulfill them.

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[41] *Id.* paras. 10, 30.

[42] UDHR, *supra* note 1, at art. XXIV.

[43] *E.U.: Vacationing a Human Right*, HARVARD POL. R. (Apr. 20, 2010), https://harvardpolitics.com/e-u-vacationing-a-human-right/ [https://perma.cc/YAX7-9RAM].

[44] *Id.*

And, finally, they make human rights seem "laughable."[45]

As Talleyrand said of Napoleon's murder of the Duke of Enghien, it was "worse than crime; [it was] a mistake."[46] In the realm of politics, there are occasions when the worst thing one can do is to expose oneself to ridicule. The human rights listed in Table 2, which are conceived as positive rights, may do more than anything to damage the cause of human rights because they make that cause seem ridiculous.

III. ANGLO-AMERICAN HUMAN RIGHTS

The rights in Table 1 provide a more fruitful starting point for a discussion of human rights. For 250 years, the American regime has more or less successfully integrated these rights into our regime. If it can be achieved here, why not elsewhere?

As already observed, these rights are all—with the exception of the Thirteenth Amendment and Article 4 of the UDHR—limits on state power. One lesson to be learned is that rights are most easily operationalized when cast modestly, in negative terms. It is when rights create affirmative duties for state and private actors to provide some good that they become most nettlesome, for the effect is to frame contentious debates over finite resources in the absolutist language of rights. As Nigel Biggar writes:

> There is no doubt that [the] health and welfare of children and mothers across the globe are very important goals that deserve protection and promotion. However, there are many other goods—some of them equally or perhaps more important—that deserve protection and promotion . . . . Unlike single-interest lobbyists and bodies, however, governments bear the unenviable responsibility of having to decide how to allocate finite resources to secure which rights and goods, and to what degree. They have to work within the unyielding limits of material, financial, and political feasibility.[47]

It is certainly true that over the centuries, "rights-talk" has become

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[45] *Id.* *See also* Matt Long, *Is Travel a Human Right?*, LANDLOPERS (May 27, 2020), https://landlopers.com/2010/05/27/is-travel-a-human-right [https://perma.cc/M3QM-T6CX]; Jimmy Orr, *Opinion: No free vacation this year? Your human rights may have been violated (at least in Europe)*, L.A. TIMES (Apr. 21, 2010), https://www.latimes.com/archives/blogs/top-of-the-ticket/story/2010-04-21/opinion-no-free-vacation-this-year-your-human-rights-may-have-been-violated-at-least-in-europe [https://perma.cc/ZJ2T-JEFX].

[46] Henrik Bering, *The Indispensable Talleyrand*, HOOVER INST. (Jan. 29, 2008), https://www.hoover.org/research/indispensable-talleyrand [https://perma.cc/WW3G-2EDA].

[47] BIGGAR, *supra* note 5, at 328.

more commonplace in American political debates, and courts and legislatures have been more willing to recognize and codify "positive rights."[48] But this is occurring within the United States, or a state or locality within the United States. Thus, the bargains are being struck in some form of political compromise and, moreover, are occurring within a particular jurisdiction with fairly narrowly defined parameters of "material, financial, and political feasibility."[49] The same balance struck in South Carolina, for example, would plainly be infeasible in Sudan.

Another striking feature of the human rights codified in American constitutional law is that they are filtered through the language of our tradition. Unlike the authors of the UDHR, the American founders were not working with "human beings"; they were designing institutions for flesh-and-blood Americans who shared a particular tradition and history.[50] The American founders rooted their arguments in the particular tradition from which they emerged.[51] That philosophical tradition was far more likely to speak of "natural rights" or "God-given rights" than "human rights," and that language is reflected in the writings of the American founders.[52] More importantly, the universal rights were often framed in light of the particular history of the American colonists. For example, in 1765, Benjamin Franklin wrote: "Have you then forgotten the incontestable principle which was the foundation of Hampden's glorious lawsuit with Charles the First, that what an English king has no right to demand, an English subject has a right to refuse?"[53] For the "incontestable principle" that government arises from the consent of the governed, Franklin appeals not to nature or even nature's God, but to Hampden's case against Charles I, a powerful precedent in the English tradition.[54]

It is true that the Declaration of Independence begins with language that seems to prefigure the preamble of the UDHR. The American Declaration pronounces that "all men are created equal,"[55] and the UDHR

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[48] *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 15 (1991) (arguing that our "rights-dominated public language does not do justice to the capacity for reason or the richness and diversity of moral sentiments that exist in American society").

[49] BIGGAR, *supra* note 5, at 328.

[50] The difference in perspective with the French Revolutionaries is often remarked upon. *See*, *e.g.*, HANNAH ARENDT, ON REVOLUTION 55-56 (1963).

[51] For a classic discussion of the sources and traditions of the American Revolution, *see* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 22-54 (Harvard Univ. Press ed., Belknap Press) (1967).

[52] *See generally* WEST, *supra* note 28.

[53] *The Origin of Human Rights: A Founding Fathers' Perspective*, NAT'L CTR. FOR CONST. STUD. (Aug. 3, 2023), https://nccs.net/blogs/weekly-constitution/the-origin-of-human-rights-a-founding-fathers-perspective [https://perma.cc/2PXT-H2WA]

[54] *Id*. (describing Hampden's case against King Charles I as "a pivotal moment in the history of English constitutionalism").

