
HUMAN RIGHTS AND HISTORY

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What is “international human rights,” does it have a history, and does that history matter? As Professor Philip Alston notes in his book review, *Does the Past Matter?: On the Origins of Human Rights*, these issues are the subject of considerable academic debate.¹

In my recent book, *The Slave Trade and the Origins of International Human Rights Law*, I examine the role of international law in the ending of the transatlantic slave trade, and I suggest that this episode forms an important part of the history of international human rights law.² Alston’s thoughtful book review first examines the specific claims in my book, and then situates my argument in the larger context of the current historiography of international human rights. In Part I of this short response essay, I will first address the points of agreement and disagreement between myself and Alston about the specifics of the slave-trade history. In Part II, I will address the historiography more generally, and in particular claims made by those whom Alston calls the “revisionists” (most notably, Professor Samuel Moyn), who contend that the history of contemporary international human rights, properly defined, only began in the 1970s. I will conclude by offering my views on why this debate matters.

I. THE SLAVE TRADE AND INTERNATIONAL HUMAN RIGHTS LAW

There are two aspects of the historical events I examine in *The Slave Trade and the Origins of International Human Rights Law* that I think significantly align this period with institutional characteristics of contemporary international human rights law: (1) the turn to international law; and (2) the involvement of a civil-society movement (employing many of the same tactics as modern human rights nongovernmental organizations) in pushing for that turn.

In my book, I argue that it was in connection with the slave trade that “[t]he idea that nations should use international lawmaking to

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¹ See Philip Alston, *Does the Past Matter?: On the Origins of Human Rights*, 126 HARV. L. REV. 1 (2013) (reviewing JENNY S. MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* (2012)).

² See generally MARTINEZ, *supra* note 1.

protect the rights of individuals” who are not their own nationals “outside their own territory was first put into practice” through international legal structures.³ The widespread adoption of treaties against the slave trade:

introduced into modern international legal discourse the idea that violations of human rights were offenses of concern to humankind generally, and not just matters between a people and their sovereign. This is the key conceptual step that separates the contemporary world of international human rights law from the ideas of natural and universal rights that arose during the Enlightenment and took national legal form in documents like the Declaration of Independence, the U.S. Constitution, and the French Declaration of the Rights of Man (which focus on the relationship between individuals and the sovereign states where they reside).⁴

My argument is specifically a claim about the legal recognition of human rights as legitimate matters of international concern and the institutional mechanisms chosen to instantiate that concern; in that regard, as Alston notes, my definition of “international human rights” tracks the institutional details of contemporary practice.⁵ Indeed, as the title of my book suggests, it is an argument about international human rights law.

Social movements are a part of the story, too, but importantly, they are tied to law. Abolitionism was a social movement that had as its goal a change in society. But the change abolitionists sought was also fundamentally a change in law: slavery and slave-trading were legal, and the abolitionists wanted them to be illegal. Were slaves chattel that could be legally bought and sold (and in whom other people had property rights), or were they people with civil rights like the rights to contract and sue for wages? It took quite a lot to change those laws — in the case of the United States, a civil war. A formal change in law would not have been enough if slavery persisted *de facto* (and indeed, it did and does in many parts of the world, and in the United States it took the civil rights movement to actually begin to eradicate the vestiges of slavery). But it is important not to forget that the goal of abolitionism in the nineteenth century was a redefinition of legal rights. Moreover, as my book recounts, abolitionists also sought changes in international law. A change in international law was as necessary to the global eradication of the slave trade as changes in laws were to slavery’s abolition domestically. At the beginning of the nineteenth century, slave trading was lawful — even encouraged — by international law; by the end, it was prohibited.

³ *Id.* at 138.

⁴ *Id.* at 149.

⁵ See Alston, *supra* note 1, at 2071.

A. *Human Rights?*

The first point of disagreement highlighted in Alston's review is a definitional one: did the abolition of slavery have anything to do with "human rights" as we understand it today? As Alston notes, I contend that this was "the most successful episode ever in the history of international human rights law."⁶ I am hardly the first to have claimed the abolition movement as an early victory for human rights. Professor David Brion Davis, the pioneering historian of slavery and the slave trade, calls abolition the world's "first successful if costly movement for human rights."⁷ Professor Seymour Drescher, another leading historian of the slave trade, describes abolitionism as "the first and, in a narrow sense, the most successful human rights movement."⁸ He has further written:

The real economic paradox of abolition is that in one major region after another — the British colonies, the American South, Cuba and Brazil — *political* power had to intervene to constrict or to abolish major slave systems whose economic advantages remained intact until well after the transformation of British abolitionism into a world human rights movement.⁹

Many abolitionists relied upon, and contributed to the development of, ideas of rights.¹⁰

Alston begins by questioning "whether there was in fact significant reliance upon concepts of rights" in abolitionism, and suggests that my arguments in support of this proposition are "almost anecdotal," noting that a keyword search of a four hundred-page collection of pamphlets in the 1780s and 1790s reveals no references to the phrase "human rights" and just twenty-eight references to "rights."¹¹ He then discounts the usefulness of this kind of "'search engine' mentality," which he believes has led me unduly to discover and celebrate the fact that President Thomas Jefferson used the phrase "human rights" in introducing the measure banning the slave trade to the U.S. Congress in

⁶ *Id.* at 2044 (quoting MARTINEZ, *supra* note 1, at 13) (internal quotation marks omitted).

⁷ Gary J. Bass, *The Old New Thing*, NEW REPUBLIC (Oct. 20, 2010), <http://www.newrepublic.com/article/books-and-arts/magazine/78542/the-old-new-thing-human-rights>; see also David Brion Davis, *Book Jacket* to SEYMOUR DRESCHER, ABOLITION (2009) (describing Drescher's book as exploring "the world's most important gains in human rights"). Numerous books and articles by historians contain similar language. See, e.g., THE OLD SOUTH'S MODERN WORLDS: SLAVERY, REGION, AND NATION IN THE AGE OF PROGRESS 314 (L. Diane Barnes et al. eds. 2011) ("Slavery's legal abolition stands as perhaps the greatest human rights achievement in world history . . .").

