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# Moral Equality and Human Rights

Considerations of Equality for the 21st Century

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## **Ch. 1: Framing the Problem**

Human rights have assumed a prominent position in global politics. Where once they operated as an internal ideological check on the state<sup>1</sup>, they are now understood as a benchmark against which a country's practices and policies may be externally measured.<sup>2</sup> However, controversy continues to surround human rights talk. Despite ostensible public agreement on human rights by the majority of the world's governments, in practice the role and content of rights remain divisive. Selective and sometimes hypocritical application of human rights standards, the perception of cultural imposition, and the suspicion that human rights are a tool of neoimperialism all complicate the use of rights in international dialogue and foreign relations.

This paper is an attempt to give an account of human rights that acknowledges the complications of using human rights in a pluralistic world and provides a justification for the right to moral equality before the law. While most political philosophers view formal equality under the law as a desirable liberal goal that is difficult to promote in international relations, I will argue that moral equality before the law is consistent with a narrower set of human rights that is more easily asserted as an international goal. Further, although politicians often view the right to formal equality as unduly demanding for societies that are differently structured than Western liberal democracies, the right to moral equality is a tenet upon which peoples of all cultures can agree. For this reason, I believe that the current system of human rights requires an adherence to moral equality that is not often articulated and not negotiable.

The rest of this chapter will discuss human rights as positive legal entitlements. I will introduce talk of human rights as a means of expressing moral commitments and institutionalized expectations of behavior from other states and peoples; I will then show that moral equality serves

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<sup>1</sup> Cf. the aims of Locke and Hobbes in writing about natural rights.

<sup>2</sup> The World Bank notes the regard for human rights of its beneficiaries, as does the US Foreign Aid office; the UN, of course, was constituted with human rights at its core.

an important role in both of these functions, even under human rights minimalism. The second chapter will make use of moral equality under the law to investigate some serious challenges to human rights, both ideological and practical. This section will explore how moral equality must be paid to *all people* and will deal with cultural claims that are offered in defense of the discriminatory treatment of the Dalits in India and women in Saudi Arabia. The last chapter addresses the concerns and questions that I foresee arising over my assertion that equal moral treatment should be considered a human right.

### *The Universal Declaration and the Covenants*

The Universal Declaration of 1948 is the basis for many arguments in favor of international human rights. The Declaration was written specifically to satisfy people of a certain historical morality while retaining pertinence to people with different cultural traditions and understandings of what makes a life ‘good.’<sup>3</sup> The international agreement reached with the Declaration was reinforced by the ratification of the Covenant on Civil and Political Rights (CCPR) and the Covenant on Economic, Social and Cultural Rights (CESCR).<sup>4</sup> These Covenants are generally considered to be the full articulation of the rights enumerated in the Universal Declaration. While these documents establish a purely conventional understanding of human rights conduct, they also create a strong normative impetus under which states operate. In part, this has to do with the transparency of human rights as established by the UN resolution that required all signatories to the Declaration to “cause it [the provisions, rationale and articulation of

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<sup>3</sup> Namely, the authors of the document, who were reeling from the violent excesses of WWII.

<sup>4</sup> The CCPR has 162 signatories, the CESCR has 158. (United Nations, [http://www.unhchr.ch/html/menu3/b/treaty5\\_esp.htm](http://www.unhchr.ch/html/menu3/b/treaty5_esp.htm))

human rights] to be disseminated, displayed, read and expounded.”<sup>5</sup> The Declaration, then, provides a clear set of expectations and requirements which signatory countries must publicly affirm to both their citizens and the world.

The system of human rights expounded in the Declaration and subsequent Covenants aims to establish a voluntary system of requirements that, in virtue of a country’s uncoerced willingness to accept the terms, applies equally to all peoples. It is perhaps more accurate to say that human rights apply equally to all peoples so long as they reside in a signatory country, since human rights conventions are conditional on state ratification of the Declaration. This is in keeping with Jack Donnelly’s assertion that the universality of human rights can be generated from “a social decision to act as though such ‘things’ existed”.<sup>6</sup> To some extent, such a social decision is what the signatories to the Declaration and Covenants affirm. The Declaration, a document which enumerates rights and then seeks acknowledgement from states, *creates* rights as a reality.

As a practical consideration, it is important to keep in mind that human rights fail to gain traction against abuses without cooperation and support from the international community.<sup>7</sup> I mean to stress that states are rarely compelled to action simply by claims to universal rights; rather, pressure from other nations and entities is usually necessary for reform to occur. This muddles discussion on human rights, then, since the conventions purport to establish a system of provisions for which governments are responsible regardless of the attention paid by other states. When enforcing human rights is dependent on outside state action, there is a danger of the system being undermined because of disagreement among states over implementation and the claims that

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<sup>5</sup> United Nations General Assembly, Resolution 217 (III) D “Publicity to be Given for the Universal Declaration of Human Rights” December 10, 1948

<sup>6</sup> Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, NY: Cornell University Press, 2003) p.21.

<sup>7</sup> Consider Rwanda, Apartheid, and the US South during the Jim Crow era.

human rights are used as tools of political coercion. It should be no surprise that states are often resistant to international pressure, especially when they, like China, feel that human rights are being used to advance other political aims. Therefore, it is unclear *a priori* to what extent national regimes agree with the full agenda of human rights and intend to comply with their demands. Although the Universal Declaration is supposed to achieve unanimity among signatory states, in practice it does not provide evidence that human rights are agreed upon. Although though the framers of the Declaration attempted to create a document which would reflect the values of nations around the world, the content and framing of many of the articles points to the historical and moral background of the Declaration's founders.<sup>8</sup> The moral nature of the Declaration and the disagreement that arises over this foundation pose problems that are not easily dismissed by reference to an 'international consensus' presumed by widespread ratification.

Talk of human rights is complicated because portions of the Universal Declaration are well grounded in Western morality. Beyond the Declaration, the content of the CCPR contains many articles very much aligned to Western notions of governance and individual liberties. One such provision, Article 27 in the CCPR, posits that "minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."<sup>9</sup> The issue of cultural self-determination is one that matters deeply to the moral and political structure of Western liberal democracies. Although in practice this right is sometimes contentious in the US, individuals and leaders in the West profess to value the *prima facie* right of minorities to practice their culture.

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<sup>8</sup> Cf. Johannes Morsink, *The Universal Declaration of Human Rights* (Philadelphia, PA: University of Pennsylvania Press, 1999) p.12 where he discusses the politics surrounding the drafts of the UN Declaration and cites the representative from Ecuador as saying "throughout many centuries of political struggle to bring about human unity, the climax had now been reached with the preparation of the document in which 58 nations had expressed their common ideal and their identity of thoughts regarding fundamental human rights."

<sup>9</sup> United Nation Office of the High Commissioner for Human, Covenant on Civil and Political Rights, Article 27

My point here is that Western societies have little difficulty agreeing with the content and interpretation of some human rights, especially those contained in the CCPR. However, the moral grounding that makes many of these political rights a natural expression of the West is lacking in many countries. In addition to specific provisions, the bases of the rights in the Declaration are the “equal and inalienable rights of all members of the human family,” “the dignity and worth of the human person” and “the equal rights of men and women.”<sup>10</sup> These are tenets of an intellectual tradition that views the individual person as an autonomous actor and places great emphasis on the inherent equality of all people. Constant references to the “worth,” “dignity,” and “equality” of humans raises problems of interpretation. What does “worth” amount to? Is “dignity” best achieved by promoting a harmonious society or by allowing every individual to pursue their own agenda? India, for example, is still negotiating the role of traditional religious castes in a modern, democratic society and is consequently dealing with issues of dignity and equality. Despite India’s great strides in both economic development and human rights promotion, their cultural tradition is one that explicitly denies equality amongst individuals and calls for severe restrictions on the movement and actions of the Hindu-designated “untouchables.” It should not be surprising that rights interpreted as supporting the equality and inherent dignity of individuals, qua individuals, are more tenuous among non-Western traditions, although this is not to deny that many cultures have (good) reasons to uphold these rights.

The argument that many political and civil rights are strongly grounded in Western morality has two consequences. First, it gives residents of the West an important reason for promoting human rights. People are apt to care deeply about human rights when they correspond to their morality. Moreover, when rights are expressive of moral commitments they carry far more weight than treaties and agreements based purely on political considerations; human rights

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<sup>10</sup> United Nations, Universal Declaration of Human Rights, Preamble

as a moral concern should, although they do not always, carry enough weight to override other political concerns and commitments. Another right that finds broad support in Western society, similar to Article 27 from the CCPR, is Article 18 in the Declaration which grants individuals “freedom of thought, conscience and religion.”<sup>11</sup> This right requires that individuals be allowed to determine their beliefs and religion at will and with sufficient freedom to, at least privately, express these beliefs. Commitment to these values is evident through the reaction of Westerners, both individually and collectively, to cases in which apostasy is severely punished. In Afghanistan, for example, “Abdul Rahman [...] was sentenced to die after police found him with a Bible.”<sup>12</sup> It was only “after pressure from Western governments [that] he was allowed to go to Italy.”<sup>13</sup> That governments from the West were willing to intercede indicates that Western societies are ideologically unwilling to tolerate foreign violations of freedom of conscience, even if such violations often pass unnoticed in everyday politics. Even taking account of the religious and cultural traditions at work, freedom of conscience – when recognized – can be salient enough to motivate political entities into action.

The second consequence of the mainly Western grounding of many political rights is that the billions of people who do not share a common morality with peoples in Europe or the U.S. may find arguments which rely on a Western moral basis to be condescending and presumptuous. Most of the world is not of Western origin and it is self-deceiving to think of “the West” as a homogenous culture that can be easily exported. Nonetheless, there seems to be agreement on certain rights in the West that is lacking in other parts of the world. Returning to the issue of conscience, some peoples do not subscribe to the notion that individuals have a right to freely choose their religion, government, place of residence or occupation. In addition to the caste-based

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<sup>11</sup> United Nations, Universal Declaration of Human Rights, Article 18

<sup>12</sup> “In death’s shadow,” *The Economist* 372, no.8385 (July 24, 2004)

<sup>13</sup> Ibid

interpretation of Hinduism, the Leninist tradition with which China is still negotiating and the “ethos” of other “collectivist” cultures are often set opposite to rights as individualized as freedom of conscience. It is important for proponents of ‘universal’ rights to acknowledge that other traditions, whether religious, cultural, or governmental, do not necessarily share the priorities of the West. Whether specific considerations are accepted by the international community as excusing conditions from observing human rights is a separate issue. However, the fact remains that some societies will be resistant to what is perceived as a Western imposition of certain civil and political rights. In recognizing heterogeneity, I must note that there is anecdotal evidence that resistance to rights of conscience is becoming less of an issue in the 21<sup>st</sup> century. More strongly, there may be good-but-unacknowledged grounding for many civil and political rights within intellectual traditions widely considered to be “collectivist” or otherwise hostile to Western individualism.<sup>14</sup> Despite this, political actors must be cognizant that the self-evident truths of one tradition are rarely self-evident.

Speaking to the perception of cultural and moral imposition, Michael Ignatieff is motivated by a worry that human rights are viewed around the world as a political tool of the dominant West. He fears that “human rights are seen as an exercise in the cunning of western reason: no longer able to dominate the world through direct imperial rule, the West now masks its own will to power in the impartial, universalizing language of human rights.”<sup>15</sup> This charge is a serious one, especially if human rights are meant to function as a limit on state action. Even when human rights are not used as cultural imperialism, world leaders find it possible to shame individuals in the West who are already self-conscious about their disproportionate power in international politics and culture. Although this may play out differently at different times, official

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<sup>14</sup> For a discussion of this, see Joshua Cohen, “Minimalism in Human Rights: The Most We Can Hope For?” *Journal of Political Philosophy* 12, no. 2 (2004)

<sup>15</sup> Michael Ignatieff, “The Attack on Human Rights,” in *Foreign Affairs* 80, no. 6 (Nov/Dec 2001): p.105

statements calling human rights resolutions the “outcome of double standards and the politicalization of human rights”<sup>16</sup> illustrate how distrust of Western power can deflect attention away from the substantive issue of state action. The problem with statements of this sort is that they contain partial truth while they themselves are used as a political tool.