[55] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

begins with a "recognition of the inherent dignity and . . . the equal and inalienable rights of the human family."[56] However, the American Declaration goes on to catalog particular abuses that the colonists are said to have suffered at the hands of King George III, which includes the abolition of "the free System of English Laws," the "taking away [of] our Charters," and most interestingly, of "depriving us . . . of the benefits of Trial by Jury."[57] The right to a jury trial is emphatically not a human right; there are many civilized judicial systems that are inquisitorial and do not rely on lay jurors in either civil or criminal cases.[58] But the jury trial right is a right that Englishmen regarded themselves as entitled to—not as human beings, but as Englishmen.

The American revolutionaries conceived of rights in both senses—both universalistic—applying to all human beings—and particular—arising from a specific historical tradition. They spoke of "natural rights" and "God-given rights" on the one hand, but "the rights of Englishmen" on the other.[59] In important respects, the latter tradition colored the legal rights. Many of the rights that ended up being codified in the U.S. Constitution may seem to be of the first character, but are more importantly, for legal purposes, of the second.

Consider the Fourth Amendment of the U.S. Constitution. As reflected in Table 1, this provision seeks to accomplish an objective similar to Article 9 of the UDHR, which prohibits arbitrary arrest and detention. Yet, the Fourth Amendment, to achieve this objective, draws upon a very specific institution that had been crafted over the course of centuries—a "warrant."[60] The idea of an "arrest warrant" dates back at least to thirteenth century England, and by the seventeenth century, there are elaborate discussions in Coke and Hale of how it operated and what was required for its issuance.[61] High-profile cases in England in the eighteenth century became well known in the United States.[62] To be sure, there was (and still is) a robust debate over that history and when warrants were required,[63] but that English tradition is what channels the debate. When Americans argue about limits on the arrest power of the police, the question is not about human beings and institutions

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[56] UDHR, *supra* note 1, at pmbl.

[57] THE DECLARATION OF INDEPENDENCE paras. 20, 22-23 (U.S. 1776).

[58] For a classic discussion of an inquisitorial system, see John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

[59] There is a rich debate as to whether to give prominence to the "natural rights" rhetoric or the "rights of Englishmen" rhetoric. *See* Charles R. Kesler, *Natural Law and a Limited Constitution*, 4 S. CAL. INTERDISC. L. J. 549, 549 n.2 (1995).

[60] U.S. Const. amend. IV.

[61] Thomas Davies, *Recovering the Original Fourth Amendment*, 98 U. MICH. L. REV. 547, 578-79 (1999).

[62] *See*, *e.g.*, Entick v. Carrington, 19 Howell's State Trials 1029 (1765).

[63] *See* Davies, *supra* note 61, at 560-90 (critiquing various interpretations of the Fourth Amendment).

in the abstract, but about the utility of English institutions—the warrant and the "probable cause" requirements—in checking officers who may be prone to be overzealous in the competitive enterprise of ferreting out crime.[64]

Nor have courts shied away from rooting human rights in our particular traditions. As Justice Frankfurter observed in 1949, just one year after the enactment of the UDHR,

> The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of *human rights* enshrined in the history and the basic constitutional documents *of English-speaking peoples*.[65]

There is an unmistakable chauvinism in these words, contrasting the "English-speaking people" with others, for whom the "knock at the door" can portend a violent intrusion by government officials.

Consider also the rights embodied in Articles 10 and 11 of the UDHR, which provide that criminal proceedings must include several procedural protections: "a fair and public hearing by an independent and impartial tribunal,"[66] the presumption of innocence,[67] and the requirement that "no one shall be guilty of any penal offense on account of any act or omission which did not constitute a penal offense . . . at the time the penal offence was committed."[68] These are all rights that have been recognized by the U.S. Constitution, but, again, they are framed in ways that have historical roots. For example, the Fifth Amendment provides that "[n]o one shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury."[69] And the Sixth Amendment provides further for a trial by an "impartial jury."[70] As already noted, the "jury," and certainly the "grand jury," which only countries colonized by England have in any form,[71] are not human necessities. Indeed, one can design excellent juryless criminal proceedings that respect the rights of defendants and ascertain the truth as

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[64] Alabama v. White, 496 U.S. 325, 333 (1990) (Stevens, J., dissenting) (noting that "the Fourth Amendment was intended to protect the citizen from the overzealous and unscrupulous officer").

[65] Wolf v. Colorado, 338 U.S. 25, 28 (1949) (emphasis added).

[66] UDHR, *supra* note 1, at art. X.

[67] *Id.* at art. XI.

[68] *Id.*

[69] U.S. Const. amend. V.

[70] U.S. Const. amend VI.

[71] *See* R.H. Helmholz, *The Early History of the Grand Jury and Canon Law*, 50 U. CHI. L. REV. 613, 613 (1983) ("The modern grand jury traces its origins to the Assize of Clarendon, an enactment of King Henry II in 1166").

well as the adversarial, jury-based systems familiar to the Anglophone world. But these systems wouldn't be deemed adequate in the Anglo-American tradition, and it is that tradition—not theoretical possibilities—that frames what a respect for human rights is understood to require.