⁸ SEYMOUR DRESCHER, CAPITALISM AND ANTISLAVERY (1986).

⁹ *Id.* at 5.

¹⁰ ROBIN BLACKBURN, THE AMERICAN CRUCIBLE: SLAVERY, EMANCIPATION AND HUMAN RIGHTS 485 (2011).

¹¹ Alston, *supra* note 1, at 2049.

1806.¹² As an initial matter, President Jefferson’s characterization of this landmark legislation, as he sent it to Congress, as involving “rights” is hardly an obscure or irrelevant citation that only a search engine could reveal. More generally, if I do not give a comprehensive review of every abolitionist source that frames antislavery in terms of “rights,” it is because there are so many — not so few — and because it has so long been established among historians in the field that Enlightenment ideas of rights played an important role in abolitionist thought. To be sure, ideas of “rights” were not the only thing motivating abolitionism. Alston chides me for too briefly asserting that “historians now . . . concur that British abolitionism arose out of a confluence of factors, including economic changes, Enlightenment philosophy, and religious revival movements.”¹³ But while historians have disagreed about the relative weight to be given to these various factors for several decades now, and seem likely to continue to do so, it is fairly well established that arguments based on rights played some significant part in abolitionist discourse.¹⁴

Alston suggests that there are distinctions among natural rights, the rights of man, and “human rights” as used in the eighteenth and nineteenth centuries and today.¹⁵ That is undoubtedly true. But just as true is the fact that there is not one universally accepted definition of “human rights” even today, and as Alston rightly concludes (in congruence with the claims of Professor Robin Blackburn, among many others), “there is a powerful argument to be made that there was a strong element of continuity in the evolution of rights discourse.”¹⁶

Alston is also skeptical of my claim in the book that the description of the slave trade as a “crime against humanity” by nineteenth-century international lawyers, and the attempts to gain universal jurisdiction

¹² *Id.*

¹³ *Id.* at 2048 (quoting MARTINEZ, *supra* note 1, at 17) (internal quotation marks omitted). I have a slightly longer section in my *Yale Law Journal* article than in the book on the origins of British abolitionism, see Jenny S. Martinez, *Anti-Slavery Courts and the Dawn of International Human Rights Law*, 117 *YALE L.J.* 550, 557–60 (2008), which cites sources debating the role of capitalism, the broader rise of humanitarianism in culture, the growth of religious thought, the motivations of participants in the popular abolitionist movement, and other factors. Except for those works that claim a kind of false consciousness — for example, that those talking about “rights” were really only concerned with bolstering their economic position — none of these considerations seem to negate the fact that the concept of rights played a role in how people thought and talked about abolition.

¹⁴ See BLACKBURN, *supra* note 10, at 5. Alston also chides me for citing Davis’s now-quite-old work in support of the role of Enlightenment thought in the emergence of abolitionism, but Davis’s foundational survey of the history of western thought about slavery has been refined but hardly replaced by even his own later work. I would still direct a reader seeking an introduction to the discussion of slavery in Enlightenment thought and its absorption into abolitionist thinking to DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* 365–445 (1966).

¹⁵ Alston, *supra* note 1, at 2051.

¹⁶ *Id.*

over the slave trade by redefining the slave trade as a form of piracy (because pirates were considered *hostis humani generis*, or enemies of all mankind) were at all significant. Alston suggests that “claims of continuity between today’s understanding of crimes against humanity and the historic practice of slavery have been consistently rejected in international law,” though he acknowledges in the next sentence that African governments have argued that slavery was, in fact, a crime against humanity that warrants reparations.¹⁷ The fact that, given the passage of time, African governments may have phrased requests for reparations in terms of moral obligation hardly negates the possibility that they also view it as a legal wrong. Moreover, the fact that Western governments (for obvious economic and political reasons) have denied that any reparations are due does not negate the conceptual point. The significance of “crimes against humanity” in contemporary international law turns on two interrelated ideas: first, that these are crimes that in some way disregard and undermine the very humanity of the victims, and second, that they are offenses not just against the particular victim but that rightly arouse the concern of humanity generally, of the international community. These points are, as I explain in the book, precisely the arguments that were made for bringing slave trading under the jurisdiction of international law rather than leaving it solely up to individual nations to do as they saw fit.

*B. The Causal Story: The Role of International Law
and Courts and the Role of Other Factors*

Alston also critiques certain aspects of the causal argument I make in the book about the role of international law in the ending of the slave trade. He seems to think that I am arguing that international law was the primary causal factor in the ending of the slave trade, which would indeed fly in the face of most of the historical scholarship. I do not so much as disagree with Alston as think he has misread aspects of the causal argument I do make in the book. Far from arguing that international law — let alone international courts — independently caused the ending of the slave trade, I explore the social and economic forces that made ending the slave trade possible and desirable, and then explore how international law became one tool (along with military and economic pressure) in bringing about that legal and social change.

Here is the argument I make in my book in a nutshell. In the nineteenth century, civil society activists motivated by humanitarian concerns (of both religious and secular origin) that were sometimes phrased in terms of natural rights began to organize against the slave

¹⁷ *Id.* at 2050.

trade.¹⁸ They gained sufficient political support that, as is well known, in 1807 the British parliament banned participation in the slave trade by British subjects.¹⁹ After that, these abolitionists lobbied the British government to get other governments to ban the slave trade as well, since a unilateral ban would not do much good. Economic and political interests of various sorts (not all rooted in idealism) converged. For example, British slave plantation owners in the West Indies were concerned that their businesses would be hurt if French plantations continued to import new, cheap slaves and they could not. Once abolitionists had gained the upper hand in Parliament and secured legislation banning the importation of slaves into British colonies, the plantation owners wanted other countries to be stopped from slave trading as well. Based on these various domestic constituencies, the British government incorporated slave-trade abolition into its foreign policy.²⁰ The British government then persuaded (using a combination of bribes, threats, and moral argument) other governments to join a network of bilateral treaties banning the slave trade, and created international courts to enforce the treaties.²¹ This moment was the first time a global network of treaties of this sort was created for humanitarian purposes (for protection of individual humans not on the basis that they were nationals of either contracting state party, but rather on the ground that what was being done to them should be done to no human), and the first time international courts were used to enforce such an international regime. It was a legal innovation, designed to achieve a foreign policy objective supported by domestic political constituencies with various motivations.

