

# Cross-Cultural Analogues for the UDHR: Ethnographic Foundation for the Identification of Genuinely “Human” Rights

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## I. Identifying a Human Right Through the Least Common Denominator

Taking the category of “human rights” as given, the next challenge is to identify the rights that deserve this honorific. Failures to meaningfully distinguish human rights from civil and other rights, as well as social and religious norms, can result in the rhetorical expansion of rights claiming this privileged status, to the arguable result that the impact of the appeal diminishes.<sup>1</sup>

The top-down approach that characterizes the identification of international human rights has resulted in several negative consequences. The most troubling is perhaps the perception that the drafting process amounts to little more than the imposition of one culture’s values as normatively prescriptive for all. A better strategy seeks to identify human rights that can claim to be universal while respecting the broader range of human cultural diversity. The central

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<sup>1</sup> Hurst Hannum, *Rescuing Human Rights: A Radically Moderate Proposal* (Cambridge University Press, 2019).

premise of such a project would be that, if the idea of the “human right” concerns *human* rights, their identification should spark consensual recognition by the widest range of human societies. Human rights should, in other words, converge with the underlying values of most successful groups. There need not be one-to-one isomorphism, and indigenous principles may need translation into modern legal statements. The underlying principle, however, should be sensible to any population.

Instead of the top-down transplant of human rights, several writers have suggested that they should be built bottom-up upon the values that societies actually have.<sup>2</sup> This is the “least common denominator” method closely associated with early work from Alison Dundes Renteln.<sup>3</sup> The argument begins with the observation that societies are adaptive responses to panhuman problems rooted in the universal experience of “human frailty” such as shelter, sustenance, reproduction, and security.<sup>4</sup> Because these common challenges are best approached in groups rather than individually (*i.e.*, hunting large animals, defense against opposing groups), much of the stuff of social living concerns balancing individual desires and motivations with cooperative goals.<sup>5</sup> The expectation is that anything claiming to be a human

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<sup>2</sup> “A committed vanguard of scholars has arisen to resolve, in a sense, the tension between cultural diversity and the universalist program of international human rights by identifying those points at which cultural traditions overlap in a way that reconciles them to both the idea and the substantive content of international human rights.” GOODALE, *supra* note \_\_\_\_\_, at 80.

<sup>3</sup> ALISON DUNDES RENTELN, *INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM* (1990).

<sup>4</sup> Turner, *supra* note \_\_\_\_\_, at 504 (“The argument is that we can, in the absence of natural law, avoid sociological relativism through a re-interpretation of philosophical anthropology to assert an ontology of rights in the claim that human frailty is a universal feature of human existence.”).

<sup>5</sup> See, e.g., Bronislaw Malinowski, *The Group and the Individual in Functional Analysis*, 44 AMER. J. SOC. 938, 949 (1939). See also ALAN GEWIRTH, *THE COMMUNITY OF RIGHTS* 67 (1996) (“The universality of human rights ... is a direct consequence of the universality of the needs of agency among all human being.”).

universal will relate to those broad interests rather than the more specialized problems that arise in only a few forms of political organizations or modern economies.

In the literature this is sometimes called the Least Common Denominator [LCD] approach.<sup>6</sup>

Noting that “to date negligible progress has been made in the direction of establishing that human rights are universal or even that certain moral principles are widely shared,”<sup>7</sup> Renteln

devises a method that recognizes the bounded diversity of cultures, one that seeks

“homeomorphic equivalents” of proposed rights in each culture.<sup>8</sup> Reviewing the literature, she

finds support to propose rules regulating retribution as a candidate universal principle.<sup>9</sup> By

employing independent methods—ethnographic descriptions and tenets of major religious

traditions, and cases examples of blood money and the feud—Renteln feels justified in

concluding that “all cultures have mechanisms which are intended to limit violence and to

prevent needless killing.”<sup>10</sup>

This result does not lead directly to the claim that a right against excessive punishment is a

cross-cultural universal, but it does support a practical reliance on a preexisting indigenous

ethos capable of providing “a foundation for human rights.” The general methodological

conclusion is that “where it is possible to demonstrate acceptance of a moral principle or value

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<sup>6</sup> See, e.g., MELVILLE HERSKOVITS, CULTURAL RELATIVISM: PERSPECTIVES IN CULTURAL PLURALISM 31-32 (1972) (“*Absolutes* are fixed, and, as far as convention is concerned, are not admitted to have variation, to differ from culture to culture, from epoch to epoch. *Universals*, on the other hand, are those least common denominators to be extracted from the range of variation that all phenomena of the natural or cultural world manifest.”).

