
BOOK REVIEW

DOES THE PAST MATTER? ON THE ORIGINS OF HUMAN RIGHTS

THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW. By Jenny S. Martinez. New York, N.Y.: Oxford University Press. 2012. Pp. 254. \$29.95.

*Reviewed by Philip Alston**

INTRODUCTION

How far back can we trace the genealogy of today's international human rights system? And does it matter where we come out on such an arcane academic question? Historians, international lawyers, and human rights activists have recently suggested that there is, in fact, much at stake here. But there the consensus ends, and the accounts reflected in the vibrant literature of recent years diverge radically in the answers they propose. They also disagree in fundamental respects as to why the lineage of human rights really matters in the twenty-first century.

Until fairly recently, little attention was paid to the historiography of human rights, and the mainstream histories mostly reflected an uncritical narrative of relatively steady progress in the evolution of ideas, perhaps dating even from biblical times, and the gradual uptake of these ideas in the form of legal norms. But these somewhat amorphous and largely undifferentiated genealogies have come under strong challenge from a variety of critics, almost all of whom have sought to identify more precise and recent points of origin for today's human rights family tree. The present analysis takes as its point of departure the claim by Professor Jenny Martinez in *The Slave Trade and the Origins of International Human Rights Law* that contemporary international human rights law has its origins in the early nineteenth-century movement in Great Britain to abolish the transatlantic slave trade (pp. 149–50). In the final years of the eighteenth century, the British abolitionist movement began to make significant inroads, and by 1807 the

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reformers had succeeded, apparently against all the odds,¹ in passing the Act for the Abolition of the Slave Trade.² Parliament prohibited British subjects from participating in the trade, and slaves were no longer allowed to be imported into Britain's extensive colonial empire. The British navy began to apply the law, and offenders were initially tried in British courts. Starting in 1817, Britain also entered into a series of bilateral treaties that led to the creation of so-called "courts of mixed commission" sitting in Freetown (Sierra Leone), Havana (Cuba), Rio de Janeiro (Brazil), and Paramaribo (Suriname) with the power to determine whether seized ships had been engaged in slaving and, if so, to order their forfeiture (pp. 78–79). In the course of the next five decades, the mixed commissions heard over six hundred cases and freed some eighty thousand slaves (p. 99).³

Martinez portrays the mixed commissions as "the first international human rights courts" (p. 6) and sees them as an integral part of "the most successful episode ever in the history of international human rights law" (p. 13). Not content with staking out a large historical claim, she also implies that genealogy matters by claiming that the nineteenth-century history that she recounts has major implications for many of the key contemporary debates over human rights, so much so that this history should change the way we think about the entire field, including its "origins, limits, and potential" (p. 15).

It is, in many respects, an appealing thesis, but it has to contend with the fact that it flies directly in the face of a highly influential new school of revisionist history. This new understanding largely dismisses the very quest for genealogy, separates the antislavery movement out from what should properly be thought of as matters of human rights, systematically downplays the international significance of all but the most recent discourse around human rights, accords minimal importance to treaties in this area and even less significance to courts, and locates the origins of the international human rights movement firmly in the year 1977.

In this Review, I first consider the extent to which Martinez's claims about the roles played by rights, treaties, and courts in the first half of the nineteenth century are supported by the evidence. I then

¹ Until at least 1783, the British Parliament showed surprisingly little interest in questioning the slave trade. A key turning point came with the eventual discrediting of the Company of Merchants Trading to India, an industry lobby group that in 1750 had replaced the monopoly previously entrusted to the Royal African Company. Christopher L. Brown, *The British Government and the Slave Trade: Early Parliamentary Enquiries, 1713–83*, 26 *PARLIAMENTARY HIST.* 27, 40–41 (2007).

² 1807, 47 *Geo. 3, c. 36* (Eng.) (repealed 1824).

³ The network of mixed commissions expanded enormously in later years to include sites such as Bremen, Cape Town, Genoa, Luanda, and New York. See DAVID ELTIS, *ECONOMIC GROWTH AND THE ENDING OF THE TRANSATLANTIC SLAVE TRADE* 84 (1987).

situate her account along the spectrum of recent historiographical studies in the field. In particular, I contrast her approach with that of Professor Samuel Moyn,⁴ who is the most influential of the revisionists. I argue that much of the heated controversy that has been generated in the recent literature over whether and how the origins of human rights may be discerned is due primarily to a failure to acknowledge the polycentric nature of the human rights enterprise. Attempts to capture the alleged essence of that enterprise by viewing it through a single lens are intrinsically flawed and potentially deeply misleading. I nevertheless conclude by arguing that genealogy matters a great deal in these debates, although not in the ways that Martinez suggests.

I. THE “FORGOTTEN” STORY

Martinez’s story is one about the triumph of moral values over economic and other great power considerations, the highly positive instrumental power of domestic and international law and legal institutions, and continuity and progress. In today’s language, standard-setting, treaty-making, multilateralism, courts with potential global reach, and the strategic use of force in the interests of justice have a crucial role to play in achieving respect for human rights. It is a thoroughly researched, impressively reconstructed, and well-told story. But can its arguments be sustained?

She begins and ends her book by emphasizing that she is recounting an otherwise “forgotten bit of history” (p. 15). Martinez chides historians for having downplayed the mixed commissions’ significance and legal scholars for having almost entirely ignored them (pp. 148–49). But her analysis is not entirely consistent in identifying who is doing the forgetting or what exactly they are neglecting. And while the work of the mixed commissions is not prominent in the literature, it has in fact garnered more attention than she suggests,⁵ even from lawyers.⁶

Martinez’s analysis focuses on the movement that began in the late eighteenth century to abolish the traffic in slaves between Africa and the Americas. Between 1501 and 1867, 10.7 million people were enslaved and transported from Africa to the Western Hemisphere — an average of over 34,000 persons every year for over three and a half

⁴ See generally SAMUEL MOYN, *THE LAST UTOPIA* (2010).

⁵ For a very detailed accounting, see generally ELTIS, *supra* note 3.

⁶ See, e.g., WILHELM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* (Michael Byers trans., Walter de Gruyter rev. ed. 2000) (1984); Jean Allain, *The Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade*, 78 BRIT. Y.B. INT’L L. 342 (2008); Tara Helfman, *The Court of Vice Admiralty at Sierra Leone and the Abolition of the West African Slave Trade*, 115 YALE L.J. 1122 (2006); Patricia M. Muhammad, *The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law*, 19 AM. U. INT’L L. REV. 883, 947 (2004).

centuries.⁷ The process was inhuman at every step of the way. Large numbers died en route from their homes to the ports on the African coast. The conditions on the slave ships were atrocious. Holds were packed full with men, women, and children lying “spooned” tight behind one another for five weeks or more in urine- and feces-drenched squalor. On average, fifteen percent of the “cargo” died.⁸ And conditions upon arrival, especially on the plantations in the West Indies, were generally appalling. In other words, every stage of the process was characterized by what today would be termed gross and systematic violations of human rights.⁹

In the years before 1807, Britain had greatly extended its slave-driven colonial empire, so that by 1814 it was estimated to have had over one million slaves in the Caribbean (consisting of its own colonies and recently conquered territories), and British territories were producing more than fifty percent of Europe’s sugar imports. At the end of the eighteenth century, British slave traders continued to land fifty thousand slaves annually in the New World.¹⁰

The rise of the abolition movement was surprisingly rapid and greatly assisted by the use of highly innovative techniques. Specifically, the movement relied on pamphleteering and other public relations tools, the gathering of mass petitions on a scale previously unseen, and consumer boycotts. Quaker and other activists succeeded in mobilizing diverse constituencies, and women emerged as important players.¹¹ Starting in 1789, an abolition bill was put before Parliament every year for eighteen years until finally both houses of Parliament passed the 1807 Act for the Abolition of the Slave Trade.

The campaign that culminated in this Act is familiar territory. Less well known is the network of treaties that were negotiated and the mixed commissions that were established to implement the ban. Since the British legislation could apply only to British ships, it was essential that Britain find ways to extend the application of the ban or the slack would simply be taken up by ships trading under other flags. Initially, the Napoleonic Wars provided a legal justification to board ships on the high seas in order to ascertain whether they were either enemy ships or others providing de facto support to the enemy. Although the war was over by 1815, and peacetime searches were illegal, the prac-

⁷ See DAVID ELTIS & DAVID RICHARDSON, *ATLAS OF THE TRANSATLANTIC SLAVE TRADE*, at xvii (2010).

⁸ DAVID BRION DAVIS, *INHUMAN BONDAGE* 93 (2006).

⁹ For a statistical overview, see David Eltis & David Richardson, *A New Assessment of the Transatlantic Slave Trade*, in *EXTENDING THE FRONTIERS 1* (David Eltis & David Richardson eds., 2008).

¹⁰ SEYMOUR DRESCHER, *ABOLITION* 206 (2009).

¹¹ See generally *WOMEN, DISSENT, & ANTI-SLAVERY IN BRITAIN AND AMERICA, 1790–1865* (Elizabeth J. Clapp & Julie Roy Jeffrey eds., 2011).

tice continued until the British courts began in 1817 to invalidate the resulting seizures of alleged slave ships of other nations. The British government then initiated a series of long-drawn-out negotiations designed to create a network of bilateral treaties with the key trading states. In 1814, treaties were signed with both the Netherlands and the United States, although the treaty with the latter contained no enforcement provision. Negotiations with France and Spain stalled, but in 1815 Britain “succeeded through a combination of bribery and threats” in getting Portugal to sign a treaty that included enforcement provisions, although this did not apply to the trade south of the equator (p. 31). In order to assuage fears that mutual inspection arrangements would, in practice, license the British and their own judicial system at the expense of other nations’ sovereignty, Britain proposed bilateral arrangements to create specialized tribunals. These “mixed commissions” were set up pursuant to bilateral treaties signed with Portugal, Spain, and the Netherlands in 1817–18. Eventually Sweden, Argentina, Uruguay, Bolivia, and Ecuador also signed such treaties. But France never did, and until the Civil War the United States resisted all enforcement arrangements. British efforts to persuade the Americans and others that the slave trade could be classified as a form of piracy, thus giving rise to a right to search and seizure, were stubbornly resisted throughout.

Each of the four mixed commissions, or “courts” as Martinez generally refers to them, consisted of a commissioner and an arbitrator from each side, and a registrar appointed by the government of the territory in which the commission was located. If the two judges did not agree on the outcome, an arbitrator was chosen by lot to cast a deciding vote. The functioning of the commissions proved highly favorable from a British perspective. Most of the seized ships were captured by the British navy and the overwhelming majority of these were duly condemned, often at the end of summary proceedings. And the British judges often managed to decide the cases on their own due to the illness or absence of their counterparts. For example, this scenario occurred in 81 of the 109 cases heard in Sierra Leone. I consider below the actual impact of the outcome of these cases.

Martinez does an excellent job of bringing alive the story of the mixed commissions, primarily through archival research that provides a real feel for the ways in which the commissions functioned. She offers fascinating vignettes of the lives of those involved, including the slaves themselves, the ships’ captains and crews, the judicial officers, the slave owners and plantation managers, and the imperial bureaucrats. But, for the most part, the book is an old-fashioned history with a great story to tell, rather than an interdisciplinary work that seeks to

locate that history within a broader context. Thus, there is almost no engagement either with the major new historical studies on the abolition of the slave trade,¹² or with the various recent interdisciplinary critiques challenging the coherence, legitimacy, and effectiveness of the human rights regime that she describes.

II. EVALUATING MARTINEZ'S CAUSAL CLAIMS

Much ink has been spilled in seeking to explain how abolition came about, the sources of support and of opposition, the relative importance of religious, nationalist, economic, military, and other factors, and the waxing and waning of both public and political attitudes toward the practice of slavery itself. Given the centrality of these questions to Martinez's thesis, one might expect at least a survey, but instead she brushes over them very rapidly by noting that "historians now largely concur that British abolitionism arose out of a confluence of factors, including economic changes, Enlightenment philosophy, and religious revival movements" (p. 17).¹³ More problematically, she never seeks to reconcile this pithy summary with her own argument, based on "the best historical evidence," that "[s]lavery was eradicated, intentionally, by people who had come to believe it was morally wrong. It was eradicated in part by military force, but also by coordinated international legal action — including, surprisingly, international courts" (p. 13).