In this respect, the slave-trade treaty regime was the result of a social movement using many of the tools of advocacy common in international human rights activism today — petitions, speaking tours, boycotts, rallies, and so forth. For example, in 1814, three-quarters of a million people (out of a national population of twelve million in Britain) signed petitions in support of including a stronger anti-slave trade provision in the peace treaty with France.²² The lead treaty negotiator for the British, the Duke of Wellington, commented in his correspondence on the “degree of frenzy” in London about the slave trade, noting that “[p]eople in general appear to think that it would suit the

¹⁸ See MARTINEZ, *supra* note 1, at 16–20; see also Martinez, *supra* note 13, at 557–60, and sources cited therein.

¹⁹ See MARTINEZ, *supra* note 1, at 22–23.

²⁰ See Martinez, *supra* note 13, at 563–64.

²¹ See MARTINEZ, *supra* note 1, at 31–37.

²² See *id.* at 28–29.

policy of this nation to go to war to put an end to that abominable traffic.”²³

I do not suggest that British antislavery efforts were motivated solely by altruism but instead acknowledge the complex interplay of political factions motivated by a variety of different concerns.²⁴ Anyone who advances the contrary position — that the entire British antislavery effort was motivated by imperial ambition and that more idealistic motives were not a factor in any significant actor’s decision-making — has a much tougher position to square with the historical record.²⁵ There are thousands of archival pages of private correspondence from ship captains, judges, Foreign Office officials, politicians, and abolitionist leaders expressing a moral repugnance towards the slave trade; it is conceivable that each individual was in the grips of false consciousness, and was actually subconsciously seeking to bolster Britain’s empire, but that seems implausible as a total explanation. To be sure, some people who supported the effort to suppress the slave trade were primarily motivated by money, power, and self interest — and as I say in the book, Britain would not have campaigned for abolition if it had been devastating to its economic and political interests²⁶ — but some were motivated by idealism.²⁷ As liberal international relations theorists have long noted, states’ actions in the international realm are usually the product of multiple domestic interest groups, which may act with different motivations.

Nor do I claim that the slave-trade treaties or courts played a primary causal role in the ending of the slave trade.²⁸ Instead, I suggest that they had an impact on the slave trade but also suffered from some significant constraints that limited their impact. To spell out the impact and weaknesses, I rely on both quantitative data (about the per-

²³ *Id.* at 29 (emphasis omitted) (internal quotation marks omitted).

²⁴ See, e.g., *id.* at 23 (noting that slave owners in the British West Indies had economic motivations to support slave-trade suppression after Britain banned the practice for its subjects); *id.* at 82–83 (describing extensive parliamentary debates by different factions about whether Britain should remove itself from treaties regarding the slave trade); *id.* at 169 (noting that realist international relations theorists are likely to “focus on the material self-interest of Britain” and “Britain’s use of its hegemonic military and economic power to achieve its goals”).

²⁵ See, e.g., Samuel Moyn, *Of Deserts & Promised Lands*, *NATION*, Mar. 19, 2012, at 32, 32 (suggesting that my book “simply assum[es] that pure benevolence led [Britain] to establish the international courts” when, in fact, “[h]umanity provided the warrant for what one observer acidly called ‘war in disguise,’ when the policing of the seas was crucial, in an age of rival empires”).

²⁶ See MARTINEZ, *supra* note 1, at 14.

²⁷ Moral ideals and more material interests may coincide or interact in complex ways. See generally CHRISTOPHER LESLIE BROWN, *MORAL CAPITAL: FOUNDATIONS OF BRITISH ABOLITIONISM* (2006).

²⁸ Compare *id.* at 168 (“But the narrative recounted here at least suggests the possibility that it was no mere coincidence of social conditions in different countries Instead, at least some small role was played by international treaties and international courts themselves.”), with Alston, *supra* note 1, at 6.

centage of slave ships that ended up in one form of adjudication or another, and the use of various flags by ships in the trade, how these flags changed over time, and how they were temporally related to changes in the treaty regimes) and qualitative information from debates at the time (in the form of hundreds of pages of testimony before Parliament, in which participants in the treaty system testified) about whether the treaty system was working.²⁹ I acknowledge the many factors at play in the slave trade over the course of the nineteenth century, including economic changes.³⁰ To the extent that I posit a causal mechanism at all, I suggest that the existence of the treaties and the international norm against the slave trade was one factor altering the perception of the legitimacy of the slave trade and putting additional pressure for change on various national governments, which ultimately ended the trade by effectively enforcing domestic law bans on slave imports.³¹

Moreover, I note that, like many international treaties, the slave-trade treaties were a means of solving coordination problems and the prisoner's dilemma by creating a mechanism for commitment and cooperation.³² I suppose it is possible that the treaties had no effect at all and that states could all independently have abandoned a lucrative practice like the transatlantic slave trade for their own reasons and without any coordination or mutual commitment, but rational choice theory suggests that possibility is unlikely.³³

²⁹ MARTINEZ, *supra* note 1, at 78–98.

³⁰ *Id.* at 15 (arguing that we should look at “[t]he antislavery movement’s use of international law and legal institutions as part of a broader social, political, and military strategy”); *id.* at 146 (“Other factors in Cuba — including changes in attitudes, the increased domestic enforcement of anti-slave trade laws, a decline in sugar prices and a concomitant drop in the value of slaves, and the perception that the institution of slavery itself might be doomed — also played a significant role in the final suppression of the Cuban slave trade in the 1860s.”).

³¹ *Id.* at 168 (“Changes in domestic attitudes were critical to the final suppression of the slave trade. The possibility that the universality of the antislavery treaty regime may have played some part in this shift in attitudes is at least worthy of further investigation.”).