The above statement is the official contention of the Chinese representative to the UN that the US is pushing for greater human rights monitoring in China because of political mistrust. To an extent, this argument holds some truth; the US routinely ignores the abuses of its allies, like Saudi Arabia, in favor of shining a spotlight on the rights abuses of less friendly countries. However, China does have a long and proven list of human rights abuses that it has failed to denounce and, taken as an isolated case, looking more closely at human rights in China makes sense. The push for greater scrutiny in China is political in the sense that China has been explicitly targeted to the exclusion of other countries, and while it is dubious that all signatories are held responsible for upholding human rights, China *has* signed the Declaration stating its support for human rights. Arguments around this issue are problematic because, whether or not claims to political manipulation are true, these claims make the task of advancing human rights far more difficult.

It is widely accepted that certain moralities dominated the framing and interpretation of some political and civil human rights.<sup>17</sup> Instead of reflecting the values of many cultures and traditions, many articles in the Convention on Civil and Political Rights advance the prevailing moral interests of Western democracies. This is not to say that all the articles in the CCPR are exclusive to the West and its interests, but rather that the document, taken as a whole, is amenable

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<sup>16</sup> H.E. Ambassador Qiao Zonghuai, “Situation of Human Rights in China,” 57th Session of the UN Commission on Human Rights (April 23, 1999)

<sup>17</sup> It is probable that other rights are closely aligned to non-Western moralities, but I here limit my focus to contentious political/civil rights since my upcoming discussion of moral equality best fits here.

to the West in a way that remains more contentious in other countries. Notwithstanding these substantial conflicts in the human rights sphere, a global system has been constructed in the name of nations and peoples around the world and a set of expectations now governs the actions of most states. We must now give an account of how human rights can continue to operate in the face of such contradiction. Since it seems that a reconciliation between the universal claims of rights and the charges of cultural imperialism is not forthcoming, we must find a way of accounting for rights that either takes their origin from someplace other than the UN Declaration or admit that human rights are not as universal as we would like. One potentially attractive solution is to adopt a minimalist version of human rights that jettisons culturally contentious rights and thereby secures their universal application. The next section will give an account of human rights minimalism that illustrates how such a rights scheme could be understood. I believe, however, that minimalism is at times an insufficiently robust account of human rights and that it fails to fully capture the ethical standard that rights promote.

### *Minimalism about Human Rights*

This section examines the power of approaching human rights from a perspective primarily concerned with securing their universality. Minimalists are so named because they believe that the political and moral agenda of human rights – that is, the protection of essential facets of human dignity and life – can best be achieved by adherence to a succinct list of “core rights.” As Michael Ignatieff puts it, “Human rights can command universal assent only as a decidedly ‘thin’ theory of what is right, a definition of the minimal conditions for any life at all.”<sup>18</sup> On the face of it, Ignatieff’s description of human rights is quite attractive. We should, he believes, pursue ardently those rights which are essential to a basically “decent” life for people

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<sup>18</sup> Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton, NJ: Princeton University Press, 2001) p.56.

across the globe. Of course, different peoples will have different concepts of what this requires. This leads Ignatieff to the claim that “human rights is [sic] morally universal because it says that all human beings need certain specific freedoms ‘from’; it does not go on to define what their freedom ‘to’ should consist in.”<sup>19</sup> This negative view of human rights is well reflected in most public human rights talk: we are concerned with the abuses of foreign and domestic power because we feel that people should not be subjected to atrocities. Certainly, all proponents of human rights agree that people should be free *from* arbitrary arrest, beatings, and the violent actions of their neighbors and political adversaries.

Minimalism also relieves the pressure of culturally-based criticisms of human rights by advancing the uncontroversial aims of people everywhere. No government can claim that the U.S. or any other country is acting in a selfish or political manner when they demand that regimes respect the basic integrity of individuals – especially when this integrity is construed as a right to freedom from the worst government abuses. Core rights – under some accounts called human rights proper – form our understanding of what is critically important that a government uphold. They also provide a set of behavioral requirements that is widely supported throughout the world. Security, subsistence, basic liberties, government representation and some form of government legal protections are generally constitutive of a minimal list of human rights.<sup>20</sup> Minimalists may subtract or add a right to the list, but their use of rights as identifiers for intolerable government abuse overrides more expansive political, economic, and social considerations. Minimalists thus construct human rights as provisions owed to each individual that are impossible to refute by citing cultural differences. In doing so, they ensure that excuses based on cultural particularism gain no traction and human rights regain their universal quality.

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<sup>19</sup> *ibid*, pg. 75

<sup>20</sup> Erin Kelly, “Human Rights as Foreign Policy Imperatives” in *Ethics of Assistance*, ed. Deen Chatterjee (Cambridge, UK: Cambridge University Press, 2004) p.185-186.

Although the roles that human rights serve in international relations are varied, minimalism may require some commitment to respond in the face of widespread human rights abuse. Because minimalism distills human rights down to the provisions considered essential by all peoples, a violation of minimalist rights is a cause for serious concern and possible government action. Some philosophers, like Erin Kelly, assert that when rights are sufficiently limited “all states are morally prohibited from profiting in their dealings with regimes that violate human rights.”<sup>21</sup> She goes on to describe further considerations, like special requirements from states that promote human rights violations abroad or additional support from wealthier nations, which further flesh out the moral requirement that governments not support or benefit from states that engage in consistent human rights violations. Not all minimalists hold such a strong position, however, perhaps giving more consideration to the political feasibility of disengaging from or censuring human rights violators. Nonetheless, minimalists that call for a government response in the face of rights abuse have a clear advantage over theorists with a more expansionist position, since the rights which would require governmental responses are less contentious.

John Rawls has given human rights minimalism a central place in his discussion of decent regimes and their qualities. Rawls believes that a decent society is constituted when a peoples “is not aggressive against other peoples and accepts and follows the Law of Peoples; it honors and respects human rights; and its basic structure contains a decent consultation hierarchy.”<sup>22</sup> Of Rawls’s three criteria for decency, one of is respect for human rights and another (the Law of Peoples) in part requires that peoples uphold human rights.<sup>23</sup> Rawls envisioned that rights would constitute an expression of a *political* agreement, for which further justification would be generated by “comprehensive doctrines.” Comprehensive doctrines are properly understood as the

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<sup>21</sup> *ibid* p.177

<sup>22</sup> John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 2002) p.5.

<sup>23</sup> Article 6 of the Law of Peoples is “Peoples are to honor human rights,” in John Rawls, *The Law of Peoples*, p.37

organization of values by which a society constructs its moral and social framework, generally taking the form of religious interpretations or a cultural or intellectual tradition. Because comprehensive doctrines justify the political commitments to the human rights identified by an overlapping consensus, societies have internal reasons for securing human rights. Furthermore, making the agreement on rights political allows us to avoid debate on the origin or moral grounding of rights. In this way, moral norms which enjoy *prima facie* agreement among decent societies become established regulations for state actions. Peoples thus have both internal and external reasons for upholding human rights: the first coming from their comprehensive doctrines and the second from their political agreement with other decent societies. Despite culturally divergent foundations, human rights identified by overlapping consensus are internationally codified expectations and requirements of decent societies. The requirement of overlapping consensus, however, means that human rights must be limited to those rights which all decent regimes would consider essential.

It should be clear that the number of human rights supported by Rawls's process is rather limited. We can expect a good deal of cultural and moral variety among decent peoples and under Rawls's framework it is improper to prioritize the needs and goals of any one group. Even non-liberal societies, provided they meet the criteria of decency, command equal respect among decent peoples. In fact, Rawls's intent in positing overlapping consensus was to allow many non-liberal societies to qualify as decent. To this end, Rawls commits us to basic rights that include the right to security, property, conscience, and basic liberties, but does not go beyond this.<sup>24</sup> Thus limited, rights become expectations and aspirations that each decent state can affirm. While it is plausible that Rawls would accept Ignatieff's lament that "states that signed the Universal

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<sup>24</sup> *ibid* p.80 footnote 23: "Articles 3 to 18 may all be put under this heading of human rights proper"

Declaration never actually believed that it would constrain their behavior,”<sup>25</sup> such a remark fails when levied toward Rawls’s human rights minimalism. Any state found in violation of one of Rawls’s rights, in his idealized world at least, would be under pressure to reform from other decent states and their own internal values.

Rawls’s use of human rights is problematic because his account seems to do little more than posit that human rights exist. He wisely avoids debate on the foundation of human rights, but it is unclear how we come to any understanding of which rights to include in his human rights proper. I see two potential origins of Rawlsian rights: 1) human rights originate from an overlapping consensus among decent peoples, or 2) human rights are found somewhere else. The problem with the first option is that human rights are used in two of the three criteria for determining which societies are decent. If we use human rights to identify decent peoples, we cannot then generate a list of rights from the ideals of these peoples. Although Rawls views “decency as a normative idea of the same kind as reasonable,” stating that “we give it meaning by how we use it,” it is still circular to describe peoples which respect human rights as decent while at the same time pointing to the human rights upon which decent peoples agree as the list of human rights proper.<sup>26</sup> The second option is problematic because it faces the same problems of cultural contention over justification and interpretation that minimalism and overlapping consensus were meant to solve.

I believe we can retain a good deal of the Rawlsian notion of human rights – including his use of overlapping consensus – if we shift our understanding of decency from respect for human rights to the ideal of equal moral respect. Equal moral respect will be discussed through the rest of this paper, but I raise it here to offer one potential solution to the Rawlsian dilemma. Although an

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<sup>25</sup>Michael Ignatieff, *Human Rights as Politics and Idolatry*, p. 8

<sup>26</sup> John Rawls, *The Law of Peoples*, p.67

insufficient criterion, equal moral treatment within a society demarcates those peoples who are indecent from those who are potentially decent. Under this proposed account, additional concerns for decency would need to be identified, but I believe that equal moral treatment offers a useful and compelling starting point in investigating whether a peoples qualifies as decent. Once decency is established, we could look to overlapping, deeply held values to identify an appropriate list of human rights which would then be internally justified by the comprehensive doctrines of decent peoples. I regret that I do not have time to follow this line of thinking to its conclusion, but I believe that the soon-to-argued tenet of moral equality is a promising basis for revising a Rawlsian understanding of human rights. For now I will put aside the question of how decency is grounded without using rights and will use the term similarly to Rawls to denote regimes which enjoy good standing in the international community and which generally respect human rights.

Moving from Rawls to the non-ideal world, the actions of the UN are not far removed from the position of minimalists. The Human Rights Council Advisory Committee recently adopted seven resolutions, three of which dealt with the issues of missing persons, the rights of civilians in armed conflicts, and the right to food.<sup>27</sup> Of the other four resolutions, two dealt with the actions of UN bodies, one with gender mainstreaming, and one with ending discrimination against lepers. In this instance, at least, three of the resolutions regarding rights are within the appropriate scope of human rights as defined by minimalists, while two resolutions are not and two concern matters internal to the UN. Since three of five rights discussed could be considered minimalist rights, the chasm between the rights listed in the Declaration and rights minimalism is

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<sup>27</sup>United Nations Human Rights Council Advisory Committee, “Human Rights Council Advisory Committee Adopts Seven Recommendation to Human Rights Council” (January 30, 2009)

not as sharp in practice as it is in theory. The UN recognizes the importance for pushing for core rights, although to a lesser extent it also attempts to advance more expansionist rights.