Even phrases in the U.S. Constitution that seem to be unmoored and abstract often tap into a history and tradition. Although John Hart Ely denounced the Fourteenth Amendment's due process clause as "green pastel redness,"[72] the clause in fact has a seven-century pedigree. Arguably arising from the Magna Carta, which references "the law of the land,"[73] an English statute from 1354 provided that no man can be deprived of his estate without "due Process of the Law."[74] That history renders the phrase, repeated in the Fifth Amendment, intelligible. Judge Easterbrook's complaint that the clauses "could mean just about anything"[75] is spot on in describing Article 6 of the UDHR, which provides that "[e]veryone has a right to recognition everywhere as a person before the law."[76] But it is at least arguable that the U.S. Constitution's due process clauses are illuminated by the history that preceded them. Thus, for example, the Supreme Court in *In re Winship* concluded that the due process clause required the "beyond a reasonable doubt" evidentiary standard in all criminal cases, with the observation that "[t]he requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation."[77] More broadly, the Court in an earlier case observed that the rules governing a criminal trial "are historically grounded rights of *our* system."[78]

Among the most important, and still controversial,[79] uses of the Fourteenth Amendment's "due process" clause has been to "incorporate" many of the provisions in the Bill of Rights against state governments. In determining whether a given right is applicable to the states through incorporation, the Court has asked whether the right is necessary to an "Anglo-American regime of ordered liberty."[80] This test acknowledges that other regimes may include, or exclude, some of the rights that are entrenched

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[72] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980).

[73] WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 375 (2d ed. 1914).

[74] Liberty of Subject Act 1354, 28 Edw. 3 c. 3, *quoted in* Randy Barnett & Evan Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WILLIAM & MARY L. REV. 1599, 1607 (2019).

[75] Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 90 (1982).

[76] UDHR, *supra* note 1, at art. VI.

[77] 397 U.S. 358, 361 (1970).

[78] Brinegar v. United States, 338 U.S. 160, 174 (1949) (emphasis added).

[79] *See, e.g.,* McDonald v. City of Chicago, 561 U.S. 742, 805-58 (2010) (Thomas, J., concurring) (writing separately to explain why incorporating the Bill of Rights to the states is not "faithful to the Fourteenth Amendment's text and history").

[80] Duncan v. Louisiana, 391 U.S. 145, 149 n. 14 (1968).

in our scheme.[81] We have already mentioned the jury trial right, but the test has generated other striking results. For example, the Washington Supreme Court concluded that the right to bear arms is entrenched in our regime, noting the almost-universal inclusion of the right in every state constitution in America.[82] By contrast, the Utah Supreme Court concluded that "[t]he defense of impossibility is not a fundamental right essential to an Anglo-American regime of ordered liberty."[83] It is certainly possible that other traditions would reject a right to bear arms and adopt an impossibility defense; about such matters one can imagine differences of opinion even among "civilized" nations.

The American experience suggests that there are some rights, such as these, that are peripheral and which may or may not be part of a particular tradition. Other rights which are part of our tradition, however, go to the core of what it means to be human: these are rights that all governments in civilized nations must respect. "Human rights" in this constrained form, restricted to limits on state power and focused only on the matters of greatest concern, would seem to be the most fruitful approach to securing universal agreement. American defenders of the UDHR on the political right have recently argued that the document is best understood in this way.[84] This claim perhaps understates the articles in the UDHR that are vastly more ambitious,[85] but the question remains whether even a constrained form of human rights can be operationalized in the trans-political way.

This is the ambition of the human rights movement. A test case for determining whether this modest ambition can even be realized is Article 5 of the UDHR, which provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[86] Closely tracking this provision is the U.S. Constitution's Eighth Amendment, which provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[87] The intuition behind Article 5 and the Eighth Amendment is compelling: surely, it would seem, there should

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[81] *Id.*

[82] State v. Sieyes, 225 P.3d 995, 1001 (Wash. 2010) (noting that "[f]orty-four state constitutions explicitly recognize the right to keep and bare arms and '[n]early all secure (at least in part) an individual right to keep some kinds of guns for self-defense.' . . . The right was [also] considered essential in the colonies and by the original states").

[83] State v. Sommers, 569 P.2d 1110, 1111 (Utah 1977).

[84] Peter Berkowitz, *Responsibly Championing Human Rights*, REALCLEAR POL. (Nov. 21, 2021), https://www.realclearpolitics.com/articles/2021/11/21/responsibly_championing_human_rights_146759.html; Mary Ann Glendon, *There's Life Yet in the Universal Declaration of Human Rights*, WALL ST. J. (Dec. 8, 2023), https://www.wsj.com/articles/theres-life-yet-in-the-universal-declaration-of-human-rights-460a2be3.

[85] *See supra* Part II.

[86] UDHR, *supra* note 1, at art. V.

[87] U.S. Const. amend. VIII.

be the human right to be free from cruel punishment.[88] However, in operationalizing even the most compelling of human rights, difficulties arise.

IV. DEFINING THE HUMAN RIGHT TO BE FREE FROM CRUEL PUNISHMENT

At a high level of generality, it is possible to say that there is a human right to be free from "cruel" punishment—the right inheres in our dignity as human beings. Yet judicial punishment always entails causing some measure of pain; and, unlike the punishment meted out by a parent, there is often no countervailing benefit for the recipient of the judicial punishment. In other words, a parent can honestly say, when punishing a child, "this is for your own good." This is not the case for the judicial authority, which often punishes criminals simply to satisfy the demands of deterrence and retribution,[89] irrespective of whether the punishment makes the affected party better or worse. Indeed, the point of judicial punishment is pain, and it is not always easy to say when that pain crosses a line that renders it so "cruel" as to be inconsistent with our humanity. As sketched in the first part of this section, the prohibition on "cruel punishment" within the United States is more precisely a prohibition on "cruel and unusual punishments." That phrase borrows from an older tradition and defines the right within the context of this nation's practices, both past and present. The second section considers three controversial punishments and, in so doing, explores the difficulty of defining "cruel punishment" outside of a particular tradition.