³² *See id.* at 169 (“Institutionalists will likely see the treaties and the court system they created as rational, utility-maximizing mechanisms for cooperation. In the absence of such mechanisms, even a state that wanted to abolish the slave trade would be tempted to defect to gain material advantage, but the regime created the opportunity for cooperation and thus mutual long-term gains for all participants.” (footnote omitted)).

³³ Slavery and slave trading were profitable. While idealistic abolitionists may have had political influence in some national governments, moneyed interests had influence as well. If Britain had unilaterally stopped trading in slaves, Portugal would have stood to profit that much more from allowing its merchants to continue to trade in slaves (and Britain would have stood at that much greater an economic disadvantage if Portugal had continued trading than if everyone had stopped at once). Once countries like Britain and the United States stopped allowing their ships to participate, slave trading interests in Spain, Portugal, and Brazil had that much more incentive to lobby for continuing the traffic. Even if both the Spanish government and Portuguese governments had agreed that, for humanitarian reasons, it would have been better for all concerned if the slave trade stopped, without a means of ensuring that the other country was not “cheating,” it

I also suggest a darker relationship between law and society in noting that British military force was an important part of securing the enforcement of the treaties, and I acknowledge that (not without cause) many observers thought the whole scheme was a method of advancing British imperial interests.³⁴ And I note that the end of the transatlantic slave trade did not mean the end of slavery, or of slave trading in other forms and in other regions.³⁵ It is clear that those who were formerly enslaved and their descendants were not well treated far into the twentieth century.

If I say that the treaties played a “surprisingly central” role in the abolition of the transatlantic slave trade, I meant to put the emphasis on “surprising” because it is surprising that they played any role at all. One would be hard pressed to find a serious legal academic today who would argue that “law” unilaterally and independently “caused” a major social change. Take the American civil rights movement of the mid-twentieth century. The most relevance that law ekes out in the major accounts is something like this: Social, economic, and political factors in American society changed in the early twentieth century, which created the circumstances whereby African Americans’ equality claims became socially plausible. Additionally, the growth of a political elite and a broader social movement supporting some version of such equality set the stage for the Supreme Court to decide *Brown v. Board of Education* and subsequent cases. Together, this environment may (or may not) have galvanized political elites and popular social movement participants, which may have helped play a part in getting Congress to enact the Civil Rights Act of 1964 and Voting Rights Act

would have been hard for either country to make the sacrifice unilaterally, knowing that a rival could gain economic advantage as a result of its decision.

³⁴ See, e.g., MARTINEZ, *supra* note 1, at 27 (noting that other countries “insinuated that Britain was not interested in the slave trade at all, but was simply using the humanitarian cause as a cover for its self-interested efforts to dominate maritime commerce”); *id.* at 46–55 (recounting America’s skepticism of British motivations and quoting John Quincy Adams’s diary description of British efforts as a “barefaced and impudent attempt of the British to obtain in time of peace that right of searching and seizing the ships of other nations which they so outrageously abused during war,” *id.* at 46 (quoting John Quincy Adams, 6 June 1817, in 3 MEMOIRS OF JOHN QUINCY ADAMS COMPRISING PORTIONS OF HIS DIARY FROM 1795 TO 1848, 557 (Charles Francis Adams ed., 1969)) (internal quotation marks omitted)); *id.* at 103 (“The Spanish viewed this proposal as a reflection of Britain’s insincerity in opposing the slave trade on humanitarian grounds and its secret desire to bolster the labor forces in its own colonies”); *id.* at 169–70 (“Postcolonialists might view the entire enterprise as a by-product of European desire to establish economically viable colonies in Africa.”); Martinez, *supra* note 9, at 559 (noting that some historians have argued “that the antislavery movement served to legitimate free labor, thereby reinforcing the interests of new capitalist elites in Britain”).

³⁵ See MARTINEZ, *supra* note 1, at 13 (“To be sure, modern forms of forced labor remain a significant human rights issue affecting millions of people . . .”).

of 1965, which may or may not have had a big impact on actual equality in our society.³⁶

If anything, my book tells an almost anodyne law-and-society story: social movements (in this case, abolitionism) impacted the law (in this case, international law), which in turn (along with economic, political, and other factors) eventually had some sort of impact on society (in this case, global society). The argument that the treaties against the slave trade had no impact whatsoever on the suppression of the transatlantic slave trade seems a much harder causal claim to make than that they did have some impact. The oceans were too vast to be thoroughly policed by the British navy (even at the peak of its naval dominance and imperial aspirations), and multiple nations had to cooperate to end the trade.

Nor do I disagree that other things Alston mentions, such as the American Revolution, the slave uprising in San Domingue in 1791, rebellions onboard slave ships, economics,³⁷ or imperialism, all may have played a role in the end of the slave trade (not to mention the American Civil War, which he does not highlight).³⁸ Alston places great weight on accounts that emphasize that the slave trade–abolition campaign advanced British imperial efforts.³⁹ But as Alston notes, “[n]one of this is to suggest that imperialist justifications, objectives, and means constitute the entire picture.”⁴⁰ Any kind of causal story that focuses solely on one aspect of society, economics, or ideology is likely to miss the multiple factors that converged in the ending of the slave trade. To claim that international law was a factor we should examine is not to claim that it was the only one.

But even if one wants to defend the claim that the treaties’ impact on the ultimate end of the transatlantic slave trade was so trivial as to be not worth attention, one still has to reckon with the fact that the courts that were created by the treaties freed 80,000 individual human beings from slavery. As Alston notes, and as I myself discuss in my book, many of these individual people ended up in conditions that weren’t much better than slavery, and 80,000 was a relatively insignificant fraction of the overall transatlantic trade. But, as my book explains, in certain critical years, either the international courts or the

³⁶ See, e.g., MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 6–7 (2004) (discussing disagreements among scholars about the importance of Supreme Court decisions with regard to civil rights).

³⁷ Compare Alston, *supra* note 1, at 2059 (suggesting the importance of debate about economic dimensions of abolitionism), with Martinez, *supra* note 9, at 558–59 (discussing debate about economic dimensions of abolitionism).

³⁸ See Alston, *supra* note 1, at 2059.