Human rights minimalists advance an important perspective in which we retain the urgency and importance of rights. This reflects pretheoretical notions about the primacy of human rights in international affairs. Rawls recognizes this, which is why his criteria for decency contain multiple references to human rights. Claims of abuse under minimalist frameworks are automatically a high priority since violating core rights is a serious matter over which people should express moral outrage and expect that their government will do the same. Unlike the much-derided rights to “enjoy the arts”<sup>28</sup> or take “remunerated periods of vacation,”<sup>29</sup> when rights are few they are more likely to be of the utmost concern. Furthermore, the argument that rights express a particular philosophy or political history is quite weak against minimalist constructions of human rights. The price for this type of universality is that some of the ideals which liberal societies hold in high regard must be abandoned in the face of cultural consideration. Struck from the list of rights is the freedom to publicly practice religion, free speech, and the right to enjoy full legal equality. Minimalists believe that abandonment of these goals is necessary to generate a suitably limited list of rights, and this may be true. But is minimalism, in the words of Joshua Cohen, the most we can hope for?<sup>30</sup>

### *Revision of Human Rights Minimalism*

While minimalism as I have defined it remains a plausible alternative to full-fledged human rights expansionism, I believe that it allows for too much consideration of cultural variety. Before I continue, I want to articulate the role of human rights as a means of supporting my

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<sup>28</sup> United Nations, UDHR, Article 27

<sup>29</sup> *ibid* Article 24

<sup>30</sup> See Joshua Cohen, “Minimalism about Human Rights: the Best We Can Hope For?”

revised minimalism. I believe that human rights serve a dual function by elaborating internationally expected behavior and identifying moral goals to which every nation should aspire. To these ends, minimalism is well-positioned to make a convincing case that all peoples should strive to respect human rights. As an elaboration of expected behavior, human rights serve as a benchmark against which actions may be measured. Countries which fail to adhere to human rights may be criticized for acting improperly, considered indecent in the Rawlsian sense, or encouraged to reform. Perhaps in some cases no action is required, even though violations of human rights are viewed as identifying areas in need of improvement. Secondly, human rights identify aspirations on the part of the international community. This is important since if human rights constitute expected behaviors, then they must also be goals to which peoples can aspire. Consider a country in which subsistence rights are not met because of widespread economic deprivation caused by global exploitation. Although individuals are being denied their right to subsistence and we would expect their government to promote greater economic opportunities, it is unlikely that we would identify such a government as a human rights abuser.<sup>31</sup> Rather, the human right to subsistence would be seen as an expected provision which is not afforded to individuals through no fault of the government. Clearly, this right would be something to which the state government aspired.

Framing the role of rights in this way requires that our list of core rights remains as culturally neutral as possible. Otherwise, nations whose traditions contradict international rights will have no reason to aspire to human rights and there will be dissent over what we should expect from governments. That being said, there is danger in discarding any human right which may offend a peoples; there are many cultural traditions which are no longer considered

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<sup>31</sup> In this example, we would most likely not call on the government to reform, although it seems reasonable we would support action similar to that called on by Kelly's principle of International Responsibility for Human Rights requiring that states provide aid or some other form of assistance.

acceptable and which should not be given a pass by human rights (e.g. slavery). It is from this worry that I approach human rights minimalism. This section will give an account of moral equality before the law that I believe fits with the function of human rights as articulating international expectations and aspirations. I begin by identifying the problem of invidious discrimination before developing the human right to equal moral treatment. In this way, I hope to retain the broad appeal of human rights minimalism while asserting the right of individuals from all cultures to be treated with moral respect.

The issue of invidious discrimination is a serious concern for many individuals around the world. I focus on discrimination because it seems to exist in every nation and society around the world and in many cases appears to be completely unjustifiable. I will first lay out an account of wrongful discrimination that I believe captures the wrong being done to discriminated-against groups. I will then briefly discuss cultural arguments against my proposed proscription on discrimination. Finally, having traced out the wrongness of invidious discrimination and the limits of this concept, I will articulate the human right that I believe is lacking in most minimalist accounts – moral equality before the law.

Larry Alexander states that wrongful discrimination is the product of “[b]ias, or differential moral concern.”<sup>32</sup> He allows that consideration of an individual’s moral viciousness may diminish our moral concern for that person, but holds that “along all other axes, people are moral equals.”<sup>33</sup> His thesis rests upon the notion that all people are of equal moral worth.<sup>34</sup>

Accordingly, we may be justified in being more receptive to individuals with whom we have special ties, like kin or loved ones, but this must not come at the moral devaluation of others. To devalue

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<sup>32</sup> Larry Alexander, “What Makes Discrimination Wrong” *University of Pennsylvania Law Review* 141, no. 149 (1992): p.159.

<sup>33</sup> *Ibid* p.160

<sup>34</sup> This is a common view in moral philosophy. See Kant *Grounding for a Metaphysics of Morals*, Hobbes *Leviathan*, the Bible, Talmud, and Qur’an.

another person without good cause is to deny that they are a person of equal standing. Such a demotion in standing justifies the belief that another's values, feelings and personhood are not as important or worthwhile as one's own. Concern for moral equality is not inherently instrumental, however, since people are due equal moral standing to the extent that they are considered members of humanity in the same way as others. Moral equality is owed to each person in virtue of their shared personhood.

Widespread bias, furthermore, is generally encountered only towards socially salient groups of people. This is a practical claim that does not deny that invidious discrimination may occur under circumstances of popular hatred and resentment toward an individual when accompanied by an unwarranted devaluation of this person's moral status. However, I will focus on socially salient groups because I believe that most cases of discrimination reside in the realm of group or social dynamics. Socially salient groups are grouped by themselves or others on the basis of some noticeable or discernable trait. As Jeffrey Blustein notes, "membership in this group is seen by others as a salient fact."<sup>35</sup> This trait is salient insofar as it constitutes a part of an individual's identity in the eyes of others, allowing outsiders to apply socially meaningful categories to individuals. Thus, women, ethnic minorities, and religious practitioners are socially salient groups; people with green eyes, while readily identifiable, do not form a socially salient group because they do not share characteristics important to their identity or their place in society.<sup>36</sup>

Beyond offending the ideal of moral equality among individuals, wrongful discrimination against socially salient groups often causes serious harm to the members of the group. Alexander notes that social harm is contingent upon the circumstances of discrimination, including relational

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<sup>35</sup> Jeffrey Blustein, *The Moral Demands of Memory*. (Cambridge, UK: Cambridge University Press, 2008) p.351

<sup>36</sup> It is conceivable that in the face of widespread and damaging discrimination, green eyed people would band together in solidarity and become a socially salient group.

dynamics and the response of the discriminated against group. Although not always the case, agents believed to be of less moral worth are often denied opportunities afforded to others and generally have lower self-esteem and socioeconomic positions. Alexander is careful to point out that, in light of the contingent nature of harm, the true wrongness of discrimination lies in an improper adjustment of the moral standing of disadvantaged group members.<sup>37</sup> To the extent that harm against others is based on unfair moral evaluation, the moral transgression of biased discrimination is heightened.

There is a second account of what constitutes wrongful discrimination that is exemplified by Kasper Lippert-Rasmussen.<sup>38</sup> On this account, discrimination is wrong “when it is, because it makes the discriminatee worse off.”<sup>39</sup> This account focuses on the harm that is incurred by discrimination, positing that it is harm and not discrimination per se that forms the wrongful aspect of discrimination. Proponents of the harm-based account are careful to distinguish between the wrongness of the act and the wrongness of the attitudes and intentions behind the act. To distinguish between the act and the actor is not to deny that the two are linked; indeed, “denying that a certain discriminatory act that involves no harm is bad implies neither that the agent cannot be criticized for performing it [...] nor that it is not bad that the agent has a character [so] disposed.”<sup>40</sup> Removing the double negatives, Lippert-Rasmussen is positing that distinguishing between the badness of discrimination and the badness of an agent’s moral character does not erase the relationship between the two. Those that hold a harm-based account of wrongful discrimination believe that once a “relevant baseline” for harm is set, we are well situated to judge whether or not a discriminatory act is wrong by reference to the harm it causes.

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<sup>37</sup> Alexander, “What Makes Discrimination Wrong?” p. 163

<sup>38</sup> Kasper Lippert-Rasmussen, “The Badness of Discrimination,” *Ethical Theory and Moral Practice* 9, no. 2 (April 2006): pp.167-185

<sup>39</sup> *ibid* p.174

<sup>40</sup> *Ibid* p.176

I find the harm-based account flawed because of the emphasis placed on distinguishing between the wrongness of an action and the corrupted or bad character of the agent. I believe that action has an expressive nature which reveals the values and attitudes of actors. Lippert-Rasmussen agrees on this point, which is why he believes that we may criticize and even blame agents who take potentially harmful actions even when no harm occurs. However, it is his position that potentially harmful discriminatory action in the absence of harm is not wrong. I question why, if we are holding an agent blameworthy for the intentions and attitudes behind his actions, we would judge the very same actions morally unproblematic when they turn out to be ineffectual or contingently harmless? Especially when Lippert-Rasmussen acknowledges that actions reveal something unsavory about the agent, what would it mean to hold such a position? Perhaps before the law firing a gun at someone with the intention of killing them and succeeding is more reprehensible than firing a gun at someone with the same intention and failing, but from a moral perspective the act of *pulling the trigger with the intention to kill* is the same. Lippert-Rasmussen denies that his account favors a consequentialist view, but his analysis of the wrongness of discriminatory action seems to trade on a necessarily consequentialist position.

I believe that sticking with Alexander's analysis allows us to make good sense of troublesome discriminatory practices around the world. While Lippert-Rasmussen's account quickly becomes mired in discussion of what constitutes harm and whether the action is wrong or just the agent is to blame, Alexander's account provides a good basis from which we may evaluate discriminatory practice. That said, I do not apply Alexander's framework as the only analysis of wrongful discrimination but rather use it as a means of identifying certain cases of discrimination that cannot be defended. It is Alexander's analysis from which I approach the issue of wrongful discrimination and generate my accompanying right of moral equality before the law.

This is not to deny that a harm-based account of discrimination is useful; indeed, when harm is heavily incurred by a single group, there is often good reason to worry about the basis for these harms. However, I do not rely on a harm-based account for the simple reason that the wrongs identified by harm-based accounts are the purview of other human rights. If groups are denied economic opportunities and struggle to eke out subsistence, the wrong may be addressed by appeal to subsistence rights. Similar rights are available to deal with physical injury perpetrated against a social group, or an unwillingness to allow certain classes of people to publicly interact with others. By focusing on harm, we have a good system of identifying cases of probable human rights abuse, but this tool only extends as far the human rights which do the actual work.

While I think that group-directed harm is often unjustifiable, denying classes of people equal moral worth is a clear wrong. I believe that protection from biased discrimination constitutes a human right and I hope to show that it serves the role of articulating international expectations and defining a moral aspiration that all peoples can share. I acknowledge that some cultural traditions outside the West explicitly deny, as the West did until very recently, the moral equality of individuals and therefore reject the premise that people have a right to equal moral worth. I contend, however, that judgments of moral inequality are harder to justify than their proponents assume.

To return to the example of India's caste system, a history of explicit denial of moral equality for the Dalits has compelled the Indian government to enact expansive legal protections. Despite these protections, the Dalits have not experienced any major change in their social status or their socially-perceived moral worth. That is, despite a plethora of constitutional and legal provisions meant to protect and uplift India's Scheduled Castes, "caste-based discrimination,

inequality, and oppression comfortably survive and even thrive in modern day India."<sup>41</sup> As I will argue later, the legal and political changes in India signify an acknowledgement of the invidious quality of discriminating against Dalits. However, I also recognize that Hindu society is organized around a traditional conception of hereditary moral worth and that legal changes do not necessarily reflect a change in popular thought. I reserve a thorough discussion of these issues for later, although I raise it here to make two points.

First, discrimination when based on moral devaluation is widely considered by decent regimes to be wrong. More and more governments are taking steps to prevent codified discrimination, as illustrated by the rise in international conventions against discrimination and the reworking of internal legal structures. I grant that there are many arguments for the social or political necessity of government preferences, but no decent regime will argue that groups suffering discrimination are less morally valuable than their counterparts. My second point is that even when official agreement is reached over the badness of biased discrimination, the practice may well continue unabated. No country becomes immune to widespread discriminatory practices simply by enacting legal proscriptions. Therefore, when considering whether moral equality is respected in a society, one must look beyond legal recognition of groups as moral equals and observe the actual treatment of disadvantaged social groups.