While the archival work that Martinez has undertaken makes an important contribution to the literature, the heart of her thesis revolves around the central importance in the whole episode of the legal and human rights dimensions. In her view, this was "the first successful international human rights campaign, and international treaties and courts were its central features" (p. 13). As already noted, this claim is not only bold, but it also does not sit easily with most other historical evaluations of this episode. It is thus appropriate to scrutinize carefully her claims regarding the roles played by rights discourse, and by international law and courts, and then to seek to put these factors in some sort of comparative perspective with other causal elements.

A. *Rights Discourse*

The claim that human rights discourse played a central role in motivating and framing the abolitionist movement raises three separate

¹² These works include DRESCHER, *supra* note 10; and ROBIN BLACKBURN, *THE AMERICAN CRUCIBLE* (2011).

¹³ The corresponding footnote cites to DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* (1966). This is the oldest of Professor Davis's many books about slavery, and his later work presents a more detailed and significantly revised analysis.

issues. The first is whether there was in fact significant reliance upon concepts of rights in this particular episode. Martinez's claim is clear: abolitionists "[o]n both sides of the Atlantic . . . conceptualized the issue in terms of human rights, and spoke as well of a religious and moral obligation" (p. 17). She supports this claim with three quotations: a British MP's reference to the "rights of men," Lord Grenville's reference to the "rights of nature," and President Thomas Jefferson's surprisingly modern reference in 1806 to "violations of human rights" (p. 17).¹⁴ She adds that even abolitionist arguments were "deeply intertwined with ideas of natural law and natural rights" (p. 17). But these illustrations are almost anecdotal, and the question is how one might be able to demonstrate the ubiquity or the absence of rights discourse in a more systematic way. For example, a search of a 400-page collection of the principal pamphlets written on both sides of the slavery debates during the 1780s and 1790s reveals not a single reference to "human rights" (except in the editor's introduction) but does yield twenty-eight references to the term "rights."¹⁵ But this type of "measurement" is also unconvincing. Indeed, one pathology that Martinez appears to share with Samuel Moyn is what might be termed a "search engine" mentality. Just as Martinez celebrates when she discovers Jefferson using the phrase "human rights" in 1806, Moyn emerges triumphant from electronic searches of the *New York Times*¹⁶ and Google Books databases¹⁷ that reveal very few references to "human rights" before 1977 and a dramatic uptake thereafter.

Martinez makes a more sustained argument in chapter 6 about the significance of over two centuries of a commitment to promoting principles of "humanity." She attaches particular importance to President James Madison's condemnation of the slave traffic in 1810 as a "violation of the laws of humanity," (p. 116)¹⁸ and to the characterization of slavery in 1842 by Henry Wheaton — the most prominent American international law treatise writer of the time — as a "crime against humanity" (p. 115).¹⁹ From there, her historical review moves fairly rapidly from the reference to "the laws of humanity" in the 1899 Hague Conventions (the so-called "Martens Clause") (pp. 137–38) to Article 6(c) of the Nuremberg Charter of 1945, which classified "enslavement" as a crime against humanity (p. 156), an approach also reflected in

¹⁴ Internal quotation marks have been omitted. Three additional references, spanning much of the nineteenth century, are cited in footnote 4 (pp. 180–81).

¹⁵ THE SLAVE TRADE DEBATE (Bodleian Library 2007).

¹⁶ MOYN, *supra* note 4, at 4.

¹⁷ Samuel Moyn, *Substance, Scale, and Salience: The Recent Historiography of Human Rights*, 8 ANN. REV. L. & SOC. SCI. 123, 133 (2012).

¹⁸ Emphasis has been omitted.

¹⁹ Emphasis and an internal quotation mark have been omitted.

Article 7(1)(c) of the 1998 Rome Statute of the International Criminal Court. Based on these developments, she argues that the antislavery effort both “foresaw and justified” modern international human rights law, and demonstrated that crimes against humanity “were a proper subject of international lawmaking” (p. 139). But demonstrating this sort of connection would be very difficult. The concept of crimes against humanity as it emerged in 1945 differed greatly from any supposed precursors. It was given a very limited scope and, until the 1990s, was interpreted as applying only in situations of international armed conflict.²⁰

Moreover, claims of continuity between today’s understanding of crimes against humanity and the historic practice of slavery have been consistently rejected in international law. Kenya has recently argued that slavery “is not a crime against humanity just for today, not just for tomorrow, but for always and for all times . . . [because] crimes against humanity are not time-bound,”²¹ and African governments have called for reparations to be paid by the slave-trading nations.²² But while the latter have expressed their abject regret for historical wrongs committed,²³ they have insisted on separating issues of responsibility from reparations and rejected the imposition of ex post facto liability.²⁴ Although expert reports endorsed reparations,²⁵ the 2001 World Conference Against Racism only “acknowledge[d] that slavery and the slave trade are a crime against humanity and should always have been so, especially the transatlantic slave trade.”²⁶ This formulation has consistently been interpreted to mean that slavery was not in fact such a crime at the time it happened. Instead, the Conference recognized a “moral obligation . . . to halt and reverse the lasting consequences of those practices” and invited governments “to honour the

²⁰ See generally M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY* (2011).

²¹ Marc Bossuyt & Stef Vandeginste, *The Issue of Reparation for Slavery and Colonialism and the Durban World Conference Against Racism*, 22 HUM. RTS. L.J. 341, 350 (2001) (internal quotation mark omitted).

²² See *id.* (noting that this position was put forward on behalf of the African group at the World Conference Against Racism in 2001).

²³ In 2003 President George W. Bush characterized the slave trade as “one of the greatest crimes of history.” President George W. Bush, Remarks by the President on Goree Island (July 8, 2003), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/07/20030708-1.html>.

²⁴ See EMMANUEL DECAUX, *LES FORMES CONTEMPORAINES DE L’ESCLAVAGE* 200–01 (2009); RHODA E. HOWARD-HASSMANN WITH ANTHONY P. LOMBARDO, *REPARATIONS TO AFRICA* 69–70 (2008).

²⁵ See generally Anti-Slavery Int’l, *Abolishing Slavery and its Contemporary Forms*, ¶¶ 142–146, Office of the United Nations High Comm’r for Human Rights, U.N. Doc. HR/PUB/02/4 (2002) (by David Weissbrodt).

²⁶ World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, Durban, S. Afr., Aug. 31–Sept. 8, 2001, *Declaration and Programme of Action*, ¶ 13, U.N. Doc. A/CONF.189/12 (2001).

memory of the victims of these tragedies.”²⁷ It is thus dubious at best to attach much contemporary significance to nineteenth-century uses of the phrase “crimes against humanity.”

In contrast, Martinez is right to highlight the centrality of diverse forms of rights-related discourse in the abolitionist debates. But that conclusion gives rise to the question of whether such historical usages can meaningfully be assimilated to contemporary understandings of “human rights.” The issue of synchronic versus diachronic approaches to the history of ideas has long preoccupied scholars. Moyn and his fellow revisionists have no doubt that there is little, if any, meaningful transferability in this regard.²⁸ Even Professor Lynn Hunt, who makes major claims for the comparability of late eighteenth-century rights discourse with today’s equivalent, warns of the risks involved. She takes the example offered by Martinez of Jefferson’s 1806 reference to “human rights” and points out that while he generally used the term “natural rights” until the French Revolution, and sometimes used the term “rights of man” thereafter, his reference to “human rights” should be interpreted to mean “something more passive and less political” than was implied by either of the other two phrases.²⁹ Thus, it should not be taken to be synonymous with any current meaning of the term.

Others have argued that the rights discourse of the abolitionists was little more than an exercise in cultural imperialism. What counted was not any sense of obligation to a universal moral community, but rather the parochial identities of those involved, whether religious, class based, or nationalist.³⁰

But there is a powerful argument to be made that there was a strong element of continuity in the evolution of rights discourse. Professor Robin Blackburn, for example, argues that nineteenth-century abolitionists often invoked the idea of rights in ways consistent with its later usage. He rejects Moyn’s approach and argues that “there is a living tradition here that cannot be artificially arrested at some privileged moment that discloses its inner truth.”³¹ This debate about the diachronic transferability of language essentially pits those who see a process of evolution or mutation against those for whom discontinuity and novelty better describe the relationship over time. It is clear that

²⁷ *Id.* ¶¶ 101–102.

²⁸ See, e.g., MOYN, *supra* note 4, at 32–33 (“[C]auses [such as] . . . the campaign against the slave trade . . . were almost never framed as rights issues.”). For a powerful critique of this aspect of Moyn’s work, see Robin Blackburn, *Reclaiming Human Rights*, NEW LEFT REV., May–June 2011, at 126, 131–33 (reviewing MOYN, *supra* note 4).

²⁹ LYNN HUNT, *INVENTING HUMAN RIGHTS* 22 (2007).

³⁰ See Chaim D. Kaufmann & Robert A. Pape, *Explaining Costly International Moral Action: Britain’s Sixty-Year Campaign Against the Atlantic Slave Trade*, 53 INT’L ORG. 631, 644 (1999).

³¹ BLACKBURN, *supra* note 12, at 485.

the use of the term “human rights,” or something close to it, whether in the twelfth or nineteenth centuries, will inevitably conjure up a very different meaning from that attributed to it today. But there is also a strong genealogical or ancestral component in the sense that one generation has provided the foundation or the impetus for the emergence and shaping of the next generation’s usage. Even in a story of evolution involving significant departures from, and rejections of, what has gone before, there are indispensable elements of continuity. It is clear that we need to disentangle the various vocabularies that are too often used interchangeably in the area of rights, but the claim of discontinuity is unsustainable.³²

B. The Role of International Law and Courts

Martinez argues that international law was “surprisingly central” to the overall slavery enterprise, being used both to “justify . . . [and] suppress it” (p. 16). While she makes a strong case for its being one element among many, the case for its centrality is hardly compelling.

First, the British Parliament was reluctant to put in place a watertight domestic legal regime, both with respect to the slave trade and to slavery in the British colonies. Until 1824 it was not illegal for British merchants to sell goods or equipment to a slave trader provided that the deal was arranged outside British territory. The consolidated legislation adopted in 1824 did make those actions illegal, but a prosecution could only succeed if the seller could be shown to have had prior knowledge that the goods were intended to be used for purposes related to the slave trade.³³ Thus, for all its expressions of moral outrage, Britain was in no position to negotiate a strong international law regime until 1843, when Parliament barred British subjects from participating in the slave trade.

Second, while Britain devoted much energy to achieving bilateral treaty arrangements, it is unclear how much difference these treaties made. Most historians have accorded them relatively minor significance,³⁴ while some of those who consider these arrangements to have been significant do so because of their contribution to the overall imperial enterprise of enabling Britain to interdict ships and establish precedents.³⁵ Moreover, Britain paid over ninety percent of the total

³² As Professor David Boucher has argued, “natural law, natural rights (both prescriptive and descriptive), and human rights are conceptually distinct, but are related to each other, not as answers to the same question, but as part of the same historical process by which one turns into the other.” DAVID BOUCHER, *THE LIMITS OF ETHICS IN INTERNATIONAL RELATIONS* 3 (2009).

³³ ELTIS, *supra* note 3, at 83.

³⁴ See DRESCHER, *supra* note 10, at 236–37.

³⁵ GREWE, *supra* note 6, at 566–67.

direct costs of the system, thus underscoring the essentially unilateral nature of the resulting regime.³⁶

Third, as noted earlier, in its failure to have slavery characterized as a form of piracy, Britain actually failed spectacularly in its most ambitious and determined effort to mobilize the power of international law to prohibit the slave trade.