³⁹ See *id.* at 2060. I do, in fact, note in multiple places the ways in which Britain’s policies were perceived as tied to its imperial ambitions. See, e.g., sources cited *supra* note 34.

⁴⁰ Alston, *supra* note 1, at 2060.

British courts operating under a theory of universal jurisdiction captured significant numbers of known slave trading voyages — thirty-nine percent in the peak year of 1835.⁴¹ Indeed, one of the topics I explore is the ebb and flow of court cases in relation to political and military developments, and why holes in the legal regime meant that the courts were ultimately never successful in touching anything close to a majority of cases. And I spend an entire chapter of the book describing how those freed by the courts ended up in conditions not much better than slavery itself.⁴²

But in raw human terms, any international court, any international law that actually has some concrete and direct impact on 80,000 human beings — even if the impact is just being granted formal legal freedom at a moment when they were about to be sold in chattel slavery — is “surprisingly” effective, if only because the baseline assumption of nonlawyers is that law and courts have no effect at all. Many modern international courts — about which tens of thousands of pages have been written — have not had any similar direct impact. As of this writing, the International Criminal Court (ICC) has only convicted one person, after a decade of operation. Perhaps no one should pay attention to the ICC. But those who are, nevertheless, paying attention to the ICC might also want to pay attention to what factors made it possible for the slave-trade courts to grant legal freedom to 80,000 people — and, as I explore in my book, what factors stopped them from having an even greater impact.⁴³

II. THE CURRENT HISTORIOGRAPHY OF HUMAN RIGHTS

Why should we care about the role of international law in the end of the slave trade? Perhaps historians of the slave trade might care a bit, but most of us are not historians of the slave trade. As I suggested in the preceding paragraph, my contention is that those who seek to design and use the tools of international law today may gain valuable insights about the relationship between international legal institutions,

⁴¹ MARTINEZ, *supra* note 1, at 80.

⁴² Moyn suggests that I “only grudgingly admit[] that slaves freed by abolitionist efforts, especially in Cuba, lived out their lives in penurious circumstances and often forced labor.” See Moyn, *supra* note 25, at 33. Chapter five of my book is entirely devoted to this topic. See MARTINEZ, *supra* note 1, at 99–113.

⁴³ Alston also suggests that the accomplishment of the abolitionists was incomplete, since modern forms of slavery persist even today, and European powers engaged in extremely violent and even genocidal colonial practices even after they stopped the transatlantic slave trade. Alston, *supra* note 1, at 14. This suggestion is undoubtedly true, but if one is tempted to describe the end of the transatlantic slave trade as an utterly insignificant event, imagine the counterfactual: despite the many forms of injustice that persist today, would the world not be a less just place if slaves were still being shipped from Africa to America?

society, and political power by studying the interplay of these factors in the past.

Until recently, the conventional wisdom focused on the post–World War II period as the key moment at which “international human rights” as such became institutionally rooted in international discourse, through measures such as the Universal Declaration of Human Rights, the U.N. Human Rights Commission, the Genocide Convention and the Nuremberg trials of Nazi war criminals.⁴⁴ More recent scholars have emphasized and explored roots further back in history, whether in ancient philosophical and religious traditions,⁴⁵ the Enlightenment,⁴⁶ the American and French revolutions, or specific developments in the nineteenth century.⁴⁷

While my book argues for careful consideration of the slave-trade episode as an element of the history, I do not significantly disagree with the large group of writers who treat other time periods as significant or relevant to contemporary human rights. In this respect, I do not disagree with Alston’s claim that human rights is “polycentric” and that multiple data points may be relevant to different aspects of the field.⁴⁸

Alston is correct, however, to highlight the importance of my disagreement with revisionist historians of human rights, most notably Moyn. As Alston notes, Moyn argues that human rights “emerged in the 1970s seemingly from nowhere,”⁴⁹ that earlier concepts that appear similar in certain respects to contemporary human rights are *faux amis* (or false cognates) to the current concept, and that those who argue that earlier events are relevant are at best misguided and at worst blinded by ideological devotion to human rights activism.

As Alston notes, part of the disagreement stems from the definitional assumptions “that inform the choice of criteria against which each author determines when human rights ‘began,’ or came to matter, or passed some other designated threshold.”⁵⁰ Moyn defines international human rights as “a set of global political norms providing the creed of a transnational social movement”⁵¹ that involves as a central concept the detachment of rights from the nation-state. As Alston de-

⁴⁴ See generally, e.g., ELIZABETH BORGWARDT, *A NEW DEAL FOR THE WORLD* (2005); *FROM NUREMBERG TO THE HAGUE* (Philippe Sands ed., 2003); MARY ANN GLENDON, *A WORLD MADE NEW* (2001); PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS* (3d. ed. 2011); SAMANTHA POWER, “A PROBLEM FROM HELL” (2002).

⁴⁵ See Alston, *supra* note 1, at 2063 & nn.87–89.

⁴⁶ See, e.g., LYNN HUNT, *INVENTING HUMAN RIGHTS* (2007).

⁴⁷ See, e.g., GARY J. BASS, *FREEDOM’S BATTLE* (2008).

⁴⁸ See Alston, *supra* note 1, at 2078; see also *id.* at 2077–78.

⁴⁹ SAMUEL MOYN, *THE LAST UTOPIA* 3 (2010).

⁵⁰ Alston, *supra* note 1, at 2071.

⁵¹ MOYN, *supra* note 49, at 11.

scribes it, two claims are central to Moyn's assertion: "(1) the norms need to be 'global' in the sense that they are not merely rights claimed by citizens against their own state but instead bypass or transcend the authority of the state; and (2) they need to be championed by a powerful transnational movement."⁵² I tackle these criteria in reverse order.

A. *Transnational Social Movements*

As Alston notes, the second prong of Moyn's implicit criteria excludes many developments that others reasonably understand to form a part of the modern development of human rights — notably, the legal developments of the late 1940s — because a mass global social movement on the scale he demands did not emerge (and, as Alston points out, could not have emerged) until the 1970s.⁵³ I do not disagree with Moyn that the scale of the contemporary international human rights movement is significant, but I believe that it is nevertheless worth paying greater attention to earlier rights-focused transnational social movements (like the abolition movement and, as discussed below, the women's suffrage movement) that, although smaller in scale and ambition, were in certain ways more similar to contemporary international nongovernmental human rights organizations than Moyn acknowledges.