On the face of it, there seem to be few plausible reasons that decent regimes could give to justify discrimination. I will discuss specific cases of discrimination in the next section, but want to briefly state here that I believe common attempts to justify widespread discrimination fail for lack of sufficient grounding. There are, to be sure, a great deal of logistical problems with the notion of invidious discrimination: how can we reliably identify unjust discrimination when it is

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<sup>41</sup> Smita Narula, "Equal by law, Unequal by Caste: The 'Untouchable' Condition in Critical Race Perspective," *Wisconsin International Law Journal* 26, no. 2 (2008): p.256

based on moral respect, what should be done about such discrimination, what obligations do states have to prevent discriminatory practices from occurring? These are real concerns, but they are concerns over implementation, not concept.

To the extent that human rights articulate expectations and moral aspirations, I believe that moral equality before the law should be considered a basic human right. I take moral equality before the law to closely follow Dworkin's maxim for the role of the government:

Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect [...] Government must not only treat people with concern and respect, but with equal concern and respect. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern.<sup>42</sup>

Dworkin posits that government should provide goods and opportunities among its citizens by virtue of the equal concern and respect they are owed. When goods and opportunities are distributed unequally, inequality must not be based on the notion that some citizens are worthy of more concern.<sup>43</sup> The type of "concern" that Dworkin has in mind is unclear, perhaps intentionally so. I propose that understanding this concern as moral concern validates both our intuitions about equal treatment and Alexander's analysis of wrongful discrimination. If this is the case, then moral equality before the law will establish individual claims against unjust government discrimination and will make a further claim on regimes to secure for everyone freedom from unjust discrimination.

As I understand it, moral equality under the law has two provisions which secure the basic rights of all people to live a life free of degradation:

1. Every normally developed person, to the extent that they have not been judged morally vicious or corrupt, has the right to enjoy equal moral treatment as a member of society.

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<sup>42</sup> Ronald Dworkin, "What Rights Do We Have?" in *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977) pp.272-273

<sup>43</sup> We can imagine good reasons for a government to make differential provisions, e.g. persons in great material need in the aftermath of a natural disaster are provided a greater share of government attention and resources. The issue at stake, however, is whether or not we justify differential treatment by reference to inherent worth (for tornado victims, we do not).

2. Each State has the duty to promote, to the extent reasonably possible, the right of individuals and groups to be treated as a moral equal.

The first provision is simply a restatement of my above point that people should be treated as moral equals unless there is a *morally* compelling reason for differentiation. The second point calls upon the government and its affiliates to secure for individuals basic freedom from invidious discrimination. This second point covers not just the actions of government, but also socially institutionalized forms of discrimination. Governments must ensure that, in addition to treating persons with respect, persons are also free from the disrespect of others. Although there will necessarily be limits on what we require governments to monitor, it is not good enough to simply end discriminatory policies. Thus, legal statutes against discrimination are insufficient in the face of socially accepted bias; even when government itself is free of discriminatory practices, widespread invidious discrimination should generate a further response.

I constrain myself to the cases in which discrimination violates the right of individuals to equal moral treatment and their government, whether or not the perpetrator of the discrimination, has a duty to act. Alexander makes the case that there may be good cause for putting a stop to certain kinds of noninvidious discrimination,<sup>44</sup> but this is not my concern in this paper. I admit there may be good social and moral reasons to proscribe certain non-invidious forms of discrimination; however, the requirements *a priori* are too broadly drawn and too unclear to generate a human right.

Inclusion of moral equality before the law in a minimalist framework establishes a middle ground between strict minimalism and an expansive litany of rights. This revised minimalism will not alienate different cultures but does not allow for egregious discrimination under the banner of cultural sensitivity. Minimalists rightly identified the problems with using the Declaration as a

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<sup>44</sup> See the discussion in Alexander, p.149 in which he considers the effects of benign discrimination on discriminated-against groups.

basis for human rights and I believe that we can further the minimalist project if we admit my version of moral equality under the law. The next chapter uses the right to moral equality before the law to inspect two cases of discrimination. I hope that the following investigation will make clear just what this human right amounts to in everyday practice.

## **Ch. 2: India's Dalits & Saudi Women**

This section explores current cases of discrimination as a means of illustrating the use of moral equality before the law in evaluating the policies and actions of foreign peoples. Part descriptive, part prescriptive, I intend the following accounts to make clear the way in which moral equality rights can be invoked on both the domestic and international scene. I begin with the case of India before moving on to Saudi Arabia.

### *India, Caste, and Life as a Dalit*

India is widely acknowledged to be the world's largest democracy and, with a rapidly expanding economy, is positioning itself for ascension as a global economic power. It is, in theory, a model of development and liberty, a country in which a tumultuous past has been transformed into a democracy that actively encourages human development. As part of this development, the poorest in India, the Dalits or "untouchables," are acknowledged as needing special protection by the state. A number of amendments give the Dalits, the Hindu population excluded from the caste system and therefore historically marginalized, special legal resources in fighting for equality in India. From a formal standpoint, India is a good example of equality under the law. Not only is "equality under the law" a universal right under the Constitution, but discrimination based on caste, race, sex, and religion is outlawed.<sup>45</sup> Furthermore, the Indian Constitution has explicitly outlawed the use of "untouchable" as a category and made punishable any "disability arising out of 'Untouchability.'"<sup>46</sup> All of these measures are very much aligned to India's status as a democracy and points to a desire for greater social and economic equality.

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<sup>45</sup> Indian Constitution, Articles 14 and 15, respectively

<sup>46</sup> Indian Constitution, Article 17

Despite the legal statutes in India, the caste system has not ceased to exist nor have the Dalits experienced widespread elevation in their position. As Narula stated in her 2008 article:

Caste division between Dalits and non-Dalits dominates in housing, marriage, employment, and general social interaction – divisions that are reinforced through the practice and threat of social ostracism, economic boycotts, and physical violence. Dalits are denied access to land, forced to work in degrading conditions, and routinely abused at the hands of the police and "higher-caste" groups that often enjoy the state's protection.<sup>47</sup>

The situation as described constitutes clear abuse toward a group of people and is in violation of Indian law. Equally clear, however, is the scale to which caste-based thinking still pervades Indian society. The term caste “denotes a traditional system of rigid social stratification into ranked groups defined by descent and occupation.”<sup>48</sup> Traditionally, castes are conceived in the holy books of Hinduism as the variable levels of incarnation. It is thought that the actions of a person’s past lives determined the caste into which she is born. By explaining caste in this way, traditional Hindu society was able to justify the complete marginalization of the “untouchable” by reference to past wrongs great enough to exclude them from the caste system. By referencing past wrongdoing, Hindu society was able to justify a reduction in the moral value of the Dalits.

Ranking individuals by birth as a means of determining their opportunities in life is antithetical to the ethos of both democratic and neoliberal thought. For both practical and moral reasons the constitution of India includes the aforementioned provisions against discrimination, going so far as to abolish the Dalits as a legitimate social class. While there has been no comprehensive attempt to outlaw caste as a form of organizing society, there have been special courts established to hear cases of caste-based discrimination and to promote the economic interests of the lowest classes.<sup>49</sup> There are two competing narratives in India. One appeals to legal protections from abuse and discrimination as a good-faith effort on the part of the government to secure full rights for a portion of the Indian population generally excluded from both social and

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<sup>47</sup> Narula, “Equal by law, Unequal by Caste: The ‘Untouchable’ Condition in Critical Race Perspective,” p.273

<sup>48</sup> Narula, “Equal by law, Unequal by Caste: The ‘Untouchable’ Condition in Critical Race Perspective,” p.270

<sup>49</sup> Special courts were created by the Scheduled Castes and Scheduled Tribes Prevention of Atrocities Act 1989

economic privilege. The other notices that the “potential of these laws to bring about social change, however, has been severely hampered by their under-enforcement due to institutional prejudice and police corruption.”<sup>50</sup> I believe there is a good case to be made that Dalits are being systematically denied their human right to moral equality before the law.

First, the caste system over the last 50 years has become secularized and now functions largely as a means of inheriting privilege and reproducing socioeconomic standing. As such, claims of religious sanctimony in organizing society by caste are no longer as strong as they once were. M.N. Srinivas, one of the fathers of Indian sociology, details the way in which traditional society in India is organized around the village, caste and family. He contends that caste is influential in, although not wholly determinate of, the occupations into which individuals will enter. This move away from traditionally prescribed caste-occupation is not the same as the dismantling of caste and, as Srinivas points out, “India is, certainly at the regional if not at the state level, the India of dominant castes.”<sup>51</sup> Although caste is historically rooted in religion, it is increasingly apparent that caste is becoming less a matter of spiritual organization and more a proxy for privilege. Narula shows that, contrary to expectations, “caste-based discrimination is also openly practiced by Sikhs, Christians and Muslims against Dalits who have converted to these faiths.”<sup>52</sup> Presumably, then, much caste-discrimination is based not in religious but in social convention.

While some Hindus may sincerely believe that mistreating Dalits is justified by the moral viciousness and wrongdoing committed in past lives, it is more likely that Dalits are judged to be of compromised (non-religious) social and moral standing *because* Dalits have been construed as socially undesirable. Biased discrimination based on social constructs is obviously invidious and

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<sup>50</sup> Narula, “Equal by law, Unequal by Caste: The ‘Untouchable’ Condition in Critical Race Perspective,” p.289

<sup>51</sup> M.N. Srinivas, *The Dominant Caste and Other Essays* (Delhi, India: Oxford University Press, 1994) p.8.

<sup>52</sup> Narula, “Equal by law, Unequal by Caste: The ‘Untouchable’ Condition in Critical Race Perspective,” p.271

constitutes a clear wrong: the use of social position to assign moral worth is a violation of the right to be treated as a moral equal in the absence of morally relevant criteria. Assigning moral worth on the basis of hereditarily-ascribed social positions conflates social organization with moral practice. While I think that using moral character to organize society is sound social practice (we do not hire felons to guard the US Treasury), the converse does not hold; I see no justification for assigning moral value to individuals based on their social status or inherited characteristics. The realm of sincere religious belief, however, is less straightforward.

Indian society is still largely affected by the practice of Hinduism, despite its waning influence on the political and economic cultures. Within Hindu society, ascription of untouchable-status ensures that individuals engage in practices which further strengthen their untouchability. As “polluted” individuals, Dalits must engage in the dirtiest actions – gathering and disposing of human refuse, working with cow leather, and bathing in the used bathwater of others – which further disqualifies them for contact with others.<sup>53</sup> Socioeconomic exclusion of the Dalits is thus multiple, as their inherited disability is compounded by non-voluntary acts which make them religiously unclean by virtue of their behaviors and occupations. I strive to be selective in my defense of Dalits because some amount of discrimination (or at least non-engagement) against individuals who perform unclean acts may be acceptable in Hindu society. What is clearly unjustifiable, however, is the nature and hereditary grounding of the current discrimination.