But it is the role of the mixed commissions that takes pride of place in Martinez's analysis of "the most successful episode ever in the history of international human rights law" (p. 13). Moyn, on the other hand, dismisses them as "a minor episode in the history of anti-slavery."³⁷ Although the landmark cases litigated in both Britain and the United States have in fact been the subject of reasonably extensive comment, the literature on the mixed commissions themselves is limited. The most affirming comment made by any of the major historians is Professor Seymour Drescher's comment that the mixed commissions were the "quiet pioneers" of the late twentieth century's international court system,³⁸ an assessment that is rather more modest than Martinez's claim. In fact, between 1808 and 1867 the mixed commissions dealt with only 572 of the 1635 ships condemned. The British vice-admiralty courts that dealt with 823 ships were more active, leading Professor David Eltis to conclude that the "international courts were no substitute for the domestic criminal courts."³⁹ Since Martinez's thesis first appeared in 2008, her claims about the commissions have gained little attention from most historians of the era, and the few exceptions have been notably resistant to endorsing her thesis.

But perhaps more significantly, her claims raise the question of how to evaluate effectiveness in an area such as this.⁴⁰ A first criterion could focus on the number of slaves freed by the commissions. Martinez gives the figures of 65,000 freed in Freetown between 1819 and 1846; 10,000 freed in Havana; and 3000 freed in Rio, for a

³⁶ ELTIS, *supra* note 3, at 90, 96.

³⁷ Samuel Moyn, *Of Deserts and Promised Lands: The Dream of Global Justice*, NATION (Feb. 29, 2012), <http://www.thenation.com/article/166516/deserts-and-promised-lands-dream-global-justice> (reviewing JENNY S. MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* (2012)).

³⁸ DRESCHER, *supra* note 10, at 237.

³⁹ ELTIS, *supra* note 3, at 86.

⁴⁰ Evaluation is a vital, but much neglected and poorly understood, issue in the human rights field generally, although it should be more feasible in relation to the issue at hand because of the detailed statistics and the extraordinary documentary trail available to us. Martinez makes effective use of the extensive data compiled in the Trans-Atlantic Slave Trade Database, which is available at <http://www.slavevoyages.org/tast/database/index.faces>.

rounded total of about 80,000.⁴¹ Other sources offer slightly higher estimates.⁴²

A second criterion may consider the number of persons who would have been enslaved but for the existence of the enforcement efforts. Eltis puts forward a strong but ultimately untestable hypothesis that without British interdiction efforts the slave trade would have been “several times what it actually was.”⁴³ Martinez’s claim is more modest. She takes the number of ships that were seized and condemned without any slaves on board and estimates that these 225 ships could have carried as many as 90,000 slaves (p. 79). These numbers make it difficult to understand why such impressive achievements have not been more celebrated. One answer is that these numbers have to be compared to the overall number of slaves who continued to be traded. Some twenty-five percent of the total number of Africans shipped to the New World, or some three million people, were sent after 1807, and “[t]he volume of the transatlantic slave trade between 1826 and 1850 diminished by only 5 percent.”⁴⁴

A third criterion might analyze the fates of those slaves who were freed by the commissions. By this standard, as Martinez fully acknowledges, the results were far less impressive. In Sierra Leone, most of those freed became part of the ordinary labor force in the colony, although relatively little is actually known about what this shift meant in practice.⁴⁵ In Rio and Havana, those freed endured conditions that constituted little improvement from their enslavement (pp. 99–100).⁴⁶ The fate of the others who were captured but not processed

⁴¹ The number freed by the commissions was of course considerably fewer than the total number interdicted. Blackburn indicates, for example, that Britain’s naval squadron off the West African coast apprehended ships carrying 145,000 slaves in the period 1815 to 1865. BLACKBURN, *supra* note 12, at 232.

⁴² See, e.g., Samuël Coghe, *The Problem of Freedom in a Mid Nineteenth-Century Atlantic Slave Society: The Liberated Africans of the Anglo-Portuguese Mixed Commission in Luanda (1844–1870)*, 33 SLAVERY & ABOLITION 479, 481 (2012) (citing figures of 66,000 freed in Freetown, 6700 freed in Rio, 13,000 freed in Havana, 137 freed in Luanda, and 54 freed in Suriname). Differences in numbers reflect the probable inclusion in the leading database of some slaves who had been disembarked before the apprehension of the vessel.

⁴³ ELTIS, *supra* note 3, at 139.

⁴⁴ DRESCHER, *supra* note 10, at 245.

⁴⁵ For example, Professor Walter Hawthorne has found records of an African who opted to remain a slave in Brazil rather than obtain his legal freedom in either Rio or Freetown. See Walter Hawthorne, *Gorge: An African Seaman and his Flights from ‘Freedom’ back to ‘Slavery’ in the Early Nineteenth Century*, 31 SLAVERY & ABOLITION 411, 413 (2010).

⁴⁶ For more searching accounts of the conditions in Rio and Havana, see generally Beatriz G. Mamigonian, *In the Name of Freedom: Slave Trade Abolition, the Law and the Brazilian Branch of the African Emigration Scheme (Brazil–British West Indies, 1830s–1850s)*, 30 SLAVERY & ABOLITION 41 (2009); Rosanne Marion Adderley, ‘A Most Useful and Valuable People?’ *Cultural, Moral and Practical Dilemmas in the Use of Liberated African Labour in the Nineteenth-Century Caribbean*, 20 SLAVERY & ABOLITION 59 (1999); Luis Martínez-Fernández, *The Havana Anglo-Spanish*

by the commissions was also grim. They were either “enlisted” (i.e., conscripted) into the British military forces, or were indentured as “[a]pprentices” for up to fourteen years.⁴⁷ Tens of thousands of “liberated Africans” were thus sent across the Atlantic as indentured servants to work on the plantations, helping to make up for the reduced supply of slaves.⁴⁸ And even those who were “rescued” by the British navy often subsequently had to endure harsh transport conditions that led to high mortality rates.⁴⁹

In addition, the limited remit of the mixed commissions left them far from being empowered to render justice to all. Neither those responsible for the slave trade itself — such as the ships’ captains — nor those guilty of particularly egregious cruelty perpetrated in the slave trade context were held criminally liable or otherwise punished (although the ships and slave cargoes belonging to the paymasters of the ships’ captains were forfeited). Further, reparations were not awarded to the victims, and even those who were released were, as we have seen, not always much better off as a result. Unsurprisingly, some commentators continue to argue that transatlantic slavery remains a crime that “has never been adjudicated.”⁵⁰

This analysis leads to a fourth possible criterion, concerning the lasting contribution of this episode to the abolition of slavery itself. Martinez’s analysis tackles this issue by noting that slavery and the slave trade have become universally acknowledged as international crimes, that no government officially defends slavery (which she contrasts with the situation pertaining to torture), and that legalized chattel slavery has disappeared (p. 13). But the path from 1807 to the modern conception of slavery and the slave trade was, in fact, very rocky. First, the adoption of some twenty-four separate international treaties and other instruments between 1815 and 1957 shows that the international community faced significant challenges in prohibiting, preventing, and punishing variously described acts of slavery.⁵¹ Second, much of the more recent international normative activity has

Mixed Commission for the Suppression of the Slave Trade and Cuba’s Emancipados, 16 SLAVERY & ABOLITION 205 (1995).

⁴⁷ See Anita Rupprecht, ‘When He Gets Among His Countrymen, They Tell Him That He is Free’: *Slave Trade Abolition, Indentured Africans and a Royal Commission*, 33 SLAVERY & ABOLITION 435, 439 (2012).

⁴⁸ See *id.* at 451 (internal quotation marks omitted).

⁴⁹ Robert Burroughs, *Eyes on the Prize: Journeys in Slave Ships Taken as Prizes by the Royal Navy*, 31 SLAVERY & ABOLITION 99, 102 (2010).

⁵⁰ Muhammad, *supra* note 6, at 947.

⁵¹ M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT’L L. & POL. 445, 453 (1991).

sought to condemn “contemporary forms of slavery”⁵² or “slavery-like” practices on the grounds that old forms of enslavement have simply metamorphosed into new techniques that require neither transportation nor chains.⁵³ There has also been a great deal of criticism of the continuing absence of effective international enforcement mechanisms for dealing with slavery.⁵⁴

Third, the so-called scramble for Africa from 1881 to 1914 involved European powers engaging in a wide range of practices akin to slavery, and often doing so precisely in the name of what King Leopold of Belgium termed a “crusade” designed to “open to civilization the only part of our globe which it has not yet penetrated, [and] to pierce the darkness which hangs over entire peoples.”⁵⁵ His subsequent creation of the Belgian Free State brought immense wealth to Belgium but untold misery to Africa, and caused a population loss of as many as ten million people.⁵⁶

Finally, even today chattel slavery is far from having been eliminated. In 2008, for example, the Community Court of Justice of the Economic Community of West African States (ECOWAS) ordered the Government of Niger to pay damages to a victim for its failure to protect her from being sold into slavery in 1996.⁵⁷ Civil society groups estimate that there are still as many as 43,000 people enslaved in Niger.⁵⁸

None of this is to suggest that the movement to abolish the transatlantic slave trade did not contribute greatly to putting slavery squarely on the agenda of international law. However, this movement was only the beginning of a long and bumpy ride in which there have been many setbacks, no certainties, and all too little continuity of the type implied by Martinez’s thesis.

C. *The Comparative Role of Other Factors*

The question that emerges from the analysis above is whether the treaties and the mixed commissions loom large (or loom at all) when

⁵² Nicholas Lawrence McGeehan, *Misunderstood and Neglected: The Marginalisation of Slavery in International Law*, 16 INT’L J. HUM. RTS. 436, 439 (2012).

⁵³ See generally *id.*

⁵⁴ See, e.g., DECAUX, *supra* note 24, at 9. See generally JEAN ALLAIN, *SLAVERY IN INTERNATIONAL LAW* (2012); *THE LEGAL UNDERSTANDING OF SLAVERY* (Jean Allain ed., 2012).

⁵⁵ ADAM HOCHSCHILD, *KING LEOPOLD’S GHOST* 44 (1998) (quoting from King Leopold’s address to the Geographical Conference, which led to the establishment of the International African Association).

⁵⁶ *Id.* at 233. This figure is an estimate that takes into account population loss from: (1) murder; (2) starvation, exhaustion, and exposure; (3) disease; and (4) the plummeting birth rate. See *id.* at 226–32.

⁵⁷ *Koroua v. Republic of Niger*, ECW/CCJ/JUD/06/08 (ECOWAS CCJ, Oct. 27, 2008).

⁵⁸ Lydia Polgreen, *Court Rules Niger Failed by Allowing Girl’s Slavery*, N.Y. TIMES, Oct. 28, 2008, at A6.

compared with the overall range of factors that have been put forward in the voluminous and still-expanding literature on this theme. Or is it only when seen through the eyes of international lawyers that these elements seem particularly significant?

A nineteenth-century Irish historian, William Edward Hartpole Lecky is best remembered today for his bold assertion that the “unweary, unostentatious, and inglorious crusade of England against slavery may probably be regarded as among the three or four perfectly virtuous pages comprised in the history of nations.”⁵⁹ In other words, abolition was an act of altruism, unsullied by self-interest or hidden motives. In reviewing Martinez’s book, Samuel Moyn seems to want to align her with Lecky by suggesting that she simply assumes that “pure benevolence” was the driving force.⁶⁰ But this suggestion is unfair to her, given her emphasis on the importance of moral condemnation, military force, and legal action (p. 13). Without seeking to review the many causal theories that have been advanced, we cannot avoid a brief *tour d’horizon* in order to assess the adequacy of Martinez’s three factors.

Her category of “moral condemnation” appears to include both the religious and philosophical factors identified by other historians. Few would contest the importance of the former, especially from the 1820s onwards,⁶¹ but the relationship between the religious and the philosophical arguments that were put forward remains contentious among scholars. Professors Chaim Kaufmann and Robert Pape contend that most of the religious discourse relied on condescending and paternalistic assumptions and thus had little in common with lofty moral arguments.⁶² It is difficult to dispute, however, the contention that much of the rhetoric surrounding British abolition was characterized by a high-minded moralism, whatever the deeper content or motivation of such rhetoric might have been.