<sup>7</sup> Renteln at 95.

<sup>8</sup> *Id.* at 11.

<sup>9</sup> *Id.* at 95-96.

<sup>10</sup> *Id.* at 133.

by all cultures, it will be feasible to erect human-rights standards. The reality of universality depends on marshaling cross-cultural data.”<sup>11</sup>

While the LCD method will not prove the cross-cultural salience of the concept of human rights as a category—which may indeed be a culturally specific way to articulate the generalization—it does promise an empirical foundation upon which to argue that a particular right reflects broad human values. If we accept that “[a]fter a century of ethnographic work, anthropologists believe that all societies have human rights propositions,”<sup>12</sup> the LCD project appears feasible in theory and can lead to a defensible method to identify just what those rights may be: “where it is possible to demonstrate acceptance of a moral principle or value by all cultures, it will be feasible to erect human-rights standards. The reality of universality depends on marshaling cross-cultural data.”<sup>13</sup>

The project Renteln describes has not, to this author’s awareness, been undertaken. The feasibility of the approach shall therefore be tested by identifying which of the rights within the UDHR, the first formal listing of the consensual human rights, are supported by a broad range of cultural norms, and thus deserve recognition as “human” rights.

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<sup>11</sup> *Id.* at 135.

<sup>12</sup> Theodore E. Downing, *Human Rights Research: The Challenge for Anthropologist*, in HUMAN RIGHTS AND ANTHROPOLOGY 9, 10 (Theodore E. Downing & Gilbert Kushner, eds., 1988).

<sup>13</sup> Renteln, 111-112.

## II. The Expansion of Human Rights<sup>14</sup>

From the initial declaration in 1948, the number of human rights formally identified—to say nothing of the informally claimed—increases every year. Even granting that the initial statement by the UDHR was sufficiently limited to the most cross-culturally defensible standards of acceptable protections—an assumption we shall later test—later accretions impose ever more exacting demands. According to a tally offered by Eric Posner, the “number of human rights increased from 20 in 1975, to 100 in 1980, to 175 in 1990, to 300” in 2014.”<sup>15</sup> From a different perspective, while there were almost no international instruments on human rights before WWII, by the end of the twentieth century there were “two hundred assorted declarations, conventions, protocols, treaties, charters, and agreements, all dealing with the realization of human rights in the world.”<sup>16</sup> The ever-growing number of elemental human rights tracks a tendency to frame a growing percentage of conflicts through that same vocabulary. It is questionable whether the increased appeal to human rights has resulted in a corresponding improvement in the complained conditions,<sup>17</sup> or whether the reflexive use of that argument has drained it of persuasive impact.

Perhaps one reason why claimed violations fail to trigger the desired responses may be that the growing roster of human rights does not always respect the diversity of values within the world’s cultures. A common complaint has been that the purportedly human rights are only the

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<sup>14</sup> Early sections of this paper draw heavily upon arguments more fully developed in James M. Donovan, *Human Rights: From Legal Transplants to Fair Translation*, (2017). 34(3) WISCONSIN INTERNATIONAL LAW JOURNAL 475-534.

<sup>15</sup> POSNER, *supra* note \_\_\_\_\_, at 92.

<sup>16</sup> Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting & Intent* 20 (University of Pennsylvania Press, 1999).

<sup>17</sup> Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1989 (2002).

ideals of Westerners projected outward as hegemonic demands upon subordinate Others, “an updated version of the civilizing mission of Western imperialists.”<sup>18</sup>

Taking the human rights regime as a practical reality, this paper considers how that project can better achieve its promise to guarantee core rights to all persons—all *humans*—without requiring that they surrender the things that they understand make them human in the first place. The premise is that a method that better identifies norms that truly warrant the label *human*—that is to say, cross-culturally meaningful—is likely to yield a well-defined and limited roster of human rights, and thereby make their invocation more powerful for being both rare and uncontroversial.

While experts may prefer an ostensive definition that defines “human rights” by pointing to clear exemplars, such a method limits the category to the rights in relevant legal documents. Human rights become just whatever the international agencies say they are. For all intents the category label has been applied after a list has been identified to do the political and legal work required by the drafters. The term “human rights” should not then be taken too literally other than to demarcate the list generated by sundry motives.