The nature of discrimination against the Dalits is violent, vitriolic and inexcusable. The first step in ameliorating the situation seems to be pressing India to properly enforce its anti-discrimination laws and ensure that equality under the law is a reality for the Dalits. That said, there may be some room in which certain types of discrimination based on religious and cultural traditions are justifiable. If discrimination against Dalits was limited to exclusion from Hindu

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<sup>53</sup> See Narula, p.280 on “manual scavengers” and Srinivas, pp.69,84-85 on social practices

temples and such exclusion did not result in further socioeconomic disabilities, I would have trouble identifying a human rights issue. The voluntary nature of religious participation, assuming that it is distinct from wider civil and social participation, seems to provide more latitude in determining which practices are under human rights. If religious practice were constrained within relations between religious practitioners, perhaps discrimination would be excusable. However, contrast that picture with the situation as it now stands, one in which discrimination has led to the total debilitation of Dalits as a class of citizens. Dalits are without practical recourse to law, face numerous barriers to economic prosperity, and live under the constant threat of violence. The widespread, socially pervasive discrimination in India is best viewed not as a matter of internal religious practice but rather as a means of organizing society so as to maintain the poverty and marginalization of a group of people. Discrimination against Dalits is a violation of the right to equality under the law as understood domestically and violates any international right to equal moral treatment. We should be careful not to conflate moral equality with other core human rights, however tempting it may be in the face of violations of the right to security and subsistence. Let us imagine that Dalits were ever-so-grudgingly allowed to farm small plots of land and were not subject to beatings. Even when security and subsistence rights are met, there is something deeply disturbing about a society that explicitly considers a hereditary class of people to be less morally valuable than the majority of citizens. Cold toleration of this sort does not recognize the right of peoples to equal moral regard, nor does it promote a situation in which societies are apt to uphold the rights to subsistence and security. Even so, perhaps cold toleration is all the behavior we can demand of individuals, provided that such toleration is compatible with equal moral treatment. As an international expectation, cold toleration may pass the test for upholding the right to moral equality before the law. As a moral aspiration, I would hope that

international agreement would push for greater acceptance of the Dalits. Equal moral treatment, whether or not grudgingly offered, is valuable as it reflects the tenet that people are to be judged moral equals until they prove otherwise – a necessary belief for all societies, especially those with participatory governments.

The problem still remains that Hindu society views Dalits as deserving of their marginal social position because of hereditary characteristics. However, this sincere belief is not well placed to offer a credible defense of the malicious abuses perpetrated against Dalits; while purity and differentiation are well within the purview of religion, beatings and socioeconomic exclusion neither further the aims of Hindu purity nor are they excused by reference to religious beliefs. There have been many arguments pointing out the parallels between Dalit-oppression and racism in the West and, while I do not want to recount them here, it warrants reminding that disability based on immutable social characteristics is usually difficult to rationally justify.

I am prepared to bite the bullet and posit the wrongness of any discrimination against Dalits but I feel the situation does not require such a position. Rather, it is only necessary that the government produce an environment in which Dalits are treated as moral equals. To accomplish this, the government must go far beyond its current actions and must pursue an active approach to combating discrimination. This may require using police and military to ensure that Dalits are not subject to humiliating and degrading work; another option is to change the curriculum of public schools to include lessons on the wrongness of discrimination, especially caste-based discrimination. Short-term policies and enforcement cannot be the solution to India's problem with discrimination. Rather, the government has an obligation to prevent invidious discrimination from impairing the opportunities and degrading the quality of life of Dalits.

I emphasize the need for active government engagement on this issue because US history has shown that policies aimed at combating discrimination require significant resources. Consider desegregation, for instance, a case in which government policy had no effect on the conduct of individuals or public schools until the National Guard was called to forcibly intervene. For US states that pursued desegregation before the Supreme Court invalidated segregation in public schools, state governments found it necessary to withhold funding from noncompliant schools before desegregation policies were respected.<sup>54</sup> At every step the government had to do far more than simply proclaim the illegality of segregation; it took all the coercive tools the government had to achieve the goal of sending children of different backgrounds to the same school.

Contention that government policies aimed at stopping discrimination violate rights to religious practice are either disingenuous (since discrimination against Dalits is observed even amongst Muslims and Christians) or unjustifiable. Invidious discrimination is wrong even when it represents a sincere cultural belief. Just as the global community does not tolerate slavery, despite its long history in the tradition of many peoples, malicious discrimination of the sort leveled against Dalits expressly violates the concept of decency employed by most of the world. Even the Indian government makes explicit its rejection of ‘untouchables’ as a basis for social disability, although it has not been able to put this sentiment into effect.

Worryingly, the Indian government seems conflicted over the caste system and stated in 1996 that “caste is a uniquely Indian social institution and therefore an internal matter.”<sup>55</sup> By making this proclamation, government officials actively worked against external agents seeking to uphold the Constitutional commitments to nondiscrimination and the elimination of the

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<sup>54</sup> Both New Jersey and Illinois did this, and were eventually successful in stopping segregation as a school policy. See Michael Klarman, *From Jim Crow to Civil Rights* (Oxford, UK: Oxford University Press, 2004) p.344.

<sup>55</sup> Clifford Bob, “‘Dalit Rights are Human Rights’: Caste Discrimination, International Activism, and the Construction of a New Human Rights Issue” in *Human Rights Quarterly* 29, no.1 (February 2007) p.175.

untouchable class. Dalits themselves explicitly opened the dialogue in the late 1980s with the creation of a number of civic organizations aimed at gaining support from NGOs and international actors.<sup>56</sup> For example, the Dalits from Sambarda migrated en masse in 1989 to protest the abuse and torture they were experiencing at the hands of the other villagers.<sup>57</sup> Their demands consisted mostly of reliable government protection and “land to protect their dignity.”<sup>58</sup> I can think of no plausible argument that would reject these goals, internal matter or otherwise. The Dalits as a group desire equal moral respect and an equal application of rights in the face of a sociopolitical system that consistently denies them what they have been promised.

The caste system has been framed by the Dalits as a far-reaching system of discrimination against an unwilling group. This construal is significant because it belies the notion that Indian hierarchical culture is accepted by and represents all of its members. It would have been much harder to justify external attempts to secure the right of Dalits had Dalits not expressed widespread dissent. Rather, internal rejection of the caste system gives moral standing to foreign actors. Even conceding that some villages are structured hierarchically for traditional reasons, the malice evident in the discrimination against Dalits crosses all boundaries of decency. The current treatment of Dalits runs counter to the values of most peoples, including the Dalits and the Indian national government, and in light of this is a good candidate for international concern.

Arguments based on cultural self-determination are shown here to have limits. Although the Indian government would like the world to believe that the caste system is a matter of Indian concern, both the Dalits and international actors disagree. We do not respect cultural determination as a justification for behaviors that are anathema to an international understanding of the good as represented by human rights, especially when we are joined by the members of the

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<sup>56</sup> See Bob starting at p.175

<sup>57</sup> Ghanshyam Shah, *Social Movements in India* (New Delhi, India: Sage Publications, 2004) p.127.

<sup>58</sup> *ibid* p.127

culture most affected by the behavior in question. Moreover, there are real questions of government representation when the dissent of affected parties are ignored. Respecting human rights is not a matter of moral luck but rather reflects an understanding of what governments should sincerely strive to accomplish. In this case, India's own Constitution provides ample evidence that the government recognizes the need to pursue equality, as both a moral decision and a political acknowledgement that such behavior is expected from the international community. For the Dalits, support comes from pressures to internal consistency and adherence to external norms of behavior.

#### *Saudi Women and Fundamentalist Islam*

*For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, regardless of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civic or any other field.<sup>59</sup>*

Discourse about the rights of women in cultures that are traditionally patriarchal has undergone several shifts over the last century and a half. While secular Western societies are slowly recognizing claims to substantive equality as a part of political liberalism, many societies do not yet approach gendered inequality as a problem. Nonetheless, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is the benchmark against

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<sup>59</sup> United Nations, Convention on the Elimination of All Forms of Discrimination against Women, Article 1

which “women’s rights” are measured.<sup>60</sup> The explicit priority of CEDAW is to secure equal political and social rights for women. Although CEDAW explicitly functions for the promotion of the status of women in society, it fits well with my account of moral equality before the law. Although CEDAW emphasizes formal equality, I will show shortly that, much like the case of Indian Dalits, formal rights often come apart from experience and treatment in a significant way. Nonetheless, CEDAW and the country reports it requires of signatory states provide a useful standard for measuring sex inequality and discrimination in different societies. The issue of sex discrimination is especially problematic in societies that ground their treatment of women on religious gender roles. Martha Nussbaum identifies the unique problem that women face in nations whose laws are shaped by illiberal religious interpretations.<sup>61</sup> She emphasizes, and I mirror her sentiment, that religion *per se* is not generally the cause of discrimination; rather discrimination arises from a combination of religious interpretation, cultural tradition, and human vying for political power. I will examine Saudi Arabia through this lens and, in trying to understand how the political climate affects the opportunities of women, will discuss the role that religion plays in their widespread discrimination.

It must be noted at the outset that Saudi Arabia is a signatory to CEDAW, with the reservation that contradictions between articles in CEDAW and “the norms of Islamic Law” will be resolved in favor of the State’s laws.<sup>62</sup> The reservation makes it clear that Saudi Arabia is very much invested in upholding Shari’a (Islamic Law), although to the extent that Shari’a and CEDAW are compatible “the provisions of the Convention may be invoked before the courts or

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<sup>60</sup> I hesitate to use the term ‘women’s rights,’ since most women’s rights fall under the category of human rights and it is equal moral worth as a human right, importantly undifferentiated, that I am discussing.

<sup>61</sup> Martha Nussbaum, *Sex and Social Justice* (New York, NY: Oxford University Press, 1999) Ch.5

<sup>62</sup> Saudi Arabian Royal Decree no.25 (August 28, 2000)

other juridical or administrative authorities in the Kingdom.”<sup>63</sup> It would be incorrect, then, to view Saudi Arabia as a Muslim country politically detached from the rest of the world – a sad caricature to which some people subscribe. Saudi Arabia courts international public opinion as much as any country and purports to follow international consensus on governance and human rights, at least to the extent that such practices are compatible with their interpretation of Shari’a.<sup>64</sup> Insofar as we are committed to respecting cultural variation, Saudi Arabia is justified in organizing their society around their interpretation of Shari’a. As discussed in the section on Indian Dalits, however, respect for cultural preferences does not extend to invidious discrimination or the widespread denial of human rights. The question in Saudi Arabia is whether their interpretation of strict gender roles is compatible with human rights, women’s rights, and a commitment to equal moral treatment.

Much like the case of India, Saudi Arabia is an example of a country with well-documented legal resources for its citizens which, in practice, are not evenly distributed. To reiterate, my complaint is not egalitarian but rather a criticism of a system in which people are not regarded as moral equals and consequently do not have the access to formal institutions that they should. Let me elaborate. In the Kingdom of Saudi Arabia, the laws “require redress for a woman if she is subject to discrimination or injustice.”<sup>65</sup> More strongly, “agencies of state are obliged to apply the principle of equality”<sup>66</sup> and women may seek redress from any number of additional State entities – from the King to regional courts – should the initial agency behave improperly. On paper, all Saudi citizens have access to fundamental governmental provisions, including

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<sup>63</sup> UN Committee on the Elimination of Discrimination against Women (CEDAW), *Consideration of reports submitted by State Parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: Combined initial and second periodic reports of States Parties: Saudi Arabia*, (March 29, 2007) p.8

<sup>64</sup> This is not a superfluous claim. Rogue regimes do not care at all about human rights or international standing, so Saudi Arabia’s qualified agreement to observe human rights is important in establishing its standing as “decent.”

<sup>65</sup> CEDAW, *Combined initial and second periodic reports of States Parties: Saudi Arabia*, p.8

<sup>66</sup> *Ibid* p.8

minimalist human rights. The State explicitly grants to women the rights to a free state education, to economic subsistence, and to a basic level of health.<sup>67</sup> Analysis of the legal code paints a copasetic picture in which women are denied access only to the liberal aspirations of the West. To say that questions of gender equality under the law come up only for non-fundamental rights is to point to cultural particulars that reside in a grey area. Inheritance for women is often criticized as unfairly providing only half of what male relatives receive. Although this seems a clear case of gender bias, Saudi legal theory posits that the traditional economic roles of men and women justify an unequal allocation of inheritance. Furthermore, they contend that such a distribution actually works to the benefit of women, and in no way compromises women's rights to subsistence or economic viability.<sup>68</sup> In a case such as this, it is difficult to argue that discrimination constitutes invidiousness or violates the right to moral equality before the law. There is a plausible case for differential treatment so long as women enjoy fundamental legal protections and their basic needs are being met. Since legal inequalities emerge only at the level of non-fundamental rights and freedoms, these inequalities seem within the purview of decent societies to determine their socioeconomic organization.