Martinez’s second explanatory factor is the use of military force, by which she means primarily the role of the British Navy in interdicting and arresting slave ships. We have already seen that the importance of this dimension is contested by some and supported by others. What is not clear, however, is whether Martinez also wishes to claim that the use of force, especially in terms of bombardments and blockades, was an important explanatory factor. She suggests that the actual use of

⁵⁹ 1 WILLIAM EDWARD HARTPOLE LECKY, *HISTORY OF EUROPEAN MORALS* 153 (3d ed., rev. 1913).

⁶⁰ Moyn, *supra* note 37.

⁶¹ See DRESCHER, *supra* note 10, at 252.

⁶² See Kaufmann & Pape, *supra* note 30, at 643.

force was confined to “a few shots fired by ships in Brazilian territorial waters,” (p. 169) but this seems to significantly understate the reality.⁶³

Martinez’s third factor is legal action. Without repeating what has been said earlier, it need only be remarked that few commentators provide support for this contention.

More strikingly, especially for an analysis premised upon the power of rights and individual and collective action, Martinez devotes very little attention to several factors that have been emphasized by other historians. The first of these concerns the role of revolutions and uprisings by slaves in the colonies. Theories suggesting that these were important have been consistently played down by Drescher, who sums up his position in these terms: “Despite attempts to link the rise, persistence, and successes of British abolition to international defeats and near-revolutionary moments during more than a half century after 1775, British abolitionism, slave trade abolition, and slave emancipations were all fair-weather revolutions.”⁶⁴

But others have contested this view. Professor Christopher Brown has argued that the successful American Revolution was a *sine qua non* for the subsequent successes achieved by the abolitionists in Britain.⁶⁵ Robin Blackburn’s most recent work argues powerfully that slave resistance and accompanying revolutionary ruptures were essential in facilitating eventual emancipation. In particular, he emphasizes the impact of the uprising in the richest of the sugar-producing colonies, Saint Domingue (which rebelled in 1791 and became independent Haiti in 1804). He argues that this event gave deep meaning to the phrase *droits de l’homme* and sent an unmistakable message to all colonial powers.⁶⁶

A second factor not mentioned by Martinez concerns the impact of on-board slave rebellions. Eltis and his colleagues have shown that such rebellions may have affected as many as ten percent of transatlantic voyages, although the records are only able to confirm that thirty slave ships out of a total of 35,000 journeys actually returned to the African coast in the control of the slaves following a successful rebellion. They argue that the impact of such rebellions was far greater than this figure might suggest. The rebellions required more crew and weapons to be carried, increased the cost of landed slaves, and made the route from West Africa to North America far less attractive. Eltis

⁶³ Apart from the ever-present threat of the use of force, one incident alone — the shelling of Algiers in August 1816 — resulted in the death of 141 Anglo-Dutch troops and the wounding of 742. DRESCHER, *supra* note 10, at 235.

⁶⁴ Seymour Drescher, *History’s Engines: British Mobilization in the Age of Revolution*, 66 WM. & MARY Q. 737, 739 (2009).

⁶⁵ CHRISTOPHER LESLIE BROWN, MORAL CAPITAL 451–62 (2006).

⁶⁶ BLACKBURN, *supra* note 12, at 173–219.

and his colleagues suggest that this combination of factors saved at least several hundred thousand from potential slavery.⁶⁷

The third factor is an element in the much larger and more complex debate over the economic dimensions of abolition. Professor Eric Williams, later Prime Minister of Trinidad and Tobago, famously argued in 1944 that economic conditions in the West Indies, rather than humanitarian motives, provided the major impetus for abolitionism.⁶⁸ While key parts of his economic data were subsequently challenged, many authors continue to subscribe to different variations of the theme that imperial economic interests were congruent with abolitionism.⁶⁹ Both Drescher and Davis attach major importance to what they term “free labor ideology,” which contributed significantly to the abolitionist thrust in Britain. For Drescher, it reflects a belief that free labor was economically superior to forced labor.⁷⁰ Davis, on the other hand, is careful to distinguish his version by noting that it is more akin to an approach driven by human dignity and based on “a sense of self-worth created by dutiful work.”⁷¹

The fourth factor is imperialism. Like studies of abolitionism, much of the recent historiography of international law has highlighted the role of imperialism, but Martinez makes no mention of it. I argue that imperialism is in fact central to an understanding of nineteenth-century abolitionism, from the justifications proffered and the objectives sought, to the means used, the outcomes achieved, and the policy conclusions that might be drawn. The *justifications* invoked were, in many respects, paternalistic and condescending.⁷² The *objectives* of imperialism have been a subject of scholarly debate. Professor Lauren Benton, for example, argues that the abolitionist campaign fit very well with the imperial government’s goal of constraining the power of the colonial planters in order to reinforce its own legal authority. She directly challenges Martinez’s theory with her conclusion that the rights at the heart of abolitionism were not human rights but “the property rights and legal prerogatives of slave traders and slave own-

⁶⁷ Stephen D. Behrendt, David Eltis & David Richardson, *The Costs of Coercion: African Agency in the Pre-Modern Atlantic World*, 54 *ECON. HIST. REV.* 454, 473–75 (2001).

⁶⁸ ERIC WILLIAMS, *CAPITALISM AND SLAVERY* (1944).

⁶⁹ David Richardson, *The Ending of the British Slave Trade in 1807: The Economic Context*, 26 *PARLIAMENTARY HIST.* 127, 140 (2007).

⁷⁰ SEYMOUR DRESCHER, *THE MIGHTY EXPERIMENT* 34 (2002).

⁷¹ DAVIS, *supra* note 8, at 248.

⁷² See Yasuaki Onuma, *When Was the Law of International Society Born? — An Inquiry of the History of International Law from an Intercivilizational Perspective*, 2 *J. HIST. INT’L L.* 1, 43 (2000) (contending that the humanitarian motives reflected “the discriminatory assumptions of civilized Europe (or West or ‘white’) vs. uncivilized (or savage, barbarian, barbarous, backward or stagnant) Africa (or Orient or East)”).

ers within the imperial order.”⁷³ Professor Wilhelm Grewe presents a more comprehensive imperialist indictment by attributing abolitionism largely to the desire of the British to promote their own economic interests and to do so by whatever means were available to them as the “strongest sea power in the world.”⁷⁴ Of the total number of ships detained in the supposedly multilateral effort to abolish the slave trade, fewer than one percent had sailed from or through British territorial waters, but eighty-five percent were detained pursuant to British action.⁷⁵

But the *means* used were the most clearly imperialistic aspect of the episode. Without going beyond Martinez’s own account, a damning picture emerges of the ways in which law and legal institutions were an integral part of classically imperialist conduct. She recounts how the British government engaged in highly dubious interpretations of international law to justify high seas intervention, bribed and strong-armed other nations to enter treaties and to cooperate with British dictates, and maintained faith in the mixed commissions because the government remained firmly in control of the process. These measures can easily be seen as a vital part of establishing and enforcing the imperialist enterprise of the Pax Britannica. Other commentators paint a harsher picture. Drescher notes that “[b]efore and after the French wars ended, the Royal Navy stretched and breached international law in occasional or threatened blockades of European, Latin American, and African ports.”⁷⁶ And Eltis describes the creation of a Slave Trade Department in the Foreign Office, which also pursued global intelligence gathering, the issuance of illegal instructions to naval commanders, clandestine efforts to free slaves, British naval incursions into foreign territorial waters, extensive payments to secret informants in other states, support for slave insurrections, and the bribery of foreign legislators, media owners, and naval personnel.⁷⁷

Martinez acknowledges only that the British “engaged in somewhat dubious unilateral actions,” and then quickly notes that the British could argue that “those actions were justified under the spirit of the treaties” (p. 166). The Foreign Office did indeed make such arguments in the nineteenth century, but few took it at face value then and there are no grounds for doing so today.

None of this is to suggest that imperialist justifications, objectives, and means constitute the entire picture. Motivations are inevitably

⁷³ Lauren Benton, *Abolition and Imperial Law, 1790–1820*, 39 J. IMPERIAL & COMMON-WEALTH HIST. 355, 369 (2011).

⁷⁴ GREWE, *supra* note 6, at 562.

⁷⁵ ELTIS, *supra* note 3, at 97–98.

⁷⁶ Drescher, *supra* note 64, at 754–55.

⁷⁷ ELTIS, *supra* note 3, at 111–16.

mixed in such situations, and lawful and appropriate techniques are often combined with others. But to the extent that major elements of the British approach were imperialistic, albeit partly in the pursuit of an admirable goal, it becomes all the more important to exercise caution and discernment in drawing lessons for the future.

Martinez, however, sees only positive lessons emerging. She calls upon the United States today, while it can still do so, to project its economic and military power into the future by supporting the role of the International Criminal Court (ICC) (pp. 170–71). And seemingly drawing inspiration from Britain’s use of “raw coercive power,” among other techniques, she calls upon the United States “to foster democracy and human rights through the use of force” (p. 15).⁷⁸ Having seen no imperialist dimensions in the earlier episode, it is understandable that the strong and potentially disabling perception of the ICC as an imperialist tool being wielded against Africa, and concerns that the Responsibility to Protect doctrine is merely a twenty-first-century version of earlier imperial interventions in the Global South, give Martinez no cause to doubt the validity of her prescriptions. But it is difficult not to draw analogies between the uses and misuses of international law by the leading imperial power of the nineteenth century and the activities of its erstwhile counterpart in the early part of the twenty-first century.⁷⁹ Martinez seems unaware that imperialist motives and methods might taint, or even fatally undermine, even the most high-minded of world order projects.

III. EVALUATING MARTINEZ’S ORIGINS CLAIMS

Martinez could well have been content with her splendid retelling of an important episode in the nineteenth-century history of human rights, a period that has been given insufficient importance in most recent histories of human rights. But by adding ambitious claims as to the origins of contemporary human rights law, she put her book at the heart of one of the most contested issues in the new wave of human rights scholarship. Until very recently the international human rights regime had been of little interest beyond the relatively arcane worlds of international lawyers and activists, and it was all but invisible in

⁷⁸ An earlier study also views the nineteenth-century anti-slave-trade seizures as precedents for efforts by the Bush Administration, through its Proliferation Security Initiative, to create rules empowering it and its allies to board and inspect ships suspected of carrying weapons of mass destruction. See Helfman, *supra* note 6, at 1153–55.

⁷⁹ I will resist the temptation of drawing out the current day analogies, since they would simply distract from the issues of primary concern for this Review. For an unhappy example of one who could not resist this temptation, see the epilogue to JOHN M. HEADLEY, *THE EUROPEANIZATION OF THE WORLD 207–18* (2008).

the mainstream social science literature.⁸⁰ This low profile might be explained simply by the fact that, despite its prominence in many national legal orders, diplomatic discourse, academic debate, and even grassroots activist campaigns, the relevant body of law is of very recent provenance.⁸¹ Or the explanation might lie more in what is widely thought to be its very modest impact on the real world practices of governments. But, whatever the reasons, in the past decade social scientists have discovered human rights as a fertile and challenging subject for inquiry. Even more importantly, much of the resulting literature has been of a deeply critical nature. Philosophers have begun to agonize over the challenge of grounding the modern notion of human rights in theoretical terms;⁸² anthropologists have sought to address the decentering of human rights and the consequences of their unsettled or unstable content or status;⁸³ critical theorists have begun to suggest that the liberation promised by rights proponents is often just a form of imperialist or colonial domination dressed in new garb;⁸⁴ political scientists have challenged the effectiveness of treaties and courts;⁸⁵ and historians have challenged the basic assumption that the current human rights movement is the logical next step in a progress narrative with deep historical roots.