A. The Problem of Punishment

Judicial punishment, which necessarily entails the infliction of pain, is justified by principles of retribution and deterrence.[90] One might argue that punishment should have, as its principal goal, the rehabilitation of the offender. This certainly sounds more "humane," but as C.S. Lewis famously observed, empowering the state to "better" a criminal entrusts an almost terrifying power to the agents of the state.[91] Perhaps it is better if government officials restrict judicial punishment to the infliction of pain unmotivated by any hope of correcting the offender.

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[88] *See* SARAH J. SUMMER, SENTENCING AND HUMAN RIGHTS: THE LIMITS TO PUNISHMENT 16-19 (Oxford University Press 2022).

[89] *See* Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1313 (2000).

[90] *See* United States v. Halper, 490 U.S. 435, 448 (1989) (referring to retribution and deterrence as the "twin aims" of punishment).

[91] *See* C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATE 224 (1953).

Yet how can one know whether a punishment inflicts an acceptable level of pain—to achieve the "twin goals" of retribution and deterrence[92]—or a punishment that inflicts an unacceptable level of pain inconsistent with our humanity? On this point, the U.S. Constitution and the UDHR employ similar, and, in some respects, even identical language: The test is whether the punishment is "cruel."[93]

This linguistic similarity obscures possible disagreements, however. There is an old saw that England and America are two countries separated by a common language. The implication is that the same words can carry vastly different meanings, a difference masked by the similarity of the words. Likewise, there can be no confidence that "cruel" carries the same meaning in the U.S. Constitution and the UDHR. As was discussed in the previous section, language in the U.S. Constitution often draws upon our English heritage.[94] Indeed, the Eighth Amendment borrows language from the English Bill of Rights of 1688,[95] which was enacted in response to a particular event and intended to address a particular evil.[96] This historical tradition, together with current American practices, provides important context when American courts construe the meaning of the phrase "cruel and usual punishments."

To be sure, there is a lively debate as to the exact meaning of that phrase, with some Supreme Court Justices taking a narrow originalist/historical approach,[97] and others open to "updating" the meaning of "cruel and unusual punishment" in light of evolving standards of human decency.[98] Although some Justices are receptive to international and philosophical perspectives on the meaning of "cruelty" ungrounded in our American experience,[99] the starting point for all Justices has been to canvass the penological practices of the 52 American jurisdictions (i.e, the 50 states, the federal government, and the District of Columbia).[100] Thus, American

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[92] *Halper*, 490 U.S. at 448.

[93] U.S. Const. amend. VIII.

[94] *See supra* at text accompanying notes 60-63 and 72-73.

[95] John D. Besser, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution's Eighth Amendment*, 27 WM. & MARY BILL RTS. J. 989, 997 (2019) (remarking that "[a]ll three clauses of the U.S. Constitution's Eighth Amendment—the Excessive Bail Clause, the Excessive Fines Clause, and the Cruel and Unusual Punishments Clause—are derived from the English Bill of Rights").

[96] *See* John F. Stinneford, *The Original Meaning of "Cruel"*, 105 GEO. L. J. 441, 475-77 (2017) (discussing the history behind the Bill of Rights prohibition of "cruel and unusual punishments").

[97] *See*, *e.g.*, Baze v. Rees, 553 U.S. 35, 94-107 (2008) (Thomas, J., concurring).

[98] *See*, *e.g.*, Miller v. Alabama, 567 U.S. 460, 469-70 (2012) (noting that the Eighth Amendment has been interpreted "less through a historical prism than according to 'the evolving standards of decency that mark the progress of a maturing society'").

[99] Roper v. Simmons, 543 U.S. 551, 577-78 (2005) (discussing how the United Kingdom has handled the death penalty and remarking that "since the United Kingdom abolished the juvenile death penalty, the weight of authority against it there, and in the international community, has become well established").

[100] Graham v. Florida, 560 U.S. 48, 61 (2010) ("In the cases adopting categorical rules [pertaining to the Eighth

practices—whether in 1789 or in the modern era—provide the starting point in any judicial inquiry into what constitutes "cruel and unusual punishments."

By contrast, the prohibition of "cruel" and "degrading" punishment in the UDHR is unmoored from any tradition. Is it possible to define what is a cruel and degrading punishment in the abstract, without reference to a particular tradition? To this question we now turn.

B. Three Examples

Over the course of history, human beings have exercised their imagination in designing judicial punishments. In canvassing this spectacle, the modern observer is likely to recoil in horror and disgust.[101] But even if we limit our gaze to the present era, judicial punishments are rich in diversity. This part will consider only three punishments, practiced in some nations, but rejected emphatically by others. Our goal, if possible, is to articulate a trans-political standard that will allow us to judge whether a given punishment is impermissibly cruel. The punishments to be considered are corporal punishment, chemical castration, and capital punishment.

1. Corporal Punishment.

Does the right to be free from cruel punishment foreclose corporal punishments, such as flogging and caning? The emphatic answer of all human rights organizations is yes. Last year, the UN issued a report condemning Afghanistan's use of corporal punishment, which includes lashing, stoning, and immersion in cold water.[102] In its report condemning Afghanistan's judicial punishments, the UN agency defines corporal punishment as "any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light."[103]

This sweeping definition extends not simply to the medieval practices of Afghanistan, but also to judicial punishments common in Singapore. Caning is, in fact, a punishment deeply rooted in Singapore's tradition.[104] Yet it is difficult to argue that Singapore is "uncivilized." Its

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Amendment] the Court has taken the following approach. The Court first considers 'objective indicia of society's standards, as expressed in legislative enactments and state practice,' to determine whether there is a national consensus against the sentencing practice at issue").