While the above legal review is important in underlining the extent to which the Saudi government recognizes the needs of women as needs of people, experienced reality is quite different. A strong emphasis on preventing the mixing of women and unrelated men influences the organization of all aspects of Saudi life. The underlying foundation for this separation is found in cultural ideals of chastity (both male and female) and the protection of family virtue. In

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<sup>67</sup> Article 30 provides education for all Saudi citizens; Article 28 stipulates the State will facilitate job opportunities for every able person; and Article 31 provides public health care for all.

<sup>68</sup> For an example, see CEDAW, *Combined initial and second periodic reports of States Parties: Saudi Arabia*, p.11 where it is claimed that women are not treated differently because they are devalued or considered incapable of handling money, but rather that the economic organization of Saudi society makes differential inheritance advantageous for all.

practice, this means that all public spaces tend to be segregated such that there is no opportunity for women to come in contact with unknown men.<sup>69</sup> The religious ideal of separate social spheres for men and women grounds the prohibition on inter-sex contact, although it is argued by AlMunajjed that this is actually a sociocultural construction that uses a particular interpretation of the Qur'an rather than an objective Qur'anic stricture.<sup>70</sup> AlMunajjed's point is that understanding Saudi attitudes toward women requires paying as much attention to cultural forces as to religious scripture, although the fact remains that women's lives in the State are conditioned by an understanding of propriety based in both culture and religion. Because culture and religion are so intertwined in Saudi Arabia, Wahhabism, the conservative interpretation of Islam practiced in Saudi Arabia, pervades education, employment, private establishments and public spaces to uphold the separation of the sexes.

I look to evidence of invidious discrimination as a starting point for investigating moral equality before the law. In the case of Saudi Arabia the particular interpretation of Shari'a employed is often at odds with formal equality under the law as the term is understood in the West. Reference to a necessary separation of the sexes justifies legal barriers to full economic, social, and political participation by women. Thus, the denial of driver's licenses to women is understood in Saudi society as an attempt to secure the dignity of women and their families, not an expression of the unequal moral status of women.<sup>71</sup> Importantly, nowhere does the Qur'an or Saudi law claim that men and women are morally unequal. Rather, Shari'a as constructed by the Saudi government ascribes gendered roles (spheres) to its citizens and enacts laws that facilitate

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<sup>69</sup> This is the justification for denying women the right to obtain driver's licenses, the fear being that were women to drive, they would inevitably come across male strangers (e.g. gas station employees) and this would be detrimental.

<sup>70</sup> Mona AlMunajjed, *Women in Saudi Arabia Today* (New York, NY: St. Martin's Press 1997) pp.32,36

<sup>71</sup> Driving is seen as having a number of "risks" for women that would potentially place them in situations where interacting with men would be necessary. The need for gas, repairs, and dealing with traffic police is often cited as good reason to deny women the right to drive.

these ascriptions. Assuming that Saudis support gendered differences because they subscribe to the cultural practice of separate gender spheres – rather than holding that women are in fact less valuable than men – the test for invidiousness in the legal realm fails.

Conceding the point that the laws enacted by the Saudi government are not invidious does not fully answer the question of whether or not women are being denied their right to equal moral treatment under the law. Women in Saudi society are considered to be less rational and equanimous in decision making than men. For this reason they are prevented from political participation (despite the State's claim that they too pledge allegiance to the Prince), denied the right to leave the country without permission, and not allowed to testify in court. While these practices are technically compatible with moral equality, the practice of denying women these rights does not reflect moral respect. Firstly, the paternalistic attitude of men in Saudi society denies to women their full humanity. By claiming that women are too emotional to vote or be given the power of divorce, Saudi society structures its customs and laws on the notion that women are *less capable* of decision-making than men. As a factual statement, this has proven to be incorrect. Symbolically, any reduction in emotional control and intellectual capacity denotes a diminished level of moral ability.<sup>72</sup> Paternalistic behavior thus expresses the belief that women are not moral equals, despite public statements to the contrary. Beyond the issues raised by the belief that women have diminished capacities, women are often beaten by religious police for failing to follow dress code.<sup>73</sup> Widespread intimidation and the threat of official violence belie the Saudi government's avowal that women are the equals of men. Rather, by using force to ensure that women adhere to culturally conservative social norms, the government again conveys its belief that women are to be controlled by those who "know better." Thus, while there is not an

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<sup>72</sup> Consider children, who are not judged by normal standards because of their diminished emotional/intellectual capacities.

<sup>73</sup> See BBC News "Saudi Police 'Stopped' Fire Rescue" (March 15, 2002)

explicit moral devaluation of women, the patronizing practices and stifling restrictions at the fore of Saudi behavior indicate that in practice women are not perceived as equals. Paternalistic tendencies are based on the notion that an individual may not be trusted to choose for herself, and in this case has led to the socioeconomic and political relegation of women to a lower class. Even though the Saudi government denies that they consider women to be less morally worthy than men, often citing Qur'anic passages that refers to both women and men as evidence that they are moral equals, Saudi women do not enjoy equal moral treatment.<sup>74</sup>

There is one final aspect of Saudi society I would like to consider: the lack of consensus among women that their place in society is intolerable. Again I compare Saudi Arabia to India where it was clear that the discriminated-against population was very much opposed to their mistreatment and exclusion. Female opinion in Saudi Arabia appears more split. One study reported that “60 per cent of both educated and non-educated women [...] disapproved of coeducation,”<sup>75</sup> where coeducation can be taken as a proxy for desegregation. Even admitting that this number is not precise, there is still a near-majority that accepts the segregation of sexes and agrees with some of the consequent political, social, and economic disabilities and exclusions. To insist that the State take a more equal approach towards men and women when it is not clear that a majority of women are asking for these changes is an imposition of external values. To insist that the State treat all their citizens with *equal respect and moral concern*, however, is completely within the purview of the international community. Imposition of “Western” values is inappropriate when women are treated differently based on a cultural understanding of gender roles, especially when a significant portion of the female population subscribes to these roles. However, there is no imposition in requiring that the government not engage in or allow beatings

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<sup>74</sup> See the CEDAW, *Combined initial and second periodic reports of States Parties: Saudi Arabia*, p.11

<sup>75</sup> AlMunajjed, *Women in Saudi Arabia Today*, p.37

and intimidations to occur. The mistreatment of women by those who purport to uphold religious law and the implications that social practices have for the moral worth of women point to the conclusion that women are being denied their right to moral equality.

While legal differentiation is acceptable, the broad denial of political and civic rights in Saudi Arabia is based on a devaluation of female capacities and remains unjustified. Explicit invidiousness does not appear to ground the treatment of women in Saudi Arabia, although it is clear that they experience a great deal of viciousness at the hands of some state actors. Violations of Saudi women's rights extend far beyond moral equality to violations of security, freedom of movement, and conscience. Because of the surfeit of rights violations, my case that moral equality is being violated is messier than it otherwise would be. Counterfactuals abound when testing to see if the treatment of women constitutes invidious discrimination because it is clear that Saudi women suffer multiple violations of their rights. Nonetheless, I believe that the paternalistic attitude of Saudi society exposes the unjust devaluation of women independently of any other abuse of their rights.

This discussion of Saudi Arabia was meant to explore the way in which moral equality before the law may be absent even when invidiousness is not obvious. Saudi women inherit less than men, require male permission for certain travel arrangements, and must adhere to a standard of modesty that would be considered outrageous in most countries. Supposedly, women are equals of men in society and law because of their equal status in both the Qur'an and Saudi culture. More concretely, women have special provisions in the law that, when upheld, require the state to assist them in special ways that acknowledge their fragile socioeconomic position. Unfortunately, the actual treatment of women disabuses us of the notion that their rights – to security, representation, and equal moral treatment among others – are being respected. Their

status before the law expresses a disdain and mistrust of women that devalues them and lacks sufficient justification, at least under my notion of equal moral treatment.

### Review of Case Studies

The above case studies were meant to illustrate the way in which my concept of equal moral treatment under the law identifies areas of concern for the international community. The right extends beyond government actions to include what the government allows to transpire. This requires that regimes see to it that individuals and groups within their territory enjoy equal moral treatment, thereby enacting a positive duty on governments to protect citizens from mistreatment at each other's hands. The right to basic moral equality does not require that everything in society be distributed according to egalitarian principles nor does it imply that the legal code treat all individuals identically. Rather, the right is meant to provide freedom from invidious discrimination and unjust oppression. The power of equality under the law is that it works in concert with other basic human rights and that, in keeping with other minimalist rights, it is difficult to refute by appeal to cultural considerations. In the case of the Dalits we saw the way in which the enjoyment of rights that have been promised by the State is practically contingent on moral equality before the law; more strongly, even in a culture that historically denied Dalits moral equality, the current government recognizes the need to treat all citizens with equal moral respect. For Saudi women, on the other hand, the government espouses moral equality while enacting laws that deny them just that. For all its insistence on moral equality, the Saudi government continues to perpetuate abuse against women as a means of securing their support for a system which denies them certain political and social rights. In the face of this abuse, we must question the sincerity of the government's commitment to moral equality. In both cases, we

evaluate equal moral treatment in the legal and social realms, holding governments to account for the treatment of citizens beyond the strict sphere of government actors.

This chapter has been largely exploratory and does not purport to make recommendations on what is to be done in cases in which equal moral treatment is absent. Rather, I hope to have shown that even illiberal governments generally recognize that equal moral treatment, if not actual respect, is owed to their citizens. This recognition is aligned with my conception of human rights as internationally expected behaviors and moral aspirations. These expectations extend beyond direct government actions, moreover, and governments are often responsible for the agenda and tactics used by non-state actors. If the positive duties that arise from the right to equal moral treatment are more difficult to realize, all the better reason for elaborating what this right means.

### **Ch. 3: Objections and Responses**

This final chapter is designed to address objections to the above conception of moral equality under the law. Although this chapter is meant to give a more robust defense of moral equality as a human right, questions will undoubtedly remain. Nonetheless, it is my hope that the following pages will offer some defensive of a contentious stance on human rights.

#### *1. Rawlsian Formal Equality Covers Moral Equality before the Law*

In *The Law of Peoples* Rawls calls for formal equality (that like cases be treated similarly) as a necessary human right that regimes must respect to be considered decent.<sup>76</sup> To many philosophers, this is enough. I believe that my account of moral equality differs from his because my account of moral equality requires that regimes provide their citizens that which is due to moral equals. As I have previously stated, the origin of Rawlsian rights is unclear, since he identifies human rights by reference to overlapping consensus among decent peoples but also uses these rights as a measure of decency among peoples. For the present purposes, let us assume that decency is grounded elsewhere, that human rights are identified by overlapping consensus, and that respect for human rights is necessary for a peoples to continue being considered decent. Rawls is motivated by a desire to conceive of certain non-liberal traditions as politically decent and restricts equality rights to those of formal equality. Formal equality under Rawls is sensitive to the different traditions of peoples and requires that individuals be treated similarly in similar cases. For example, a society would be indecent if cases were judged differently on the basis of familial ties between those in power and individuals. Formal equality must extend fairly across

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<sup>76</sup>John Rawls, *The Law of Peoples* p.65

the population, giving each individual the same formal parameters as their peers under similar circumstances, but does not require that regimes extend equal legal rights to all its members.<sup>77</sup>

My account of moral equality goes beyond the Rawlsian requirement of formal equality to hold governments responsible for treating all people with moral respect. Formal equality under Rawls's account is compatible with widely differential treatment among classes of people. To the extent that other basic human rights are secured and a decent consultation hierarchy is in place, Rawls does not view legalized social differentiation as a barrier to decency. His view on equality rights is overly lenient, however, and admits too many variations in the treatment of persons. Rawls uses the example of Kazanistan, an imaginary Muslim country with a decent hierarchical structure and a legal system that grants all fundamental rights to citizens while reserving for Muslims the right to hold political office. Let us imagine that Kazanistan reserves for Muslims not just the right to political office, but also the right to an education past elementary school and the right to hold other important public office, like becoming a police officer. Kazanistan's intentions are not bad, it truly believes that non-Muslims are not well served by additional education and are ill-suited for positions of authority. Moreover, because of the consultation hierarchy, should a majority of its non-Muslim citizens want to assume these positions the government would reevaluate its position. Of course, with only limited education and lacking non-Muslim role-models in positions of authority, most of the non-Muslim population will be unable to see why they should demand such concession from the government; while some individuals may aspire to higher education, it is likely that most people will be content with having their opinions valued in society and having decent social and economic opportunities.