A. *Locating Martinez's Book in Historiographical Debates*

In order to locate Martinez's position within historiographical debates, it is helpful to distinguish three broad, but not necessarily mutually exclusive, approaches in the relevant literature: the linear progress narrative, theories that identify a precise but lengthy chronology, and the claim

⁸⁰ Professor Jonathan Glover's book *Humanity: A Moral History of the Twentieth Century* is built around notions of ethics, morality, and humanity but contains not a single index entry for either "rights" or "human rights," although there is a closing but unexplained assertion of the need for an "international authority to keep the peace and to protect human rights." JONATHAN GLOVER, *HUMANITY: A MORAL HISTORY OF THE TWENTIETH CENTURY* 401 (1999).

⁸¹ As Professor Stefan-Ludwig Hoffmann puts it, human rights "are a fundamentally new phenomenon . . . , indeed, so recent that historians have only just begun to write their history." Stefan-Ludwig Hoffmann, *Introduction* to *HUMAN RIGHTS IN THE TWENTIETH CENTURY* 1, 2 (Stefan-Ludwig Hoffmann ed., 2011).

⁸² See generally CHARLES R. BEITZ, *THE IDEA OF HUMAN RIGHTS* (2009); JAMES GRIFIN, *ON HUMAN RIGHTS* (2008); Amartya Sen, *Elements of a Theory of Human Rights*, 32 *PHIL. & PUB. AFF.* 315 (2004).

⁸³ See generally *THE PRACTICE OF HUMAN RIGHTS* (Mark Goodale & Sally Engle Merry eds., 2007).

⁸⁴ See generally ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2004); COSTAS DOUZINAS, *THE END OF HUMAN RIGHTS* (2000); MAKAU MUTUA, *HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE* (2002); ANNE ORFORD, *READING HUMANITARIAN INTERVENTION* (2003).

⁸⁵ For a survey of this literature, see generally Emilie M. Hafner-Burton, *International Regimes for Human Rights*, 15 *ANN. REV. POL. SCI.* 265 (2012).

by the “new revisionists” that the human rights movement is of such recent provenance as to lack a genealogy worthy of the name.

1. *Linear Progress Narratives.* — International law scholars have long been accused of portraying their discipline as an intrinsically or inexorably progressive one. Where once the term “civilization” had been the goal, it came to be replaced by “progress.”⁸⁶ In the human rights field, progress narratives promote a picture of more or less linear progress from ancient times through to the present. Thus Professor Micheline Ishay observes that “the notion of universality evolved throughout history . . . [as] the ancients sketched out the fundamentals of a universal ethics that the moderns would further elaborate.”⁸⁷ Religious influences were strong — “the moral injunctions contained in the Bible paved the way for the liberal and socialist conceptions of human rights” — but so too were philosophical ones, as Plato, Aristotle, and Cicero “provided a philosophical basis for challenging oppressive regimes, thereby laying the foundation for human rights activism.”⁸⁸ Various collections of human rights source documents across the ages follow the same type of inclusive and progress-oriented approach.⁸⁹

Those writing human rights history from a broader social science vantage point have generally adopted a comparable approach, albeit within a more restricted timeframe.⁹⁰ One typical account lists “the Magna Carta (1215), the English Bill of Rights (1689), the French Declaration on the Rights of Man and Citizen (1789), and the US Constitution and Bill of Rights (1791)” as individual rights-based documents that are “the written precursors” of today’s regime.⁹¹

Progress narratives of this type leap from one historical moment to another with little if any attempt to demonstrate causality, probe lines of transmission, or explain the political economy involved. They overstate coherence and continuity, marginalize competing understandings, and can be used to delegitimize alternative visions.⁹² And they are es-

⁸⁶ See, e.g., Russell A. Miller & Rebecca M. Bratspies, *Progress in International Law: An Explanation of the Project*, in PROGRESS IN INTERNATIONAL LAW 9, 11–17 (Russell A. Miller & Rebecca M. Bratspies eds., 2008) (discussing MANLEY O. HUDSON, PROGRESS IN INTERNATIONAL ORGANIZATIONS (1932)).

⁸⁷ MICHELINE R. ISHAY, THE HISTORY OF HUMAN RIGHTS 47 (2004).

⁸⁸ *Id.* at 57–58.

⁸⁹ See, e.g., THE HUMAN RIGHTS READER: MAJOR POLITICAL WRITINGS, ESSAYS, SPEECHES, AND DOCUMENTS FROM THE BIBLE TO THE PRESENT (Micheline R. Ishay ed., 1997); THE HUMAN RIGHTS READER (Walter Laqueur & Barry Rubin eds., 1979).

⁹⁰ See generally, e.g., PAUL GORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS (3d ed. 2011); Burns H. Weston, *Human Rights*, BRITANNICA ONLINE ENCYCLOPEDIA, <http://www.britannica.com/EBchecked/topic/275840/human-rights> (last visited Mar. 30, 2013).

⁹¹ *A Short History of Human Rights*, U. MINN. HUM. RTS. RES. CENTER, <http://www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-1/short-history.htm> (last visited Mar. 30, 2013).

⁹² For a strong critique, see generally THOMAS SKOUTERIS, THE NOTION OF PROGRESS IN INTERNATIONAL LAW DISCOURSE (2010).

pecially difficult to reconcile with the widely held perception that “never before, in absolute figures, never have so many men, women, and children been subjugated, starved, or exterminated on the Earth.”⁹³

Perhaps the only thing that those who are shaping the new historiography of rights, including Martinez, agree upon is that such narratives yield unwieldy and unpersuasive foundations for today’s understanding of human rights. As Lynn Hunt puts it, “the risk is that the history of human rights becomes the history of Western civilization or . . . even the history of the entire world.”⁹⁴ Similarly, Professor Stefan-Ludwig Hoffmann questions whether “the incorporation of all historical struggles for concrete rights and privileges — which were not intended to be universal, but rather were strictly tied to specific groups — amount[s] to rewriting the entire legal history as a history of human rights.”⁹⁵ In short, what Moyn has aptly characterized as “idealist and decontextualized exercise[s] in teleological conceptual accumulation”⁹⁶ wield little explanatory power today.

2. *Precise Timeframe Theories.* — The most prominent alternatives are those that identify a reasonably specific chronological starting point, such as the Magna Carta or the Universal Declaration of Human Rights. In view of space constraints, it must suffice to mention just a few of the more recent examples. The European Renaissance is a common starting point. In a controversial recent book, Professor John Headley credits European civilization with having created the “culture-transcending” notion of a “common humanity that reveals itself in programs of human rights.”⁹⁷ While these ideas originated in Stoic-Christian times, they came of age during the Renaissance and Reformation periods.⁹⁸ Headley denies any polemical or triumphalist goals in tracing the evolution of an essentially Western and Christian tradition through its more secular manifestations until he reaches today’s understanding of human rights.⁹⁹

Lynn Hunt, a specialist in the history of the French Revolution and in cultural history, locates the origins in the cultural and literary milieu

⁹³ Jacques Derrida, *Spectres of Marx*, 205 NEW LEFT REV. 31, 53 (1994). Other social scientists, however, argue that progress can in fact be demonstrated with a degree of scientific and historical accuracy. See, e.g., STEPHEN PINKER, THE BETTER ANGELS OF OUR NATURE (2011).

⁹⁴ HUNT, *supra* note 29, at 20.

⁹⁵ Hoffmann, *supra* note 81, at 4.

⁹⁶ Moyn, *supra* note 17, at 127.

⁹⁷ HEADLEY, *supra* note 79, at xv, 63.

⁹⁸ *Id.* at 7, 67–69.

⁹⁹ See *id.* at 7. Thus he describes how the “gradual detachment of the features denoting what we understand as civilization from the long nurturing chrysalis of the medieval church — its theology, liturgy, and political structures — becomes decisive for the outward thrust of an essentially moral and religious universalizing principle, its transformation, and its ramifying deployments in the global arena.” *Id.* at 65.

of the Enlightenment. They are to be found in the efforts of thinkers like Cesare Beccaria who sought to discredit the use of torture, cruel punishments, and the death penalty, and the novels of Jean-Jacques Rousseau and Samuel Richardson who unleashed the emotions and sensibilities of their readers and set the scene for “human empathy” to spread beyond each individual’s immediate community.¹⁰⁰ Other writers focus on the French and American revolutions and bills of rights as constituting the watershed moment for the emergence of a modern notion of human rights,¹⁰¹ and debates have long raged over which set of influences came first.¹⁰² Critics have rejected this attempt to pinpoint a chronological beginning. Professor Blandine Kriegel has expressed the criticism colorfully: “According to this myth, there arose, at the beginning of the eighteenth century, a new island, this absolute beginning called the individualist doctrine of human rights. Pure, smooth, round, healthy, and naked, this doctrine was like the noble savage”¹⁰³

While Martinez’s starting point is shortly after the Age of Revolutions, Professor Gary Bass locates it in British responses to humanitarian crises in the later nineteenth century, and he concludes that “[t]he agitation over the Bulgarians in the 1870s paved the way to the modern human rights movement.”¹⁰⁴ As a result, today’s human rights practitioners, rather than being “faddish [or] even particularly modern,” are simply “the ideological and organizational descendants” of those who campaigned in the nineteenth century against cruelty “in remote places like Greece and Bulgaria.”¹⁰⁵

Finally, by far the most common starting point for modern histories of human rights is the United Nations Charter of 1945 and the Universal Declaration of Human Rights of 1948.¹⁰⁶ The principal American academic proponent of this approach was Professor Louis Henkin, who marked the fiftieth anniversary of the Charter by writing: “[A] half-century of human rights has been the cause, or the result, or both, of radical change in the international state system, in the character of

¹⁰⁰ See HUNT, *supra* note 29, at 64–65.

¹⁰¹ See generally A CULTURE OF RIGHTS (Michael J. Lacey & Knud Haakonssen eds., 1991).

¹⁰² Professor Georg Jellinek, for example, famously argued that the American Bill of Rights was fundamentally different from anything that had gone before it in England or France, and that the roots of the French Declaration lay in the American debates rather than the works of Rousseau and the philosophes. GEORG JELLINEK, THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS 48 (M. Farrand trans., 1979).

¹⁰³ BLANDINE KRIEGEL, THE STATE AND THE RULE OF LAW 33 (Marc A. LePain & Jeffrey C. Cohen trans., 1995).

¹⁰⁴ GARY J. BASS, FREEDOM’S BATTLE: THE ORIGINS OF HUMANITARIAN INTERVENTION 6 (2008).

¹⁰⁵ *Id.* at 5.

¹⁰⁶ See generally MARY ANN GLENDON, A WORLD MADE NEW (2001); JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT (1999).

international law, and in its relation to national constitutions”¹⁰⁷ I return to Henkin’s role below.

These theories all compete, and are not readily compatible, with one another. Generally, this incompatibility is not particularly problematic, as the authors mostly identify different key variables against which to locate the origins for their own purposes. Thus, while one need not in fact choose between them for analytic purposes, the existence of these highly plausible competing theories suggests that the attempt to identify a single origin is a flawed approach.

3. *The New Revisionists.* — Moyn’s book, *The Last Utopia*, presents the most radical and uncompromising version of the discontinuity thesis, and his analysis has been highly influential among a particular group of historians, some international lawyers, and some social scientists. While his broad iconoclasm compels a deep and healthy revisiting of some of the assumptions taken for granted by mainstream writers of human rights history, his thesis is driven home with such single-mindedness, selectivity, and lack of nuance that it is essentially a polemic, thus putting it into a genre especially popular in French scholarship.

In Moyn’s view, the phrase “human rights” did not enter the English language until the 1940s,¹⁰⁸ and it was not until the 1970s (1977 to be precise) that the international human rights movement first emerged. He is thus deeply critical of most of the historians who have gone before him in this area, most of whom have rushed to embrace human rights as a “saving truth,” and resorted to “[h]agiography” in order to “provide the myths” needed by the new human rights movement.¹⁰⁹ He is particularly critical of those like Martinez who scrutinize “earlier eras in the quixotic search for deep roots.”¹¹⁰ And about the era of which she writes he asserts that “during the birth of internationalism in the nineteenth century, human rights were not on the horizon.”¹¹¹ Martinez, along with various other authors, has been the target of strong critiques by Moyn.¹¹²

¹⁰⁷ Louis Henkin, *Human Rights and State “Sovereignty,”* 25 GA. J. INT’L & COMP. L. 31, 31 (1995–1996).