In his book, Moyn dismisses the significance of both the abolitionist and women's suffrage movements of the nineteenth century. The women's movement gets particularly short shrift: "Insofar as a generally rights-based movement like the women's movement took on international form, its internationalism was about sharing techniques and building confidence for national agitation, not making the global forum itself a scene of invention or reform."⁵⁴ This distinction seems unconvincing, since much of contemporary international human rights practice precisely involves "sharing techniques and building confidence for national agitation." And, in any case, even if the early women's rights movement (though involving international congresses and extensive correspondence between activists from many different countries⁵⁵) did not make use of the global forum in the way Moyn thinks relevant, abolitionism did make the "global forum" a "scene of invention or reform" through international treaty-making. For example, as noted above, mass petition drives urged the inclusion of a measure address-

⁵² Alston, *supra* note 1, at 2072.

⁵³ Samuel Moyn, *Substance, Scale, and Salience: The Recent Historiography of Human Rights*, 8 ANN. REV. L. & SOC. SCI. 123, 128 (2012) (suggesting that "no international human rights movement" of significant scale emerged in the 1940s).

⁵⁴ MOYN, *supra* note 49, at 39.

⁵⁵ MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* 53–56 (1998).

ing the slave trade in peace treaties between Britain and France in 1814,⁵⁶ and the abolitionist movement continued to put pressure on the British government to persist in its efforts to end the slave trade for decades, as reflected in parliamentary hearings on the topic. The delegates at the 1840 World Anti-Slavery Convention voted in favor of a proposal for dramatically expanding the jurisdiction of the slave-trade treaty courts, and the British government in turn drafted a treaty that would have done just that (although it could not persuade other countries to adopt it).⁵⁷ The tools of international law were not the only, or even the main, thing that abolitionists focused on, but international law was a recurrent aspect of the movement's strategy for achieving global social change.

Moreover, the movement for the abolition of the slave trade and slavery involved transborder activism by nongovernmental, civil-society organizations that is linked in important ways to contemporary international activism. Later campaigns for reform in other areas — for example, the movement for women's suffrage — grew directly out of the abolition effort, as activists who had learned organizing techniques in the context of abolitionism turned to other issues. As scholars have explained, “[t]he transnational antislavery campaign provided a ‘language of politics’ and organizational and tactical recipes for other transnational campaigns as well. The women’s suffrage campaign initially drew many of its activists and tactics from the antislavery movement.”⁵⁸ Antislavery was at “the vanguard of a new mode of collective action,”⁵⁹ in which organizers deployed “a new repertoire of public meetings, demonstrations, and special interest associations, while using newspapers to project their demands and presence onto a national and international stage.”⁶⁰

It would be one thing to dismiss the abolitionist and women's suffrage movements as entirely irrelevant if there were no connections at all between these movements and twentieth-century human rights-focused movements. But there were, in fact, links not only in the similarity of tactics, but in the continuous organizational life of certain

⁵⁶ See ADAM HOCHSCHILD, *BURY THE CHAINS* 137, 230 (2005).

⁵⁷ MARTINEZ, *supra* note 1, at 101.

⁵⁸ See Margaret Keck & Kathryn Sikkink, *Historical Precursors to Modern Transnational Social Movements and Networks*, in *GLOBALIZATIONS AND SOCIAL MOVEMENTS* 35, 37–38 (John A. Guidry et al. eds., 2000).

⁵⁹ Seymour Drescher, *Women's Mobilization in the Era of Slave Emancipation: Some Anglo-French Comparisons*, in *WOMEN'S RIGHTS AND TRANSATLANTIC ANTISLAVERY IN THE ERA OF EMANCIPATION* 98, 112 (Kathryn Kish Sklar & James Brewer Stewart eds., 2007) [hereinafter *WOMEN'S RIGHTS AND TRANSATLANTIC ANTISLAVERY*].

⁶⁰ *Id.*; see also Elizabeth J. Clapp, *Introduction*, in *WOMEN, DISSENT, AND ANTI-SLAVERY IN BRITAIN AND AMERICA, 1790–1865*, 16–17 (Elizabeth J. Clapp & Julie Roy Jeffrey eds., 2011); Kathryn Kish Sklar & James Brewer Stewart, *Introduction*, in *WOMEN'S RIGHTS AND TRANSATLANTIC ANTISLAVERY*, *supra* note 59, at xi, xii.

nongovernmental organizations;⁶¹ in the invocation of the memory of these past protest movements through, among other things, visual imagery and literary references;⁶² and in their shared focus on individual rights (something that distinguishes these movements from other twentieth century transnational movements, like those tied to communism or decolonization). Particularly in the United States, campaigners for abolition were transformed into campaigners for women's legal rights. As one abolitionist wrote, "in striving to strike [the slaves'] irons off, we found most surely that we were manacled ourselves."⁶³ At the time, "[M]arried women could not own property, make contracts, bring suits, or sit on juries. They could be legally beaten by their husbands and were required at any moment to submit to their husbands' sexual demands."⁶⁴ The comparison between marriage and slavery was made by supporters of greater rights for women as early as the seventeenth century in France in novels and other literary works, and eventually was invoked in countries including Germany, Britain, and the United States.⁶⁵ As one scholar explains:

The power of the slavery analogy, for feminists, was its insistence that women, and particularly women who married, were individuals in their own right, that they possessed "human rights" and free will and could not be legally disposed of like chattel or forced, even for family reasons, to do things against their will.⁶⁶

B. Rights, Nations, and International Law

I also disagree with Moyn's first implicit criteria with regard to the substance of "human rights." Moyn asserts that a key substantive aspect of contemporary human rights is the severing of rights from the nation-state: "[T]he central event in human rights history is the recasting of rights as entitlements that might contradict the sovereign nation-state from above and outside rather than serve as its founda-

⁶¹ See MARTINEZ, *supra* note 1, at 152.