[101] *See generally* ALICE MORSE EARLE, CURIOUS PUNISHMENTS OF BYGONE DAYS (Loompanics Unlimited ed., 2010) (1896), *available at* https://www.gutenberg.org/files/34005/34005-h/34005-h.htm [https://perma.cc/MGX9-PVC2].

[102] *UN Calls on Taliban to End Corporal Punishment in Afghanistan*, U.N. NEWS (May 8, 2023), https://news.un.org/en/story/2023/05/1136427 [https://perma.cc/QG2B-FAQQ].

[103] *Id.*

[104] Firouzeh Bahrampour, *The Caning of Michael Fay: Can Singapore's Punishment Withstand the Scrutiny of*

GDP per capita is over $90,000, or fifth in the world, ahead of the United States.[105] Its homicide rate is 0.12 per 100,000 inhabitants, among the lowest in the world.[106] Nor can it be said that Singapore is without the more sophisticated trappings of civilization. It boasts forty-nine Michelin-starred restaurants[107]—an astonishing number given a population of only six million.[108] Indeed, Singapore claims more world-class restaurants per capita than the United States and nearly every country in Europe.[109]

Does Singapore's use of caning violate a human right to be free from cruel punishment? It is certainly inconsistent with European norms concerning the appropriate modes of judicial punishment.[110] Every few years, especially when a European or American citizen is arrested for a drug offense and sentenced by a Singaporean court to caning, NGOs and Western observers rally themselves to condemn the practice.[111] So far, Singapore has been unmoved. In 2015, Singapore's Court of Appeals entertained and rejected the claim that caning was a violation of the country's treaty obligations, holding that caning "did not 'breach the high level of severity and brutality that is required for it to be regarded as torture.'"[112] The International Commission of Jurists responded with predictable condemnation:

> The Court of Appeal's ruling is out of step with Singapore's obligations to prevent, prohibit and punish all forms of

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International Law?, 10 AM. UNIV. J. INT'T L. & POL'Y 1075, 1085, 1090 (1995) (noting that "[c]aning is a punishment that dates back to Singapore's early days as a Republic" and is "deeply rooted in Singapore's cultural and religious background").

[105] *GDP per capita, current prices*, INT'L MONETARY FUND, https://www.imf.org/external/datamapper/NGDPDPC@WEO/OEMDC/ADVEC/WEOWORLD [https://perma.cc/LH7S-LZDK] (last visited Mar. 26, 2024).

[106] *Victims of intentional homicide*, U.N., https://dataunodc.un.org/dp-intentional-homicide-victims (last visited Mar. 26, 2024).

[107] *Countries with the Highest Density of Michelin-starred Restaurants*, CHEF'S PENCIL (Sep. 22, 2021), https://www.chefspencil.com/density-of-michelin-starred-restaurants/ [https://perma.cc/C782-KVYL].

[108] *Singapore*, CENT. INTEL. AGENCY, https://www.cia.gov/the-world-factbook/countries/singapore/ [https://perma.cc/FPF4-5NDC] (last updated Mar. 13, 2024).

[109] *Countries with the Highest Density of Michelin-starred Restaurants*, *supra* note 107.

[110] *See* Tyrer v. United Kingdom, 26 Eur. Ct. H.R., (ser. A), at para. 35 (1978). *See also* Ezgi Yildiz, *A Court With Many Faces: Judicial Characters and Modes of Norm Development in the European Court of Human Rights*, 31 EUR. J. INT'L L. 73, 89 (2020) (discussing *Tyrer*).

[111] *See infra* at text accompanying notes 125-26 (discussing Michael Fay, the last American to be caned in Signapore). *See also* AFP, *Singapore vows to cane Briton despite protest*, DAILYMAIL, https://www.dailymail.co.uk/wires/afp/article-6593705/Singapore-vows-cane-Briton-despite-protest.html [https://perma.cc/CV2Q-N3BK] (noting that a British man was caned for drug-related offenses in 2019, prompting protests from the British Foreign Secretary); AFP, *Singapore rejects criticism that caning is torture*, YAHOO (Mar. 9, 2015), https://sg.style.yahoo.com/singapore-rejects-criticism-that-caning-is--torture-091130323.html [https://perma.cc/BE48-QN9H] (discussing the caning of two Germen men convicted of vandalism).

[112] *Singapore: Court of Appeal judgment upholding caning flouts international law prohibiting ill-treatment*, INT'L COMM'N OF JURISTS (Mar. 3, 2015), https://www.icj.org/singapore-court-of-appeal-judgment-upholding-caning-flouts-international-law-prohibiting-ill-treatment/ [https://perma.cc/G6EC-2ETY].

> torture and other cruel, inhuman or degrading treatment or punishment. International human rights bodies have made clear that caning and other forms of corporal punishment violate the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment.[113]

That Singapore is "out of step" in caning convicted criminals is surely correct. What is less "clear," however, is why this punishment is "cruel, inhuman, and degrading," at least when compared to many punishments that are commonplace in the Western world today.

Professor Peter Moskos of the John Jay College of Criminal Justice wrote in 2011 that "[i]f we want to punish criminals, and we do, flogging a man—shaming him and hurting him briefly—is better than the long-term mental torture of incarceration."[114] Moskos includes the report of the Australian drug dealer, Robert Symes, who was caned in Singapore, stating that "[t]he men responsible for administering this punishment know precisely what they are doing."[115] If the goal of judicial punishment is retribution and deterrence, why is corporal punishment not more efficient—and more humane—than the alternatives presumably preferred by the International Commission of Jurists? Why is incarceration—even for decades and in appalling conditions—which is widely regarded as acceptable in the Western world, not "cruel"?