¹⁰⁸ See MOYN, *supra* note 4, at 44.

¹⁰⁹ *Id.* at 6.

¹¹⁰ *Id.* at 311.

¹¹¹ *Id.* at 41.

¹¹² As an active and timely reviewer of all books in this area, Moyn has systematically critiqued any approach that does not fit with his own thesis. Thus, for example, Aryeh Neier’s historical survey contains “few new facts or interpretations” and is “weak on the prehistory of the international movement,” Samuel Moyn, *The International Human Rights Movement: A History by Aryeh Neier*, 26 ETHICS & INT’L AFF. 392 (2012) (book review); Professor Kathryn Sikkink’s *The Justice Cascade* (2011) “ignores the darker reasons why morality can shine forth,” and fails to recognize the fundamental geopolitical significance of America’s Cold War victory, Moyn, *supra* note 37; and Lynn Hunt’s *Inventing Human Rights* presents a “creation myth” and “treats ‘human rights’ as a body of ideas somehow insulated from history,” Samuel Moyn, *On the Genealogy of Morals*, NATION, Apr. 16, 2007, at 25, 28, 31 (reviewing HUNT, *supra* note 29).

The relevance of Moyn's work in the context of British abolitionism is well illustrated by the fact that the leading British historian of this field, Robin Blackburn, devotes extensive, indeed inordinate, attention to Moyn's work in the tome that brings together Blackburn's decades of research on slavery and its abolition. Indeed, where his previous 560-page book does not discuss human rights to any significant degree,¹¹³ the new 502-page volume is subtitled "Slavery, Emancipation and Human Rights." Moyn's argument features at both the beginning and the end of the book.¹¹⁴

Other young historians strongly influenced by Moyn include Stefan-Ludwig Hoffmann, who introduces a volume of essays on diverse aspects of the twentieth-century human rights movement by arguing that only in the latter half of that period did human rights develop into a "vocabulary for confronting abuses of disciplinary state power . . . — a claim foreign to revolutionaries of the eighteenth century, who believed that the nation-state would guarantee civil and human rights."¹¹⁵ Hoffmann's goal is to transcend (avoid) a teleological history of the idea of human rights and replace it with a genealogy that explains their origins "as the unpredictable results of political contestations,"¹¹⁶ or more dramatically, as "the product of a global history of violence and conflict."¹¹⁷ Those who argue that human rights have a pedigree that long predates the 1970s are dismissed as seeking to invent an extended history of human rights in an effort to "demonstrate the evolution of universal morality."¹¹⁸ Moyn's work, in addition to being widely reviewed, has also had a significant impact on much of the scholarly¹¹⁹ and practitioner¹²⁰ literature about human rights.

¹¹³ ROBIN BLACKBURN, *THE OVERTHROW OF COLONIAL SLAVERY 1776–1848* (1988) (omitting any entry for "human rights" in the index).

¹¹⁴ BLACKBURN, *supra* note 12, at 5, 485–87.

¹¹⁵ Hoffmann, *supra* note 81, at 2.

¹¹⁶ *Id.* at 4.

¹¹⁷ *Id.* at 25.

¹¹⁸ *Id.* at 24–25.

¹¹⁹ For example, Moyn's influence is palpable at many points in Professor Jean Cohen's superb overview of much of the recent theoretical literature about human rights. *See generally* JEAN L. COHEN, *GLOBALIZATION AND SOVEREIGNTY* (2012) ("Many have noticed the shift of human rights discourses from a minimalist apolitical moral rhetoric to a maximalist moral utopianism in the decade prior to 1989." *Id.* at 172.). Professor Susan Marks lists Moyn's "myth of deep roots" as one of four myths that should be debunked. Susan Marks, *Four Human Rights Myths* 6 (LSE Legal Studies, Working Paper No. 10/2012), available at <http://ssrn.com/abstract=2150155>. And Professor Jan Eckel relies strongly upon Moyn in concluding that human rights "never turned into an anticolonial ideology or even into an important rhetoric at all." Jan Eckel, *Human Rights and Decolonization: New Perspectives and Open Questions*, 1 HUMANITY 111, 115 (2010).

¹²⁰ *See, e.g.*, ARYEH NEIER, *THE INTERNATIONAL HUMAN RIGHTS MOVEMENT* 4, 338–39 (2012). Neier is significantly influenced by Moyn, although he cannot bring himself to decide if Moyn is largely correct, or largely mistaken. *Id.* at 338–39.

Moyn's radical discontinuity approach is so counterintuitive, and so directly at odds with Martinez's assumptions, that it requires some explanation to convey a sense of how he manages to detach the centuries before 1977 from the decades that followed. It must suffice in the present context to provide a few snapshots from his analysis, which is in itself something of a whirlwind. He begins by dismissing all of the standard accounts that attempt a synthesis of human rights history as falling into "teleology, tunnel vision, and triumphalism."¹²¹ In terms of specific ancestors, the ancient Greeks and Romans have little to teach us in this context since "neither the cosmopolitanism of the [Greek] Stoics nor the original concept of humanity [of the Romans] were remotely similar in their implications to current versions."¹²² The Magna Carta is an example of "aristocratic rights talk."¹²³ Rights proclaimed by Enlightenment thinkers "were so profoundly different in their practical outcomes — up to and including bloody revolution — as to constitute another conception altogether."¹²⁴ The French and American declarations are also dismissed, for reasons to which I shall return shortly.

One of Moyn's fellow revisionists argues that human rights "almost disappeared from political and legal discourse in the nineteenth century."¹²⁵ This is a very problematic claim, and while Moyn at least points to the example of Giuseppe Mazzini in Italy,¹²⁶ he makes almost nothing of the very relevant writings of Pasquale Fiore or Johann Caspar Bluntschli.¹²⁷ The League of Nations era has nothing to tell us about individual, as opposed to collective (minority), rights, and the Holocaust is equally marginal to understanding the rise of human rights since "there was no widespread Holocaust consciousness in the postwar era, so human rights could not have been a response to it."¹²⁸ The rest of the 1940s, despite the adoption of the Universal Declaration of Human Rights,¹²⁹ was also not significant because the United States — after a fleeting interest in human rights — turned its attention to the Cold War and entirely forgot its human rights advocacy. In the 1950s and 1960s the Soviet Union and anticolonialist forces were

¹²¹ MOYN, *supra* note 4, at 311.

¹²² *Id.* at 15.

¹²³ *Id.* at 24.

¹²⁴ *Id.* at 1–2.

¹²⁵ Hoffmann, *supra* note 81, at 1.

¹²⁶ MOYN, *supra* note 4, at 29.

¹²⁷ See MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960*, at 128 (2002) (discussing the arguments of Fiore and Bluntschli).

¹²⁸ MOYN, *supra* note 4, at 7.

¹²⁹ The Universal Declaration of Human Rights "was less the annunciation of a new age than a funeral wreath laid on the grave of wartime hopes." *Id.* at 2.

focused on “collective ideals of emancipation” that ignored or at least marginalized any notions of human rights.¹³⁰ Even as late as 1968 (the year of the first World Conference on Human Rights) human rights “remained peripheral as an organizing concept and almost nonexistent as a movement.”¹³¹ And the United Nations was responsible for the irrelevance of human rights and thus “had to be bypassed as the concept’s essential institution for it to matter.”¹³²

But in the 1970s, it seems, all of this changed. Amnesty International won the Nobel Peace Prize in 1977 and a new age of “internationalist citizen advocacy” was born.¹³³ Jimmy Carter was elected in the United States and suddenly “[t]he moral world had changed,” as human rights became a central focus of international politics.¹³⁴ Indeed, they emerged “seemingly from nowhere.”¹³⁵

While Moyn’s analysis contains a number of hard truths that demand careful reflection, there is also much about it that is contestable. Three particular problems stand out. The first concerns the long history of human rights provisions in national constitutions, dating back even before 1776 or 1789, and the wave of constitutions in the 1950s and beyond that adopted large chunks of the Universal Declaration of Human Rights. These bills of rights, according to Moyn, are not relevant because they are essentially state centered and sovereignty reinforcing,¹³⁶ and yet there is vastly more to be said about the significant impact of such statements.

The second problem relates to the U.S. Constitution and the French Declaration of Rights, which run afoul of the same critique. In Moyn’s view, the rights guaranteed by these documents are better seen as citizens’ prerogatives that are invoked against the state, whereas human rights must be external to the state and able to be invoked against it. He argues that the two types of rights need to be “rigorously distinguished” from one another.¹³⁷ Thus, the “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 foundation.”¹³⁸ In other words, Moyn’s vision of a

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 8. Another revisionist also argues that “[r]egional treaties such as the Helsinki agreements, or national legislation like the Jackson-Vanik Amendment in the United States, were far more important than international law crafted at the UN.” Kenneth Cmiel, *The Recent History of Human Rights*, 109 AM. HIST. REV. 117, 130 (2004).

¹³³ MOYN, *supra* note 4, at 4.

¹³⁴ *Id.*

¹³⁵ *Id.* at 3.

¹³⁶ *Id.* at 111–14.

¹³⁷ *Id.* at 12.

¹³⁸ *Id.* at 12–13.

human right is something that transcends the “state forum for rights.”¹³⁹ His is a determinedly cosmopolitan and supra-state vision.

And the third problem concerns the European Convention of Human Rights, which in almost all other accounts is seen as central to the historical evolution of today’s human rights regime. For Moyn, this too does not count. To Moyn, the Convention was largely a conservative Christian plot and the law of human rights mattered little in what was essentially an exercise in ideological signaling.¹⁴⁰

Much of Moyn’s myopia is facilitated by an excessive and unconvincing focus on the role of a handful of American international law scholars. The prime target is Louis Henkin, although Moyn cites, but barely engages with, Hersch Lauterpacht’s 1950 book *International Law and Human Rights*, which long stood as the most relevant effort by an international lawyer to ground human rights historically.¹⁴¹ As a result, a large array of other actors are marginalized. A short list of the ignored or neglected includes: (1) the great majority of non-American international lawyers, including all of those who worked on the drafting, adoption, and implementation of the European Convention on Human Rights; (2) all domestic lawyers working at the coalface of domestic constitution-drafting to ensure the incorporation of the values of the Universal Declaration of Human Rights at the national level; (3) all lawyers, activists, and others working to develop the substantive content of particular parts of the human rights pantheon (from habeas corpus, through freedom of speech, to freedom from torture); (4) the antiracism movements in the United States and elsewhere; (5) minority rights regimes before and after World War II; (6) the international labor movement with its emphasis on social justice and its extensive array of treaties begun in 1919; (7) the entire women’s suffrage and rights movement; (8) the children’s rights movement with its landmark 1924 League of Nations Declaration on the Rights of the Child; and (9) a wide range of other actors working on issues that they considered to involve rights, social movements, and elements of internationalization.

B. *Who is Right?*

What then are we to make of these competing, and apparently irreconcilable, claims to have identified not just the chronology but also the deeper genealogy of human rights? Professor Marc Bloch perceptively observes that “for most historical realities the very notion of a

¹³⁹ *Id.* at 20.

¹⁴⁰ *Id.* at 78–79.