⁶² See, e.g., Zoe Trodd, *In Possession of Space: Abolitionist Memory and Spatial Transformation in Civil Rights Literature and Photography*, in REPRESENTING SEGREGATION 223, 223-43 (Brian Norman & Piper Kendrix Williams eds., 2010).

⁶³ David Brion Davis, *Declaring Equality: Sisterhood and Slavery*, in WOMEN'S RIGHTS AND TRANSATLANTIC ANTISLAVERY, *supra* note 59, at 3, 11 (alteration in original) (emphasis omitted) (quoting BONNIE S. ANDERSON, JOYOUS GREETINGS, 1830-1860, 122 (2000)) (internal quotation marks omitted).

⁶⁴ *Id.*

⁶⁵ See Karen Offen, *How (and Why) the Analogy of Marriage with Slavery Provided the Springboard for Women's Rights Demands in France, 1640-1848*, in WOMEN'S RIGHTS AND TRANSATLANTIC ANTISLAVERY, *supra* note 59, at 57, 59. See generally Bonnie S. Anderson, *Frauenemancipation and Beyond: The Use of the Concept of Emancipation by Early European Feminists*, in WOMEN'S RIGHTS AND TRANSATLANTIC ANTISLAVERY, *supra* note 59, at 82.

⁶⁶ Offen, *supra* note 65, at 72-73.

tion.”⁶⁷ It is on this basis that he dismisses the works of historians like Professor Lynn Hunt and the rights talk of the Enlightenment and the American and French revolutions.⁶⁸ In this regard, I do not disagree with Moyn that one important difference between the contemporary conception of human rights and ideas of rights and the Enlightenment ideas of rights is the move from the nation-state to the international community as the guarantor of rights.⁶⁹ Unlike Moyn, I believe the slave-trade treaties made the leap to internationalism in a conceptually and legally significant way.⁷⁰

In this respect, Moyn’s definition does not closely track contemporary international human rights, which, as Alston notes, remains heavily focused in law and in practice today on the nation-state.⁷¹ Human rights are defined in treaties that are ratified by nation-states, and those treaties impose obligations on states to protect and fulfill those rights.⁷² States voluntarily consent by treaty to participate in supranational adjudication mechanisms (like the European Court of Human Rights) and it is national governments that remain responsible for implementing the decisions of those courts. Even as a mass social movement, a huge portion of human rights activism focuses on implementation and enforcement of human rights through national governments, which remain the only bodies truly capable of ensuring consistent compliance with human rights norms. To be sure, there are strands of contemporary human rights discourse that evoke the idea of naturalistic universal rights transcending the nation-state (for example, in the concept of *jus cogens*), but they are far from dominant.

C. Why Does the History Matter?

Why is it so important for Moyn to dismiss as irrelevant the abolition and women’s rights movements? Why not acknowledge that, while they certainly did not lead teleologically to the human rights movement of today, they had some influence on the way it has devel-

⁶⁷ See MOYN, *supra* note 49, at 13 (2013).

⁶⁸ See *id.* at 22–29.

⁶⁹ See *id.* at 38.

⁷⁰ As I discuss in my book, earlier traditions in international law — for example, the writings of the Spanish scholastics that helped justify colonization on humanitarian-intervention grounds — contained traces of this idea, but the attempt to embody such concerns in treaties with concrete humanitarian objectives first emerged in connection with the slave trade in the nineteenth century. See MARTINEZ, *supra* note 1, at 134–39.

⁷¹ See Alston, *supra* note 1, at 2069–70.

⁷² See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 144; International Covenant on Civil and Political Rights, Dec. 16 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16 1966, 993 U.N.T.S. 3; Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, 213 U.N.T.S. 221.

oped? Or, conversely, why would anyone persist in arguing (as I do) that they are relevant? In short, why does the history of human rights matter?

1. *The Evolution of Ideas*. — Moyn begins the first chapter of his book with a reference to Jorge Luis Borges's essay on Franz Kafka. In the essay, Borges traces ways in which scraps of text from authors ancient and recent resemble Kafka. But, of course, no one would have seen this resemblance if there were no Kafka, which is Borges's point. From this, Moyn concludes that "[i]f the past is read as preparation for a surprising recent event, both are distorted."⁷³

In a certain sense, Moyn is taking aim at a straw man. No serious scholar subscribes to a narrative of inevitable progress, in which all the streams of the past converge in a mighty river of human rights triumphalism. Predestination has been out of fashion for a few centuries now. Only Martin Luther King Jr. could get away with saying that "the arc of the moral universe is long but it bends towards justice," and even he suggested that it was an arc, not a line. Human progress seems quite contingent, unpredictable. Like Borges's "The Garden of Forking Paths,"⁷⁴ human life unfolds through infinite forks in the road.

But at the same time, ideas do not come out of nowhere. The past gives us a vocabulary, and that vocabulary in turn shapes the very ways in which we think about problems. It would not have been possible for human rights to emerge as a global discourse in the 1970s if the language, ideas, laws, and organizing tools that served as the building blocks of the movement had not already been in existence in some form. As Alston describes it, Moyn's theory is one of a Big Bang: from nothingness, matter. But the last Big Bang was more than thirteen billion years ago. Most of what humans do seems instead to be based on the remix method. Even Albert Einstein had to know about Newtonian physics in order to depart from it. Disco may have burst onto the world stage in the 1970s, but no one would have imagined its rhythms if they had not listened to jazz, swing, rhythm and blues, and rock and roll.⁷⁵ Kafka may have created his precursors, but he wouldn't — couldn't — have been Kafka if he had never read anything in the Western literary canon.

The idea of international human rights, like other human ideas, is a remix. Yes, the Universal Declaration of Human Rights did not have an immediate, measurable impact as soon as the U.N. General Assembly voted on it in 1948. But countries copied parts of it into their new

⁷³ MOYN, *supra* note 49, at 11.

⁷⁴ Jorge Luis Borges, *The Garden of Forking Paths*, ELLERY QUEEN'S MYSTERY MAG., Aug. 1948, 101 (Anthony Boucher trans.).