2. Chemical Castration.

Consider a second example of a judicial punishment: chemical castration of sex offenders. Technically labeled "anti-libidinal interventions" ("ALIs"), the punishment is used in several nations in Europe,[116] and roughly a half dozen states within the United States.[117] Moreover, several countries and states have expressed interest in adopting the procedure.[118] In most cases,

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[113] *Id.* (quoting Emerlynne Gil, the ICJ's International Legal Advisor for Southeast Asia).

[114] PETER MOSKOS, IN DEFENSE OF FLOGGING 7 (2011).

[115] *Id.* at 126.

[116] Mazlum Çöpür & Sidar Çöpür, *Chemical Castration as an Evolving Concept: Is it a Possible Solution for Sexual Offences?*, 32 J. FORENSIC PSYCHIATRY & PSYCHOLOGY 326, 341 (2021) (nothing that "chemical castration laws have been adopted in France (2005), the United Kingdom (2007), Poland (2009), Russia (2011), and Macedonia (2014), Belgium, Turkey (2016) and Moldovia (2012)").

[117] *Id.* at 340 ("Chemical and surgical castration may be imposed to sexual offenders in certain circumstances in [a] few states in the USA[,] including Wisconsin, Oregon, Georgia, California, Florida, Iowa, Texas, Louisiana, Alabama, and Montana"). Notably, Singapore does *not* impose chemical castration. *See* Paul Cheong, *Incapacitating Chemical Castration*, L. GAZETTE (Apr. 2023), https://lawgazette.com.sg/feature/incapacitating-chemical-castration/ [https://perma.cc/2GE6-99LD].

[118] *See* Natalie Neysa Alund, *Bill proposes chemical castration for some sex offenders in New Mexico*, USA TODAY, https://www.usatoday.com/story/news/nation/2023/01/26/new-mexico-chemical-castration-

ALIs are proposed as "voluntary," in the sense that submission to chemical castration is a condition of parole. As several critics have observed, however, this is not informed consent in any meaningful way: "If the offender is given the choice between a course of testosterone-reducing medication and a period of incarceration, it is likely that the offender will be coerced into choosing the treatment, on the basis that it is the lesser of two evils."[119]

ALIs have generated controversy. Indeed, one could argue that chemical castration is a more invasive form of punishment than caning—it does not simply work on the human body, but it also distorts one's manner of thinking.[120] Caning, as described by those who have endured it, has short-term and relatively discrete effects. Michael Fay, the American teenager caned by Singaporean officials in 1994, reported that, although there was some blood, "he was able to walk immediately after the caning and . . . in the days after the punishment he was able to do push-ups."[121] Nor did he seem particularly scarred by experience, adding that "he now wanted to get on with finishing high school and then go to college 'like any other kid in America.'"[122] Contrast this with ALIs. As Professor John Stinneford has written,

> [T]he very purpose of chemical castration is to exert control over the mind of the offender by drastically reducing the brain's exposure to testosterone, a hormone which is considered crucial to the "regulation of sexuality, aggression, cognition, emotion and personality" in men and is "the major activator element of sexual desire, fantasies and behavior."[123]

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bill/11126810002/ [https://perma.cc/BXM2-KEKM] (last updated Jan. 26, 2023, 3:17 PM); *see also Gang rape horrors shake Italy: 7 men accused, victim's assault filmed*, KNEWS (Aug. 25, 2023, 12:53 PM), https://knews.kathimerini.com.cy/en/news/gang-rape-horrors-shake-italy-7-men-accused-victim-s-assault-filmed [https://perma.cc/W8HZ-FH4X] (discussing proposal in Italy to chemically castrate convicted rapists).

[119] Lisa Forsberg, *Anti-libidinal Interventions and Human Rights*, 21 HUM. RTS. L. REV. 384, 390 (2021) (quoting Karen Harrison & Bernadette Rainey, *Morality and Legality in the Use of Antiandrogenic Pharmacotherapy with Sexual Offenders*, *in* INTERNATIONAL PERSPECTIVES ON THE ASSESSMENT AND TREATMENT OF SEXUAL OFFENDERS: THEORY, PRACTICE AND RESEARCH 627, 640 (Douglas P. Boer et al. eds., 2011)).

[120] Chang-Ju Kim et al., *Long-term Surgical and Chemical Castration Deteriorates Memory Function Through Downregulation of PKA/CREB/BNDF and c-Raf/MEK/ERK Pathways in Hippocampus*, 23 INT'L NEUROLOGY J. 116, 127 (2019) (noting that "[t]estosterone deprivation impairs spatial working memory and cognitive function")

[121] *Teen-Ager Caned in Singapore Tells of the Blood and the Scars*, N.Y. TIMES (June 27, 1994), https://www.nytimes.com/1994/06/27/us/teen-ager-caned-in-singapore-tells-of-the-blood-and-the-scars.html [https://perma.cc/J589-3Y4D].

[122] *Id.*

[123] John Stinneford, *Incapacitation Through Chemical Castration: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 U. ST. THOMAS L.J. 559, 567 (2006).