¹⁴¹ HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* (1950). Moyn does, however, make liberal play of Lauterpacht’s disillusionment with the nonbinding nature of the Universal Declaration of Human Rights. MOYN, *supra* note 4, at 82, 184, 199, 205.

starting-point remains singularly elusive. It is doubtless a matter of definition, but of a definition which it is unfortunately all too easy to forget to give."¹⁴² At a superficial level, this points to the principal differences among the main protagonists in this debate. Thus, many of the classic progress narratives fail to provide any meaningful definition to confine the scope of the inquiry. Martinez's stated focus is "international human rights law." Hunt looks even more ambitiously for the period in which "human rights" were "invented."¹⁴³ And Moyn directs his attention to locating the origins of the "international human rights movement."¹⁴⁴

Underlying these definitions are the analytical assumptions — sometimes made explicit and sometimes almost buried — 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. Martinez's assumptions are not explicitly spelled out but they are very clear by implication. She takes the legal and institutional characteristics of today's international human rights regime and looks for their direct counterparts in an earlier era. But if the question she set herself had been either broader or narrower, her inquiry would have led to quite different results. For example, the moment of origin might have been much earlier if she had looked for historical examples of bilateral treaties that incorporated human rights-type provisions. Or it might have been considerably later if she had instead used one or more criteria related to impact as part of her framework.

Hunt seeks to extricate her project from what would otherwise be a "very diffuse history"¹⁴⁵ (a quagmire, perhaps?) by coming up with criteria of naturalness, equality, and universality, in addition to what she calls "political content," which seems to require guarantees by the state of political rights and popular demand for those rights.¹⁴⁶ But it is difficult to avoid the sense that they were chosen in retrospect in order to justify the assertion that the period of cross-Atlantic revolutions was a veritable watershed, rather than because they are essential characteristics that distinguish all that went before that time from all that followed.

Moyn, for his part, begins by defining "contemporary human rights," rather than the "international human rights movement," as "a set of global political norms providing the creed of a transnational so-

¹⁴² MARC BLOCH, *THE HISTORIAN'S CRAFT* 29–30 (Peter Putnam trans., Manchester Univ. Press 1954).

¹⁴³ HUNT, *supra* note 29, at 23 (internal quotation marks omitted).

¹⁴⁴ MOYN, *supra* note 4, at 1.

¹⁴⁵ HUNT, *supra* note 29, at 20.

¹⁴⁶ *Id.* at 20–21. In her assessment, the English Bill of Rights of 1689 does not meet the criteria, but the American Declaration of Independence of 1776 and the French Declaration of 1789 do. *Id.* at 21.

cial movement.”¹⁴⁷ Two characteristics are apparently indispensable to Moyn’s analysis: (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.

But in Moyn’s case, the hypothesis that the definitional choices made will predict the outcome of the inquiry is stretched to the breaking point, since the criteria differ dramatically from those used in the existing literature, require a degree of globalization that by definition could not be satisfied until late in the twentieth century, and are inherently unconvincing. The first criterion — that human rights norms need to be able to “contradict the sovereign nation-state from above and outside”¹⁴⁸ — is highly artificial. The norms invoked by the international movement are not natural law norms but derive from custom and treaties made by states; the obligations are incumbent upon the state itself; and the international mechanisms to which appeals may be directed are extremely weak and themselves largely dependent upon states. The element that does arguably transcend all of this — the victim’s ability to invoke universal norms in order to appeal to, and hopefully to mobilize, international public opinion — is a relatively hollow achievement in the absence of a strong domestic human rights sphere.

The second criterion — the existence of a powerful international movement — is equally hollow. Moyn’s evidence of such a movement consists almost exclusively of the role played by just two groups — Amnesty International and Human Rights Watch — the latter of which was defined domestically by its orientation toward Washington, D.C., and internationally by its “focus on the United States as the key actor,”¹⁴⁹ and was only tangentially concerned with building an international movement. To the extent that there is a powerful transnational movement, its most important components are arguably national-level actors rather than international organizations such as Amnesty International or Human Rights Watch.¹⁵⁰

¹⁴⁷ MOYN, *supra* note 4, at 11.

¹⁴⁸ *Id.* at 13. Caroline Anderson similarly critiques Moyn’s definitional criteria, which she characterizes as “sufficiently demanding and circumscribed to demonstrate the infallibility of his conclusions.” Caroline Anderson, *Human Rights: A Reckoning*, 53 HARV. INT’L L.J. 549, 551 (2012) (reviewing SAMUEL MOYN, *THE LAST UTOPIA* (2012)).

¹⁴⁹ Yves Dezalay & Bryant Garth, *From the Cold War to Kosovo: The Rise and Renewal of the Field of International Human Rights*, 2 ANN. REV. L. & SOC. SCI. 231, 248 (2006).

¹⁵⁰ Taiwan provides an interesting example of a society in which a strong national human rights culture emerged over time, driven by domestic NGOs and with no significant involvement by any of the international NGOs. See generally Hsin-huang Michael Hsiao, *NGOs and the Democratization of Taiwan: Their Interactive Roles in Building a Viable Civil Society*, in CIVIL SOCIETY IN ASIA (David C. Schak & Wayne Hudson eds., 2003). For illustrations of the roles played by national human rights institutions, see HUMAN RIGHTS, STATE COMPLIANCE, AND SOCIAL CHANGE: ASSESSING NATIONAL HUMAN RIGHTS INSTITUTIONS (Ryan Goodman & Thomas Pegram eds., 2012).

Moyn's definitional criteria thus fail to persuade, and the reader is left to wonder what deeper agenda might be at work. At one level there seems to be a not uncommon academic desire to dismiss all competing theories and to be iconoclastic for the sake of iconoclasm, but this observation helps little in terms of a deeper understanding. Perhaps the most instructive clue is provided by his strong embrace, signaled only in his footnotes, of Professor Martti Koskenniemi's work.¹⁵¹ The latter is the most brilliant international law scholar of his generation, but he has a deep-seated skepticism about rights.¹⁵² This skepticism flows from his questioning of the validity of metanorms, his concern about the impact of hegemonic agendas, and his belief in the centrality of politics and the need to ensure that it is not preempted by rights or other claims.¹⁵³ In Moyn's hands these factors are combined with an exceptionally America-centric perspective on the world, a reluctance to acknowledge the power of ideas until they reach a high threshold, and a preoccupation with formal global political power. There is thus an instinctive distrust of the multilayered and often amorphous human rights movement and a desire to reduce or diminish it into a phenomenon that is largely illusory and destined to self-destruct.

Moyn seems implicitly to acknowledge the artificiality of the criteria he puts forward in his book in a subsequent article that identifies three different "lenses" that might be used in human rights historiography. They are: (1) substance, which covers the content of norms; (2) scale, which evaluates the geographical scope of the rights; and (3) salience, which effectively measures impact, although he describes it as focusing on "the prominence and believability of human rights as a language of political ideology, maneuvering, and struggle."¹⁵⁴ He relates these different elements to the earlier criteria by arguing:

Only a history of human rights oriented to scale and salience can capture not merely how the idea was propounded or the practice started, but also how it came to fit the imagination and reorient the actions of large swathes of people . . . , informing their everyday thought and lives and legitimating one sort of moral world over another both at home and abroad.¹⁵⁵

The criteria/elements/lenses that Moyn puts forward would be plausible in their own right if they were given their ordinary meaning and interpreted as requiring reference to normative substance, geo-

¹⁵¹ MOYN, *supra* note 4, at 293 n.3, 320.

¹⁵² See generally Martti Koskenniemi, *The Effect of Rights on Political Culture, in THE EUROPEAN UNION AND HUMAN RIGHTS* 99 (Philip Alston ed., 1999).

¹⁵³ See Martti Koskenniemi, *Human Rights Mainstreaming as a Strategy for Institutional Power*, 1 HUMANITY 47 (2010).

¹⁵⁴ Moyn, *supra* note 17, at 125.

¹⁵⁵ *Id.*

graphical diversity, and real-world relevance or salience. But this is not his intention, since again few enterprises can meet the immensely demanding criteria that he imposes: a global reach, a major transnational movement, a dramatic impact on both the thinking and the practice of vast numbers of people, and a prescription for a particular ideology of world order. By any standard, this list makes little sense when presented as the minimum threshold that human rights must surpass before it can be said to have a genealogy worthy of the name.

The key issues are whether the historical dimension really matters and, if so, what criteria should be used in future human rights historiography. I turn now to those questions.

IV. RETHINKING THE HISTORIOGRAPHY OF HUMAN RIGHTS

Does it matter whether the origins of the international human rights regime can be traced back over the centuries? Why should it matter? If it does matter, what period of time and what evidence of influence or continuity should be required?

A. Genealogy Matters

Martinez makes strong claims as to why genealogy matters and, especially, why the particular lineage that she traces is important. She argues that there is still much to be learned today from the techniques and institutions used two centuries ago, and that they exemplify a range of “dichotomies and tensions that continue to play out today,” including those between natural law and positivism, religious and secular ideas, European and non-European societies and cultures, treaties and custom, and national and territorial jurisdiction versus universal jurisdiction. Somewhat tantalizingly, she asserts that understanding how these tensions played out “can help us better understand the jurisprudential foundations of modern international human rights law” although, for the most part, she leaves readers to draw the relevant conclusions for themselves (p. 14).

In response, Moyn is correct to remind us that much of the historiography of human rights promoted by international lawyers has been superficial and unconvincing and has done little to help us understand what they describe as the long, winding, and convoluted evolution of international human rights consciousness over the centuries. He is wrong, however, in the basic assumptions of his “big bang” theory that sees human rights emerging almost out of nowhere in 1977. In what follows I consider first the importance of understanding the origins of ideas and second the consequences of accepting a big bang theory of human rights.

Consider first the history of ideas. If a nonhistorian were to put forward the thesis that human rights began in 1977, she would be accused of being ahistorical. Moyn, anticipating such a response, has an

answer. He invokes the work of the French historian Marc Bloch,¹⁵⁶ whose all too brief meditation on the craft of the historian, written just before he was executed by the Nazis, contains great wisdom.¹⁵⁷ Bloch warned about the obsession of many historians, particularly but not only those writing religious history, with the “idol of origins.”¹⁵⁸ His worry was that origins were often presented as providing a complete explanation of historical events and were also linked directly to “that other satanic enemy of true history: the mania for making judgments.”¹⁵⁹ Bloch was especially concerned that the historian would confuse ancestry for explanation. The lesson that Moyn draws from these reflections is encapsulated in a metaphor warning against the assumption that all of the water in a great downstream flood can be traced back to a trickle of melted snow in the mountains.¹⁶⁰ In reality, the water might have joined the flooded river from multiple other sources, seen and unseen. Thus, his theory, according to which a pre-1970s trickle exploded into a massive river just a few years later, presents a straightforward challenge: “[I]t is not a persistent stream but a shocking groundswell that has to be explained.”¹⁶¹ While other historians have debated the point at which the river gained significant momentum and have come to different conclusions, only Moyn has discerned a shocking groundswell, in the sense of a dramatic rupture with the flow of previous history. We need to try to understand why.

In essence, his reading of Bloch is seriously distorted. He cites Bloch as concluding that “[h]istory . . . is not about tracing antecedents.”¹⁶² Yet in writing about the relationship between different forms of slavery and freedom in the context of French feudal society, Bloch is well aware of the importance of historical continuity, as for example when he laments that the lords and judges who might have otherwise maintained the old social nomenclature “were generally too ignorant to be encumbered with legal memories.”¹⁶³ And the book Moyn cites is replete with sage advice about the need to balance present and past and to understand the relationship between them. Bloch warns on the one hand that “[m]isunderstanding of the present is the inevitable consequence of ignorance of the past,” but adds on the other hand that “a man may wear himself out just as fruitlessly in seeking to understand

¹⁵⁶ MOYN, *supra* note 4, at 41.

¹⁵⁷ See generally BLOCH, *supra* note 142.

¹⁵⁸ *Id.* at 24.

¹⁵⁹ *Id.* at 26.

¹⁶⁰ MOYN, *supra* note 4, at 41.

¹⁶¹ *Id.* at 42.

¹⁶² *Id.*

¹⁶³ 1 MARC BLOCH, FEUDAL SOCIETY 260 (L.A. Manyon trans., 1961) (1939).

the past, if he is totally ignorant of the present.”¹⁶⁴ In other words, genealogy matters.

Bloch actually warned of the perils of grand theory, or what he termed “the great attempts at interpretation,”¹⁶⁵ and emphasized that one of the great challenges of history is to understand how and why transitions occurred.¹⁶⁶ He seems unlikely to have been particularly drawn to or persuaded by a big bang theory of history such as Moyn’s.