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<sup>77</sup> Rawls' discussion of Kazanistan in *The Law of Peoples* is a good example of the way in which formal equality does not secure full legal equality for all persons.

My aim here is to show that there are further expectations and aspirations that the government should address, not that the government is in fact indecent. In the above scenario, a paternalistic government with the best interest of its population in mind has enacted a series of policies that limits the chances for intellectual and occupational development in a portion of its population. While this is done with the best of intentions, it is clear from these policies that the government has serious doubts about the intellectual capacity of its non-Muslim citizens. Insofar as the government treats this population as a ward to be watched over, something it must do since it fails to see in them much capacity for leadership or intelligence, it views them as less than equals. Just as we do not hold children or the mentally disabled to the same moral and social standards as the average individual, so too must the government view non-Muslims as needing special provisions.

I do not require that governments make full legal equality a reality, but rather that peoples and their regimes to secure for every individual the right to equal moral respect by both their government and neighbors. We expect governments of the world to enact policies that treat individuals as moral equals, and on this test the modified-Kazanistan fails. The good will showed by the government of modified-Kanzanistan makes them a good candidate for aspiring to equal moral treatment, however, and I see no reason, besides ignorance about the capacities of non-Muslims, for the government to support the policies it does. Under Rawls's account, the decency of the government and its application of formal equality are sufficient. I argue that, with moral equality before the law as a human-right-as-aspiration/expectation, the government should be encouraged to extend its policies to non-Muslims. Further, I believe that in reality many cases of legal differentiation are inspired by differential moral concern at the institutional level and that legal inequality will diminish as moral equality is observed. While I share Rawls's opinion that

societies may be decent without extending to each member equal legal status, I place greater emphasis on the respect that each person should be afforded and the role that the international community plays in sustaining such an expectation.

## *2. The Case for Moral Equality is Simply a Concern for other Rights*

I acknowledge that much of the discussion of moral equality as a right has dealt with the violation of other human rights. The examples presented of India and Saudi Arabia reveal the extent to which discriminated-against or marginalized social groups often live without security, subsistence, and representation rights. It is easy to view my opposition to discrimination as rooted in the violation of these rights and not primarily concerned with the right to moral equality.

Although I have previously spoken to this issue, I believe that it warrants discussion here since misunderstandings about my focus on rights will undermine my project.

In practice, the realization of certain rights is dependent on other rights or considerations. For example, the right to subsistence is dependent on education in the US. This raises the question of whether or not education is a right, since in the US it is required for economic prospects. Insofar as subsistence is contingent on a certain level of education, it would seem that this level of education must be assured for all persons in a given society. There may be good reasons for not calling education a human right; most obviously, its contingent relation to other rights would make it a contingent right, and human rights are supposed to be those required provisions which are non-contingent. Thus, while education is not a right in itself, societies in which education is required for any kind of occupation violate subsistence rights when they fail to provide education for all of its citizens.

I reject the notion that my account of moral equality under the law is a right in this contingent fashion. Certainly, when moral equality before the law is lacking abuses of human rights is more likely to occur and, to the extent that greater moral equality reduces these abuses, there is good reason to promote equality rights. The right is not purely instrumental, however. Adults, as far as they are normally developed individuals in good moral standing, deserve equal moral recognition by their society.<sup>78</sup> I argue that this is a right because, as the case of Saudi women shows, approaching a segment of the population as pseudo-adults in need of paternalistic care diminishes their personhood in the eyes of the government, even when other fundamental rights are being met; that is, equal moral standing prevents an official belief that some members of society are unable to determine what is best for their lives and must have their choices made for them. The Saudi case also exposes the way in which professions of moral equality are often made without substance; when women are routinely abused and denied the ability to leave the country or their homes without the consent of their male guardian, equal moral treatment is lacking in their lives.

Like other basic human rights, equal moral treatment is necessary for living a good life. This is not a cultural claim about the autonomy of individuals or the importance of having proper legal protections. Rather, treating individuals as moral equals acknowledges that persons are as capable of enjoying human rights and life as anyone else; it reflects the belief that individuals have opinions and feelings as worthy as concern as anyone else's. This is most clear when a society violates only the right to moral equality, admittedly an unlikely and highly untenable circumstance. In such a case, it is likely that individuals will suffer some negative psychological

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<sup>78</sup> By normally developed I mean that individuals have acquired the emotional, cognitive, and moral faculties that are thought commensurate with adulthood. Those with deficient faculties can and often should be given special considerations in society. My point is not to discuss these considerations but rather to offer a basis for basic human similarity.

effects caused the knowledge that others in society do not respect their capacity for pain or the worth of their values. As humans are social animals, such a denial of moral worth may lead to internalization of these opinions. Moral equality is not consequentially based, however, and independent of how individuals react to such a denial of moral respect, it is compelling to think that among our list of expectations for foreign countries, equal moral treatment should be on the list.

I do not deny that moral equality, like education, is often a necessary condition for the fulfillment of other, more widely recognized human rights. It is a right on its own, however, and holds for persons across cultures and ideologies. Insofar as human rights are meant to secure basic human provisions for all individuals, a basic level of moral respect is a necessary component.

### *3. Calling for Equal Moral Concern is an Unreasonable Breach of Personal Autonomy*

I foresee resistance to my construal of moral equality on the basis of the perception that my project is really an attempt to dictate the attitudes and beliefs of individuals. If this is in fact the case, my account has a real problem. My project has focused on securing basic human rights for individuals in the world and an imposition of attitudes and beliefs on others is at odds with the project of human rights. It seems that such an imposition is intolerable to the extent that I truly promote human rights, for how could I claim that a human right requires people to believe that which I desire for them believe? However, my account does not necessarily demand that individuals enjoy moral equality in the minds of every person they meet. Rather, I call on regimes and organizations around the world to secure equal moral *treatment* for individuals. This is a potentially contentious requirement, since it looks like a dilution of my assertion that persons

have the right to moral equality. There are two ways that I attempt to clarify my intention in writing about equal moral treatment as a human right.

First, the purview of human rights is the political treatment of individuals and their respective groups. I would like to posit that each person has an obligation to regard all other persons as morally equal, but I will refrain from doing so since such a position seems unlikely to be accepted by many people around the world. Furthermore, the personal attitudes of individuals are thought to be important to human rights only to the extent that these attitudes affect relations among individuals and groups. Human rights work to secure the *material conditions* that allow for a decent life and to regulate *interpersonal and inter-entity relationships* in order to ensure that no one is treated unfairly. For this reason, my construal of moral equality as a human right is really a requirement that persons be treated according to a standard of moral equality. Groups and individuals interested in respect for human rights care foremost about the respect that is shown to individuals as members of the human race.

A second and closely related point is that actions are generally expressive of deeper personal attitudes and beliefs. Of course, individuals are widely variable and cognitive dissonance touches almost every person in some aspect; it is natural, therefore, that some behaviors will not be indicative of any deeper commitments and will in some cases run counter to the beliefs that individuals hold. However, it would be a mistake to deny that actions have expressive value on this basis. To achieve a certain level of equal moral treatment in sociopolitical conditions is to express the belief that people are genuine moral equals. I concede that within any society there will be individuals who disagree with this belief, even when acting in a manner consistent with equal moral treatment. Reference to the aim of human rights is once again helpful: because the project of human rights is to secure the conditions and relationships necessary for a decent life,

and promoting a society in which all members are treated as moral equals goes a long way toward achieving this. Individuals within such a society will regard their moral equality as a social reality and should view detractors as those anomalous individuals who deviate from important social and moral norms. I believe that consistent moral regard by society – which is only intelligible as the *treatment* of persons as moral equals – will eventually lead more people to sincerely hold the opinion that others are equally worthy of moral respect. This picture of a “fake it ’til you make it” society may not be fully sincere in extending moral equality rights to others, but should be taken as a good-faith effort that the moral aspirations of human rights are shared and should help move individuals and society toward a more equitable moral understanding.

I have argued that the treatment of persons as moral equals fulfills the standards of moral equality as a human right. There may be cases in which, despite treatment in accordance with the principles of moral equality, persons feel that they are unfairly regarded as morally unequal and want some recourse. I am unclear about what such a case would warrant, provided that these individuals actually *experience* social and personal life as a moral equals.<sup>79</sup> Perhaps there are good moral reasons for considering individuals responsible for their attitudes independently of their actions. I doubt it, however, since even moral philosophy reaches a point in which an individual’s thoughts are her own to dictate. We may criticize someone who believes that others are morally inferior, but so long as they continue to treat other agents as moral equals we are very far removed from the realm of human rights. Human rights are not meant to inculcate in each person a commitment to egalitarian principles, nor to regulate the way in which others are viewed in our mind. We can only observe moral equality on the basis of interpersonal and political

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<sup>79</sup> That is, all public references made about them or their groups treats them as moral equals and they are not denied any social or economic opportunities on the basis of their diminished moral or human status (or proxies for either of these).

treatment anyway, making our understanding of the beliefs and attitudes of others speculative at best.

#### 4. The Concept of Moral Equality Under the Law Is Suspiciously Antithetical to Some Cultures

I return to a defense against claims to cultural particularity because it is specifically this claim that moral equality must overcome to be accepted by both minimalists and participants in non-Western cultures. As my discussion of moral equality as a non-contingent human right aimed to show, moral equality has the potential to be confused with other interests within human rights. The most likely criticism to be made of moral equality is that it attempts to promote a Western conception of the inherent autonomy and equality of persons – an ideal that is not accepted in some traditions. The cases of both India and Saudi Arabia showed that some cultures, often under strong influence by religious interpretations, explicitly deny the equality of all individuals. Hindus believe Dalits to be of compromised moral worth and deserving of their low station in life; Saudis profess that women are moral equals, but also hold that women have emotional deficiencies and irrational characteristics that make them unfit for widespread social engagement and legal testimony. It may seem that these cases, coupled with others from around the world, point to a strong interest in many cultures for retaining traditional understandings of persons and classes. I believe that my account of moral equality, even when it explicitly opposes the practices of other cultures, is defensible.

That certain cultures make a distinction among classes of people within society does not excuse these societies from treating all of their members with equal moral respect. This is not to say that societies must treat all of their members equally, but only that the treatment of persons must be compatible with an understanding of all people as moral peers; thus, people should not be

treated in a manner that would suggest them to be of less moral value than others, which is to say that a society should not be organized around the idea that the beliefs and feelings of some are less valuable than the beliefs and feelings of others. I concede, as I have previously, that some forms of inequality may be justifiable provided that discrimination is compatible with equal moral respect. Hindu society, however, remains deeply unjust so long as it continues to assert the Dalit's lack of moral worth. Some in Hindu society may claim that this is culturally imperialistic. The Dalits do not, nor would I imagine that Hindus would support such a system of codified privilege if they abstracted from their actual position to dispassionately consider the matter. There is no moral justification for treating a class of people as less worthy of moral regard on speculative grounds; perhaps culture dictates that certain forms of contact should be avoided, but this can be done without wholesale moral degradation. Inequality is often acceptable, and might be in India if the hierarchical practices of Hindu society were not expressive of such moral disdain for Dalits.