Nonetheless, a recent article in the Human Rights Law Review by Professor Lisa Forsberg concludes that this punishment would not violate any provision in the miscellaneous provisions of EU Conventions that secure the human rights protected by EU law.[124] Professor Forsberg's article collects several decisions of the European Court of Human Rights, such as Dvořáček v. Czech Republic.[125] In that case, the petitioner had been administered ALIs.[126] The European Court found no human rights violations, notwithstanding the absence of clear evidence of informed consent.[127] The court reached the conclusion that ALIs were not "inhuman and degrading" punishment because they were not punishment at all.[128] Rather, the European Court found that the use of ALIs on the petitioner was "justified by his state of health."[129] The argument would seem to be that as long as ALIs are therapeutic in design, no human right is violated. If taken to its logical conclusion, this would not be limited to consensual ALIs, and Professor Forsberg indeed concludes precisely that: no provision in the European Convention of Human Rights forecloses non-consensual ALIs.[130]

What are we to make of this? Caning, practiced in Singapore, is a human rights violation, but chemical castration, practiced in Europe, is not. A principled distinction between the two is not easy to discern. Is it possible that what passes for "human rights" corresponds to the attitudes of Western elites without any clear support in logic or the nature of "humanity"?

3. Capital Punishment.

This brings us to a third example: capital punishment. Is there a human right to be free from the death penalty? The emphatic answer of every EU institution and human rights organizations is yes.[131]

As a descriptive matter, we are told that the death penalty is dying around the world. As a normative matter, we are told that capital punishment is inconsistent with human dignity.[132] However, both claims can be

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[124] Forsberg, *supra* note 119, at 384.
[125] *Id.* at 394.
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.* at 407 ("The rights [in the European Convention of Human Rights] that seem most likely to bear on ALI provision—Articles 3, 8 and 12—are unlikely to prohibit many instances of ALI use—also when it is non-consensual").
[131] *See*, *e.g.*, *EU Statement on the death penalty*, EUR. UNION COMM. OF MINISTERS (Apr. 14, 2021), https://www.eeas.europa.eu/delegations/council-europe/eu-statement-death-penalty-1_en [https://perma.cc/6J7J-SAAJ].
[132] *See* Furman v. Georgia, 408 U.S. 238, 291 (Brennan, J., concurring) (remarking that the death penalty is "uniquely degrading to human dignity").

challenged. The descriptive claim that the death penalty is dying, repeated annually by Amnesty International,[133] is based on a counting of the number of nations that have formally abolished the death penalty.[134] There are glaring problems with this approach. First, several nations claim to observe a prohibition against capital punishment, but then summarily execute political opponents. For example, Amnesty International apparently codes Russia as an abolitionist country.[135] Second, although every nation is entitled to vote in the UN General Assembly, this is a preposterous way to calculate global trends. Under this approach, China and Japan—both of which retain the death penalty—are as relevant as Cyprus and Jamaica in projecting the future.

As this author has elsewhere argued, a more sensible approach in forecasting global trends is to consider the world as a collection of what Samuel Huntington has called "civilizations."[136] When considered this way, Western Europe's abolition of capital punishment seems far less representative of global trends than its own leaders, and countless NGOs, proclaim. Indeed, the death penalty is resilient in three of the world's largest, richest, and fastest growing civilizations: the Sinic,[137] Japanese, and Islamic. Other civilizations—the Hindu, African, and Buddhist—have conflicted attitudes, with some nations retaining it and others moving towards abolition.[138] For example, India, a nation with three times the population of Western Europe, has gone years without executing any convicted criminals. But in the wake of a highly publicized gang rape, many political leaders called for the reinstitution of the punishment.[139] And indeed, in 2020, 4 men

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[133] For the most recent statement, *see* AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL GLOBAL REPORT, DEATH SENTENCES AND EXECUTIONS 2022 (2023), *available at* https://www.amnesty.org/en/documents/act50/6548/2023/en/ [https://perma.cc/864D-PV95].

[134] *Id.* at 40 (listing the 112 "[c]ountries whose laws do not provide for the death penalty for any crime").

[135] *Id.* at 41 (including Russia in the list of "abolitionist in practice" countries, which they define as "[c]ountries that retain the death penalty for ordinary crimes such as murder but can be considered abolitionist in practice in that they have not executed anyone during the last 10 years or more and are believed to have a policy or established practice of not carrying our executions"); *see also* Dasha Litvinova, *Nerve agents, poison and window falls. Over the years, kremlin foes have been attacked or killed*, ASSOC. PRESS (Aug. 25, 2023, 12:16 PM), https://apnews.com/article/prigozhin-navalny-putin-assassination-russia-wagner-plane-crash-5d4f8506b89bfa8848fd88529701db7c [https://perma.cc/7SZE-AZXJ].

[136] *See* Craig S. Lerner, *The Puzzling Persistence of Capital Punishment*, 38 Notre Dame J. L. Ethics & Pub. Pol'y 39 (2024) (citing SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996)). *See also* Craig S. Lerner, *Is The Death Penalty Dead?,* CLAREMONT REVIEW OF BOOKS, Summer 2019, at https://claremontreviewofbooks.com/is-the-death-penalty-dead/.

[137] "The term 'Sinic,' which has been used by many scholars, appropriately describes the common culture of China and the Chinese communities in Southeast Asia and elsewhere outside of China as well as the related cultures of Vietnam and Korea." SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 45 (1996)

[138] *See* Lerner, *Puzzling Persistence, supra* note 136, at 55-62.