Let us now return to consider the practical consequences of Moyn’s theory, whether for Martinez’s interpretation or for almost any historically grounded theory of the ancestry of human rights. Central to his argument is the notion that human rights is a “utopia,” defined as a “maximalist political vision,”¹⁶⁷ and a “worldview.”¹⁶⁸ Human rights prevailed after the 1970s because “they were widely understood as a moral alternative to bankrupt political utopias,” such as socialism, nationalism, and communism.¹⁶⁹ When these all collapsed, human rights could be constructed as an attractive replacement. The problem is that in their new utopian guise human rights become a recipe for displacing or transcending politics, thus sapping “the energy from old ideological contests of left and right.”¹⁷⁰ And therein lie the seeds of destruction: the vision is no longer a moral but a political one, and it is doomed to disappoint and perhaps even implode. Moyn’s prescription therefore is to reject the utopian approach and to opt instead for a set of “minimal constraints on responsible politics.” There seems to be no middle path — it is a choice between “minimalist ethical norms” and a “maximalist political vision.”¹⁷¹

For Moyn, everything is contingent and the human rights edifice seems a particularly precarious one. Little wonder, since in his view it was built almost overnight, and such buildings do not usually last too long. Thus, the era in which human rights has so briefly prospered is “surely fleeting,” and other ideologies will soon “seem more plausible.”¹⁷² Similarly, human rights historiography is a fad and despite its very brief existence, it may well be that it has already “reached the point of declining returns, if it was a worthy field to build in the first place.”¹⁷³ And the future of Human Rights Watch, located within a particular and time-bound form of “American, bureaucratic, and in-

¹⁶⁴ BLOCH, *supra* note 142, at 43.

¹⁶⁵ *Id.* at 71.

¹⁶⁶ *See id.* at 27.

¹⁶⁷ MOYN, *supra* note 4, at 226.

¹⁶⁸ *Id.* at 221.

¹⁶⁹ *Id.* at 227.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 226–27.

¹⁷² Moyn, *supra* note 17, at 137.

¹⁷³ *Id.* at 136.

formational politics,”¹⁷⁴ is far from assured as the specific circumstances that facilitated its emergence disappear.

In the end, what is clearly a very sophisticated and nimble excursion through a vast amount of historical material actually comes down to a *realpolitik* critique of any explanatory efforts that are not constructed essentially in terms of power. Thus, abolition is to be explained not in terms of the pressures generated by revolutions (actual or feared), humanitarian or rights-inspired movements, or even economic calculations. Rather, the impetus was to secure British control over the seas in the face of threats from competing imperial powers. Similarly, the birth of the international human rights movement can be located squarely in 1977 when President Carter proclaimed an “absolute” commitment to human rights and the evolution of the Helsinki Process saw human rights being invoked in the great power battle against the Soviet Union and its communist allies.

By detaching today’s international human rights regime from its deep roots and dismissing the relevance of the many historical as well as intellectual struggles to define a shared understanding of the subject, the revisionists are able to present us with a clean sheet from which to begin their own speculations as to both the nature and the origins of the human rights movement. It is no accident that Moyn, having demolished all prior claims that human rights must be seen to have a deep and rich ancestry, then moves to portray human rights in terms that most of its theoreticians as well as practitioners will find unrecognizable. In short, 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.

B. *The Road Ahead*

Any meaningful history of human rights must disaggregate and address separately the different analytical dimensions of the overall enterprise. The enterprise of “human rights” consists of too many distinct facets to be reduced to one or two variables. The history and power of ideas, the force of grassroots social and political movements, the impact of legal and constitutional traditions, and the influence of institutions at both the domestic and international levels constitute indispensable elements that need to be factored into any effort to understand the origins, nature, and potential significance of the present regime. Several lessons emerge from the analysis above.

1. *The Intrinsic Polycentricity of the Human Rights Enterprise.* — Each of the different historiographical approaches has something im-

¹⁷⁴ Samuel Moyn, *The International Human Rights Movement: A History* by Aryeh Neier, 26 *ETHICS & INT’L AFF.* 392 (2012) (book review).

portant to offer, but we should be very wary of any single account that purports to have found the answer to the puzzle and to have invalidated alternative interpretations. The human rights enterprise is intrinsically complex and multifaceted. Its origins are to be found in different and multiple sites, and they cannot usefully be traced back to any single source or through examining the evolution of a single theme, process, or institution.

2. *Linear Claims as a Suspect Class.* — Histories that rely on strong claims of continuity over a long period of time are inherently questionable. Thus, for example, the history of antislavery alone, considered quite separately from the much broader array of human rights issues and regimes, has been a remarkably circuitous, uncertain, and often tragic one, even in the limited period from 1807 to the present. Claims of a direct lineage over a century or two will generally imply elements of consistency and perhaps even inevitability that do not resonate with the actual path that history has traced, and this is certainly true of the struggle to abolish slavery. Various recent studies have pointed to this very checkered history even in terms of the struggle to build an international legal regime throughout the nineteenth and into the twentieth century, let alone the path taken in relation to the new colonialism of the second half of the nineteenth century in Africa.

In this respect the interpretations offered by Martinez and Moyn are unhelpful mirror images of one another. Martinez exaggerates the continuities involved in two centuries of history, while Moyn exaggerates the discontinuities. Both have important points to make. But there are crucial continuities as well as discontinuities, and neither should be overlooked or underestimated.

3. *The Need for an Analytical Framework.* — Given the polycentric nature of the overall enterprise, a serious historical analysis should spell out more clearly what it is seeking when searching for the roots of human rights. As a starting point we should acknowledge that “human rights” might be thought of as:

- (a) an idea, including careful consideration of the extent to which vocabularies are interchangeable over time;
- (b) an elaborated discourse, going beyond basic ideas, but not requiring institutional manifestations;
- (c) a social movement, including a definition of such a movement and specification of why it is significant;
- (d) a practice, or an institution, that resembles in at least some respects the elements that we might consider important today;
- (e) a legal regime, either at the national or international level, or both; or
- (f) a system that is capable of effectively promoting respect for the rights of individuals and groups.

Each of these categories would constitute a plausible focus for analysis, and each is likely to be linked to the other, thus forming ele-

ments in the historical genealogy of the system. An isolated focus on one or another will inevitably produce different accounts of the origins, antecedents, precursors, and so on, as is illustrated by the approaches adopted by Martinez and Moyn. The choice of focus will also produce different causal accounts.

4. *The Power of Ideas*. — At the end of the day, the most compelling reason for the importance of genealogy is to be found in the history of ideas. But human rights does not consist of a single idea. Much of the recent literature seeks to single out one particular element that is then said to have transformed an otherwise amorphous mass of claims and assertions into a suddenly coherent body of “human rights” that had not previously existed. To the extent that Martinez seeks to mark out the origins of a regime that consists of the elements that would be most prized by a twenty-first-century international lawyer — treaties, courts, and enforcement — her case is strong. Nor is she oblivious to the broader political and societal contexts in which this regime emerged. But the weakness of the bolder claim that she makes is that she fails to trace the historical evolution of either the basic normative claims of the antislavery movement or the techniques that were pioneered at the time. Even if the case can be made that today’s norms and institutions look much like those of yesteryear, any compelling genealogical claim needs to be demonstrated rather than surmised.

For Moyn, the key transformative step is that the claim made by an individual is directed to the international community, rather than to the state of which the individual is a citizen. But this step is just one among many in the long and winding voyage of the concept of human rights, the evolution of which continues. There is no single element, no single idea that enables us to declare that the notion of human rights has reached a definitive threshold that not only marks it off from all that has gone before but also makes it qualitatively and fundamentally different. We are looking at a continuum, albeit not a linear one. While there have indeed been important discontinuities along the way, these do not lead to what might be termed a discontinuum, or a situation in which the wheel needs to be reinvented each time.

Of course, Moyn recognizes the importance of ideas, but he marginalizes them at a very early stage in his analysis. Philosophical ideas of ancient lineage that concern issues that we now think of in terms of rights are dismissed as precursors because their form bears no direct resemblance to today’s approach. And the evolution over many centuries of substantive legal norms such as habeas corpus is relegated to what is at best a very minor role, and at worst a distraction. Lawyers, Moyn tells us, “can stick with teleological histories because they live in a universe of authoritative textual precedents with little analytical in-

terest in how they fit into a complex world of causal interrelationships among law, politics, and society.”¹⁷⁵ But instead of the power of ideas or norms, Moyn’s main concern is with power *tout court*.

5. *The Role of Power*. — Power, in both its positive and negative iterations, must be an integral part of any history of human rights. But power comes in many shapes and forms ranging from military force to the soft power of ideas. Martinez is almost beguiled by the power of legal norms and courts but neglects the complex imperialistic power plays at work in the episode she recounts. Moyn, in contrast, is primarily concerned with geopolitics and worries about a world “beset by economic crisis and American and European decline,”¹⁷⁶ and heading into a “geopolitical storm.”¹⁷⁷ But where Martinez sees the imminent waning of American power as the best moment to seek to lock in global human rights commitments, Moyn draws the opposite conclusion. For him, the glory days of human rights have passed, and other ideologies will rapidly and easily overtake them.¹⁷⁸ The rapid growth of Asian power, perhaps combined with the resurgence of Islam, seems to concentrate greatly the minds of these historians, but for very different reasons.¹⁷⁹

V. CONCLUSION

The rapid growth of interest in and discourse about the law and politics of human rights has provoked mixed and sometimes contradictory reactions on the part of scholars, even if there is broad agreement that many of the older historical narratives are deeply problematic and have become patently obsolete. In their place, an array of sophisticated interdisciplinary scholarship has begun to emerge. Some of it, exemplified by Martinez’s excursions into the archives surrounding the early nineteenth-century antislavery courts, seeks to demonstrate and build upon the deep roots of today’s international human rights law, and to suggest lessons for the future. Her historical account is deeply instructive, if not always for the reasons she puts forth. But her type of scholarship is also seen as passé by the new revisionists such as Moyn. While these revisionist scholars have done much to challenge

¹⁷⁵ Moyn, *supra* note 17, at 125.

¹⁷⁶ *Id.* at 136.

¹⁷⁷ *Id.* at 137.

¹⁷⁸ *Id.*

¹⁷⁹ Headley, whose work Moyn dismisses as deeply flawed, *see* Samuel Moyn, Book Review, 43 *CANADIAN J. HIST.* 364 (2008), shares Moyn’s consciousness of the rise of China but prefers to see the possible emergence of a middle path between the West’s and China’s notions of human rights. Chinese “humanism” has the potential to correct “Western individualism, now exaggerated to the point of promoting hedonism and permissiveness,” while the Western approach can “extend the principle of equality to the traditional Confucian program of rites, rather than rights, wherein hierarchical and dictatorial features still lurk.” HEADLEY, *supra* note 79, at 217.

and expose the shortcomings of a great deal of the received wisdom in the field, there has also been a seemingly irresistible urge to demonstrate that nothing is what it seemed to be and that the history of human rights, defined in their own conveniently idiosyncratic terms, was negligible until a big bang occurred in the mid-1970s. Moyn heavily discounts the significance of the ebb and flow of rights discourse across the centuries, and of the often long and bitter struggles that have helped to shape today's complex and multifaceted human rights endeavors. By doing so, he is able to conjure up a parody of the human rights movement with shallow and unconvincing roots, defined almost exclusively from an America-centric vantage point, and sure to be swept away by the emergence of an international order no longer dominated by the West. Such a vision might explain what some consider to be the parlous situation of human rights in certain advanced democracies, but it does little to help us understand why, for example, one of the most vibrant human rights cultures in the world today is to be found in India.

The history of human rights is both long and deep, which is not to say that its progress has been linear, steady, or even predictable. But we need to understand the struggles that have shaped the movement, for better and worse, over the centuries and to acknowledge the role of precedents, including historical precedents, in terms of paving the way for change.