⁷⁵ Cf. Bass, *supra* note 7.

constitutions. Activists in national struggles invoked it from time to time in the next decades. It provided a language for making claims against power, a language which certainly became more popular in the 1970s, but which could not have become the *lingua franca* it is today if it had been so unfamiliar, so novel that no one understood it. If the Universal Declaration did not exist, did not already have some cultural valence, it would not have been possible to convince the U.S.S.R. to agree to abide by the Declaration's principles in the Helsinki Accords in 1977. And, reaching backwards, the Universal Declaration could hardly have been drafted as it was without the U.S. Constitution, the Declaration of Independence, and the 1789 French Declaration of the Rights of Man to riff off. And those documents surely could not have taken the form they did if Locke and Rousseau had never written a word. And so on and so forth.

2. *The Use We Make of the Past.* — Moyn casts himself as a neutral observer, turning a cool eye on the feverish writings of all the true-believing church historians. Moyn suggests that writers who contend that international human rights have a history prior to the 1970s have their vision distorted by their near-religious devotion to the cause of human rights:

Historians of human rights approach their subject, in spite of its novelty, the way church historians once approached theirs. They regard the basic cause — much as the church historian treated the Christian religion — as a saving truth, discovered rather than made in history. . . . Hagiography, for the sake of moral imitation of those who chase the flame, becomes the main genre. And the organizations that finally appear to institutionalize human rights are treated like the early church: a fledgling, but hopefully universal, community of believers struggling for good in a vale of tears. If the cause fails, it is because of evil; if it succeeds, it is not by accident but because the cause is just. These approaches provide the myths that the new movement wants or needs.⁷⁶

Moyn is not kind to those he views as quasi-religious zealots: “Much as Christianity was once attributed to Jesus rather than to the long-developing stages and politics of the institutionalization of his memory and teachings, the historiography of the 1940s teaches much about the substance of the Universal Declaration but nothing about why almost no one noticed it when it appeared (or if they learned of it, rejected its good news, much like Jesus's own contemporaries).”⁷⁷ In Moyn's view, Princeton politics professor Gary Bass is motivated by his early career as a journalist in the Balkans and “the desire to vindicate the model of moral engagement of [his] youth”;⁷⁸ Aryeh Neier's

⁷⁶ MOYN, *supra* note 49, at 5–6.

⁷⁷ Moyn, *supra* note 53, at 128.

⁷⁸ Samuel Moyn, *Spectacular Wrongs*, NATION, Oct. 13, 2008, at 31, 35.

recent book (on the precise period Moyn claims we should focus on) is dismissed because he is a “[m]ovement activist[.]” whose writings can only be viewed as a primary source, not as an analytically useful study;⁷⁹ Hunt has invented a “creation myth”;⁸⁰ and I am described by Moyn as a “Stanford law professor who helped argue *Rumsfeld v. Padilla* before the Supreme Court,”⁸¹ as if my ability to write a legal brief has irredeemably tainted my ability to read primary sources.

Perhaps some of us have been influenced by Justice Holmes’s warning that “it is required of a man that he should share the passion and action of his time at peril of being judged not to have lived,”⁸² but Moyn surely has a view on contemporary human rights just as much as anyone else. As Alston notes, there are deeper issues at work in the debate about the history of human rights: “There is a struggle for the soul of the human rights movement, and it is being waged in large part through the proxy of genealogy.”⁸³

For his part, Moyn seems clearly (if somewhat vaguely) taken with various aspects of the traditional left-wing critique of rights. How, he asks, “has international criminal justice ascended so quickly, and so high, even as social justice is increasingly marginalized, undermined from within at home and worsened through the victory of the free market on the world stage?”⁸⁴ He suggests that “[t]he rise of international criminal accountability has occurred alongside the eclipse of prior schemes of global justice, which promoted not retributive punishment but social renovation to achieve liberty and equality,”⁸⁵ and seems disenchanted with the ways in which “human rights inevitably became bound up with the power of the powerful.”⁸⁶ Moyn’s ambition is to extirpate the false roots of human rights, so that we will be free to imagine new utopias in its place. Moreover, Moyn predicts rather definitively that “[c]ontinuing geopolitical change will lead other ideologies and practices to seem more plausible for better or worse. These will take over the scale and salience that human rights have won, and they will do so rapidly and easily.”⁸⁷ Even us church historians do not claim that kind of ability to predict the future.

Moyn says of my book that “Martinez permits herself to dream for a moment when she suggests that her story might someday help us see

⁷⁹ Moyn, *supra* note 53, at 125.

⁸⁰ Samuel Moyn, *On the Genealogy of Morals*, NATION, Apr. 16, 2007, at 25, 31.

⁸¹ Moyn, *supra* note 25, at 32.

⁸² Oliver Wendell Holmes, Memorial Day (May 30, 1884), in THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 4, 6–7 (Mark DeWolfe Howe ed., 1962).

⁸³ Alston, *supra* note 1, at 2077.

⁸⁴ Moyn, *supra* note 25, at 32.

⁸⁵ *Id.*

⁸⁶ Bass, *supra* note 7 (quoting Moyn).

⁸⁷ Moyn, *supra* note 53, at 137.

that the powerless and poor of the world need our help just as the slaves once did.”⁸⁸ But it is Moyn who seems more occupied with dreaming of a vague future of alternative utopian visions.

Those of us who look before 1977 to understand international human rights actually have more modest ambitions than predicting the future. Rather, as I suggest in my book, “[t]he antislavery movement’s use of international law and legal institutions as part of a broader social, political, and military strategy can help us better understand the potential role of international law today,” and I highlight both the “limits” and “potential” of international law demonstrated by its role in the ending of the transatlantic slave trade.⁸⁹ There are, I suggest, concrete lessons for the legal institutions of today to be drawn from legal institutions of the past. There is a middle course between cynicism and naïveté, and it is in this space that progress is made.

⁸⁸ Moyn, *supra* note 25, at 35.

⁸⁹ See MARTINEZ, *supra* note 1, at 15.