[139] *See* Gardiner Harris, *Murder Charges Are Filed Against 5 Over Rape in New Delhi*, N.Y. TIMES (Jan. 3, 2013), https://www.nytimes.com/2013/01/04/world/asia/murder-charges-filed-against-5-men-in-india-gang-rape.html [...].

were executed in India.[140]

Even what Huntington calls the Western civilization, which spans Europe and many of the Anglophone countries it colonized, is divided on the issue. The United States still imposes the death penalty,[141] and this does not fail to excite the indignation and contempt of Western European leaders. For example, when the State of Texas was set to execute the 400th person in its history in 2007, the President of the EU himself protested this abomination, reminding Texas Governor Rick Perry that the elimination of the death penalty was "fundamental to the protection of human dignity."[142] The Governor responded that while he "respect[s]" his European friends, "Texans long ago decided that the death penalty is a just and appropriate punishment for the most horrible crimes committed against our citizens."[143]

And this brings us to the normative question: is the death penalty an affront to human dignity? The confidence with which Western elites answer this question is more interesting than the answer itself. After all, this would seem be the sort of question on which reasonable men and women might differ. Indeed, most serious thinkers throughout history have concluded that capital punishment is not simply permissible but required for any state that claims to moral authority. One could argue that any other punishment fails to recognize the agency of the offender and the dignity of the victim. In short, then, the abolition of capital punishment in 21st century Western Europe is open to interpretation: it can be cast as reflective of a gradual ascent to more peaceful methods of adjudication and a deepened appreciation of human dignity, or it could be viewed as a moral decline and the result of a diminished communal passion to see justice done.[144]

This article takes no position on this issue, but simply insists that it is an issue. Western European nations are of course authorized to abolish capital punishment for themselves, but some modesty is in order before browbeating the Japanese, Sinic, Islamic, and Texan civilizations. More broadly, we can all agree that there is human right to be free from cruel punishment, but the right could be recognized in different ways in different

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[140] David Welna, *4 Men Hanged In India For 2012 Gang Rape And Murder That Sparked Outrage*, NPR (Mar. 20, 2020, 4:43 PM), https://www.npr.org/2020/03/20/818953212/4-men-hanged-in-india-for-2012-gang-rape-and-murder-that-sparked-outrage [https://perma.cc/H9GA-9NX3].

[141] *See* Amnesty International, *supra* note 133, at 41 (listing the United States as one of the "[c]ountries that retain the death penalty for ordinary crimes").

[142] Press Release, Council of the European Union 12397/07 (Presse 191), Declaration by the Presidency on behalf of the European Union on the 400th execution in Texas (Aug. 21, 2007), *available at* https://dpic-cdn.org/production/legacy/400thTXExecutPortPres082107.pdf [https://perma.cc/Y3GA-JV66].

[143] TEXAS COALITION TO ABOLISH THE DEATH PENALTY, TEXAS DEATH PENALTY DEVELOPMENTS IN 2007: THE YEAR IN REVIEW 1 (Dec. 2007), *available at* https://tcadp.org/wp-content/uploads/2010/06/2007annualreport.pdf [https://perma.cc/86KM-MDFX].

[144] *See* Craig S. Lerner, *Rendering Judgment on America's Death Penalty*, L. & LIBERTY (Nov. 3, 2022), https://lawliberty.org/rendering-judgments-on-americas-death-penalty/ [https://perma.cc/FXC8-K6QD].

cultures. One should not, under the banner of "human rights," demand that all nations adopt the same penological practices as those that prevail in Western Europe.

CONCLUSION

It is easy to criticize the human rights movement when the rights are as amorphous and aspirational as the rights to recreation and the "free development of the personality."[145] This Article focuses on the more compelling case for human rights—that is, when they are cast more cautiously as limits on state power.

As we have seen, even when rights are exclusively understood in this way, as negative rights, it is still difficult to define them in a way that abstracts from the particular circumstances of each nation. Every nation has emerged from a particular history with a particular language, culture, and religion. It thus seems wildly unrealistic to expect identical answers to fundamental governance questions, such as the proper modes of punishing criminal offenders. This is not to say that "it is all relative" and that there is no basis for judging some nations as defective with respect to human rights. It is, however, to suggest that caution should prevail in trying to harmonize how all nations seek to achieve the goal of protecting human rights.

As previously noted, we seem to be in the midst of a crisis of confidence in the human rights movement.[146] This Article's suggestion is that this crisis is born of overconfidence. A humbler approach would welcome efforts by nations to ground human rights in their own histories. This was, as we have seen, the approach taken by the authors of the U.S. Constitution, who consistently framed rights in the language of the English political tradition.[147] A more recent example is the Hungarian Constitution of 2012, which begins with a long preamble devoted to celebrating the particular traditions of the Hungarian people.[148] Several human rights organizations have criticized the Hungarian Constitution,[149] but this is precisely the sort of *national* constitution that might be regarded as legitimate by citizens. Furthermore, this kind of constitution—one grounded in a particular tradition and history—is more likely to secure human rights than a statement of principles that abstracts from particular circumstances. If the

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[145] UDHR, *supra* note 1, at art. XXVI.
[146] *See supra* at text accompanying notes 3-5 and 14-18.
[147] *See supra* at text accompanying notes 60-63, 72-73, and 94-96.
[148] MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY, pmbl.
[149] *See*, *e.g.*, *Wrong Direction on Rights*, HUM. RTS. WATCH (May 16, 2023), https://www.hrw.org/report/2013/05/16/wrong-direction-rights/assessing-impact-hungarys-new-constitution-and-laws [https://perma.cc/385W-6Z3R].

human rights movement allowed for greater experimentation and was less dismissive of approaches that depart from those common in Western Europe today, it might revive as a salutary force.