It is not culturally imperialistic to claim that all people have the right to basic moral concern equal to that of their peers. It would be imperialistic to assert that cultural and political hierarchies are inherently immoral, but moral equality only calls on Hindu society to treat all members with equal moral respect, not to dismantle the entire social organization. If Dalits were afforded the same moral regard as others, their occupation of the lower rungs of society would still be undesirable and perhaps unjust, but it would at least avoid being compounded with semi-dehumanization.

This point is expandable and should be modified to fit whichever case is being considered. Societies that hold a certain group in lower moral regard than the rest of its members (provided that we're not talking about criminals or some other group of demonstrable moral impairment) deny their members the chance to enjoy full moral participation in social life. Impairment

includes a discounting of moral evaluations, a belief that certain members are less worthy of rights and protections, and the conviction that greater abuse than is normally tolerated may be perpetrated in light of this unworthiness. A society that allows all of these is not only unjust, it is indecent.

##### 5. Does This Account Cover Cases of Group-Espoused Moral Superiority?

My concern in advancing equal moral treatment as a human right has been the diminution of unjust and indecent practices toward marginalized and culturally devalued groups. However, there are times when moral inequality is espoused because some social groups construe themselves as worthy of additional moral regard. I am speaking here of cases in which groups judge themselves to be morally superior to other groups. These cases have a different moral and social quality than the cases I previously considered since the relation between a large body and a smaller marginalized group is generally one of social exclusion; in the case of a small group that believes itself to be morally superior to a larger population of more or less equal moral worth, how do we understand claims to unequal moral worth?

This is an interesting question, not least because of the various forms in which it presents itself. This paper has been concerned with securing for marginalized persons a right to equal moral treatment, so I discuss the issue of superior moral worth only because it presents a unique problem for my account. Generally, I believe that groups assert their superior worth in one of two situations: 1) groups occupy a superior social, cultural, and economic status thereby constituting a ruling class that is self-justified by reference to their superior moral worth or, 2) superior moral worth is advanced as a means of inculcating group solidarity in a group. I will begin discussion with the first case.

The superior moral worth of a small group of persons has been useful, historically, in retaining positions of power and prestige. European monarchs, white, landed American males, and Chinese emperors have all justified their monopolistic exercise of power by reference to their superior moral worth. Both monarchs and dynastic emperors touted themselves as the group chosen by God(s) to lead the people. Their claims to moral superiority were not based on the inhumanity or compromised moral faculties of the rest of society, but rather originated from a special relationship with deities. They were superhuman and endowed with a greater moral worth consistent with this.

A case in which moral superiority is based on superhuman status is a tricky situation. It appears as though such rulers, at least theoretically, upheld the moral equality of all people; however, their self-conceived position as more-than-human allowed them to assert a greater moral importance and to demand preferential moral treatment. I have trouble understanding such a position under the framework of human rights since modern theocracies do not frame their rule in these moral terms. If a nation did arise in which a ruling family justified their stranglehold on state power by reference to their superior moral worth, perhaps some reference to human rights would seem natural. Although it is unlikely that rulers espousing such a claim would be more oppressive or cruel than the standard dictator, and equal moral treatment would certainly not be the leading complaint of the international community, leadership by superhumans unfairly discounts the projects and *common humanity* of others. Of course, such a denial of commonality on the basis of shared humanity is precisely the point, but much modern philosophic and political thought explicitly deny the validity of such a point. If you find the example ludicrous, please disregard this discussion, but I believe that it shows that asserted moral superiority is a violation of the rights of persons to be treated as moral equals.

The second case deals with a small group in which the moral superiority of the members is asserted as a means of establishing group solidarity. This could come about as a reaction to cultural devaluation by the rest of society, a sense that the group is morally superior based on racist or otherwise-biased characteristics, or action on the part of group leaders to strengthen feelings of support and belonging amongst members of the group. In any event, the group in this case may feel that their projects, feelings, considerations and moral judgments are worth more than those of other members in their society. I conceive of this example so that the group holds themselves *as better* than the majority of society. Their superiority perhaps originates from mental or moral faculties self-evaluated as superior, a special insight into life's truths, or some other self-congratulatory assessment. Imagine a group of Nietzscheans convinced of their own superior moral worth, believing that they are justified in killing whomever and taking whatever they want since they are endowed with the special character of the overman. What should be said about their self-obsession and refusal to acknowledge the equal moral worth of others?

I hesitate to pursue this line of thinking too far. There are and probably always will be individuals and groups who believe themselves to be special and fail to concern themselves with the vast majority of humans who they consider to be of lower status. Provided that these persons have no special power or influence in their societies, I have trouble identifying the issue as one of human rights or even of pressing concern. They have, to be sure, violated their obligation to consider others as equal moral entities. Whether or not they actually mistreat other people on the basis of their unequal moral worth, their societies have good cause for criticizing their thinking. Still, this case does not qualify as a violation of human rights to be addressed in international discourse. It falls more appropriately under the purview of the relevant society, which has good cause to oppose group feelings of special moral entitlement.

## 6. The Problem of Monitoring and Enforcement

The above discussions have meant to serve as a clarification on the limits and contours of equal moral treatment under the law. The two points have not been addressed, however, are the problems of monitoring moral treatment and what is to be done in the face of violations. Although these are issues for the social sciences, I offer some considerations that political scientists, sociologists, and others may find useful.

The issue of monitoring is made difficult by the inherently moral nature of this human right. As noted in section 3, my concept does not demand universalizing moral attitudes or beliefs and instead concerns itself with treatment. To discover whether a society treats its members with equal moral regard is complicated. Equal moral treatment is compatible with such a variety of actions and organizational structures that societies which uphold this right may have vastly different compositions. While *a priori* benchmarks may not be possible, I believe that a few considerations can act as good guide to determining which practices are acceptable and which violate a right to equal moral treatment.

First, persons in a society must accept, to some degree, their position and treatment in society. Any society will have disgruntled members who feel unfairly put upon or discriminated against by their society; however, when such an opinion is widely held within socially salient groups, there is often a good reason. Putting aside groups which thrive on martyrdom, widespread feelings of oppression – especially when coupled with an irresponsive society – are a good indicator that individuals are being denied important social consideration. A second variable to explore is the explanation that society and regimes provide for differential treatment of classes and individuals. Many cases of rigid social determination are justified by reference to paternalistic

concerns, especially the idea that certain social groups are unable to properly judge what is good for themselves and must be watched over by the larger society. Such concerns are appropriate when applied to children, the chronically criminal, or the developmentally disabled. Applying these justifications to groups that do not share the requisite qualities of the abnormally or insufficiently developed is unjust. Paternalism towards women, lower social classes, religious minorities, or indigenous peoples is founded on mistaken notions of moral and intellectual capacity and is generally indefensible; judgments of diminished capacity are usually accompanied by devaluation in moral worth. The justifications that societies offer is a good point of exploration for possible moral devaluation. A final point of interest for monitoring the moral treatment of persons is the outcome of socially distributed goods and opportunities. Non-consequentialist moral evaluation is sensitive to the outcomes of action and evaluating the practices of other societies should be no different. A distribution scheme in which certain classes of people are perpetually relegated to the lowest echelons of the economic and social spheres is likely detrimental to the aspirations, self-perception, and personal identity of this group. It is, moreover, likely a result of diminished moral concern, if not outright moral devaluation. As harm becomes more apparent and is distributed according to established social groups, the perceived moral worth of these groups in their society comes into question. I have previously asserted that some forms of hierarchical social organization may be compatible with and reflect equal moral respect, but the more lopsided the distribution of social goods and harms is, the more questions and suspicions are raised in the minds of others.

I believe the above three considerations constitute a good starting point for the investigation of equal moral treatment. Societies are complicated and a fuller understanding is necessary before making judgments about the moral treatment of persons. Still, I find the above

aspects to be useful and generally indicative of the regard in which people are held more broadly. I turn now to the issue of what is to be done when regimes violate their members' right to equal moral treatment. Again, I offer only helpful considerations, not hard and fast rules, and I certainly do not suppose that the following considerations will be the end of discussion.

Following my account of human rights as international expectations and moral aspirations, I see a few potential responses to unequal moral treatment. We can imagine cases like that of the Dalits in which censure is surely appropriate. Both the international community and persons within India have an interest in ensuring the government respects the right of Dalits to equal moral treatment. When regimes are unwilling to do so, public expressions of disapproval – such as those used by Dalits in demanding greater government protection – are useful. Although criticism is at best marginally helpful, and at worst incites defensive reactions in governments, it is part of the process of expressing which expectations the international community holds. Additionally, criticism may provide an area of shared moral aspiration for the morally mistreated persons within a society. The Dalits had great success obtaining the support of international organizations in part because they saw the discourse on human rights with its emphasis on non-discrimination as aligned with their own project of equality.

Neither ignoring the issue nor military intervention seems to be an appropriate response to a violation of equal moral treatment. Perhaps low levels of unequal moral treatment would fail to justify foreign action, or would better be combated by an alternative strategy. We can imagine such a case by revisiting the group that casts itself as morally superior without any social or political influence. Such cases fail meet the threshold for human rights abuse and would not require any official response. Still, it seems in the interest of human rights generally to encourage, even ever-so-slightly, foreign governments to pursue greater moral equality in dealings with their

citizens. I cannot imagine cases in which intervention would be required, except where many rights were being systemically and grossly violated and political negotiations had completely broken down. Again, I will not speculate on the conditions under which intervention would be justified except to say that far more than moral disrespect would likely be required.

## **Conclusion**

This paper has attempted to articulate a moral requirement that holds across cultures and political systems. I believe that the right to equal moral treatment is fundamental in both interpersonal and sociopolitical relations. Because I believe this tenet is acceptable to different cultures and traditions, I think it is well-placed to assume a position among a limited number of human rights proper. Equal moral treatment is useful whether human rights proper are used to establish decency or simply to articulate serious expectations on the part of the international community. The requirement of equal moral treatment coheres with other human rights proper by asserting the right to a basic level of respect that does not depend on any particular intellectual or moral tradition for grounding. It is a tenet to which most people can subscribe, and I contend that those who do not have good reason to reevaluate their perspective on discriminated-against groups.

Although I have touched a number of concerns, there are many that I have not discussed. The point has been raised that some people may feel entitled to greater non-moral concern, and that parts of our legal system, at least in the U.S., are responsive to this.<sup>80</sup> Provided that these legal structures occur in decent societies, I have few intuitions about the possible wrongness of such assertions and I feel that such a topic is beyond my scope. I have also left out of my paper serious policy recommendations. Although I view human rights as expressing expectations and moral commitments, this is more of a reflection on the role rights currently play than on the role I believe they should serve. That I partially defer to the field international relations is not to say that I leave politics entirely to the politicians. I think my theory of equal moral treatment is as successful under a Rawlsian framework as it is under more “realist” perspective. Still, I have been

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<sup>80</sup> My thanks to Lionel McPherson for raising this point.

careful not to recommend too many state actions as my focus is more on the moral component of human rights than it is on the feasibility of enacting change in the international human rights system.

Returning to Rawls, I previously suggested that equal moral treatment may be a good place to begin grounding a notion of decency. Of course, if equal moral treatment is used in grounding decency, then its status as a human right will have to be revoked. That is, equal moral treatment will become a provision more basic than human rights, something owed to people regardless of which human rights are identified by overlapping consensus. I accept this conclusion and believe it is compatible with my account of equal moral treatment. As a consideration more basic than human rights, equal moral treatment would require moral grounding outside of the comprehensive doctrines of decent peoples. Whether this provision is basic enough to ground decency remains to be proved or refuted. I propose that further work be done in this area, since I feel it is a topic that deserves separate and in-depth treatment.

Still, I am happy enough positing equal moral treatment as a human right and arguing that it is something to which all peoples can aspire and show respect. In this paper I have argued that equal moral treatment should be considered a human right because it serves the role of human rights in articulating international expectations and moral aspirations. As a provision for a good life, equal moral treatment provides individuals a guarantee of basic regard within their society and the promise of a sympathetic foreign audience should this aspiration fail to be realized.

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