Most ordinary speakers, however, adopt a more natural approach that takes seriously the meanings of the words used to mark the concept. Typical in this regard is the definition offered by philosopher Richard Wasserstrom:

If any right is a *human* right, it must, I believe, have at least four very general characteristics. First, it must be possessed by all human beings, as well as only by

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<sup>18</sup> ERIC POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* 68 (2014)

human beings. Second, because it is the same right that all human beings possess, it must be possessed equally by all human beings. Third, because human rights are possessed by all human beings, we can rule out as possible candidates any of those rights which one might have in virtue of occupying any particular status or relationship, such as that of parent, president, or promisee. And fourth, if there are any human rights, they have the additional characteristic of being assertable, in a manner of speaking, 'against the whole world.' That is to say, because they are rights that are not possessed in virtue of any contingent status or relationship, they are rights that can be claimed equally against any and every other human being.<sup>19</sup>

Lest Wasserstrom's definition is thought to be too abstract, it should be noted that it varies only slightly from that given by the United Nations:

Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.<sup>20</sup>

By any definition human rights shoulder an unenviable burden. This new legal creation emerged from the aftermath of Nazi atrocities which were, at the time they were committed, not technically illegal. Under the norms of state sovereignty under the Westphalian

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<sup>19</sup> Richard Wasserstrom, *Rights, Human Rights, and Racial Discrimination*, 61 J. PHIL. 628, 631-632 (1964).

<sup>20</sup> United Nations, Office of the High Commissioner, *What Are Human Rights?*, <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx>.

international order, a state was generally permitted to treat its own citizens however it wished. Human rights aspire to pierce this veil of state immunity from outside intervention by providing an unquestioned and unquestionable floor of protections from state action for every citizen. To be effective in this work, human rights must be unchallenged in the broad strokes, with disagreement limited only to whether a contested action falls within the forbidden category. Invocation of human rights serves as shield against aggression by state actors, as a superior claim in arguments against which no higher principle can be invoked, and as burden-shifter that puts it upon the other party to defend its actions. To create this impact “universal human rights in their dominant register (i.e., the one expressed through instruments like the UDHR), are above politics, before culture, and, quite literally, outside of history.”<sup>21</sup> Against mandates of such authority a state could not, for example, assert a right to torture political prisoners, but only that these individuals were criminals, not political prisoners, and in any event were being subjected only to “enhanced interrogation,” not torture.<sup>22</sup>

One need not question whatever good has flowed from the international regime of human rights to notice that its benefits and burdens have not been evenly distributed. While marketed as a demanding standard for all, the contents appear to elevate normative values already held by some, at least to the extent that they can be employed as a critical lash against others while ignoring more local shortcomings. As noted by one legal historian, under American

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<sup>21</sup> Mark Goodale, *The Power of Right(s): Tracking Empires of law and New Modes of Social Resistance in Bolivia (and Elsewhere)*, in *THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL* 130, 144 (Mark Goodale & Sally Engle Merry eds., 2007)

<sup>22</sup> E.g., Talal Asad, *On Torture, or Cruel, Inhuman and Degrading Punishment*, in *HUMAN RIGHTS, CULTURE & CONTEXT: ANTHROPOLOGICAL PERSPECTIVES* 111, 120 (Richard A. Wilson ed., 1997).

exceptionalism human rights are openly looked upon as “export commodities – goods shipped off to others in faraway places, but rarely considered fit for domestic consumption.”<sup>23</sup>

In the meantime, those in “faraway places” may not share our view that the demands being made are either good or right, and may even think them to be the opposite. When others fail to recognize the relevance of human rights claims, we tend to criticize them as barbarians or inhumane. The challenge suggested here is that we should perhaps reconsider the latent messages of those human rights, and whether they are truly “human” rights in the sense described by Wasserstrom.

The fear is that

Instead of serving as a bulwark against fascism and the oppression of the weak, a declaration of human rights would, eventually, no matter how well intentioned, tend toward the opposite: it would become a doctrine “employed to implement economic exploitation and ... deny the right to control their own affairs to millions of people over the world, where the expansion of Europe and America has not [already] meant the literal extermination of whole populations.”<sup>24</sup>

This divergence between the ennobling sweep of the popular imagination and the gritty particularities of group life raises the problem the present project attempts to measure.

Such complaints come not from the general idea of human rights itself, but with the attempt to fill the category with specific content. Lacking any firm or consistent criteria to identify human

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<sup>23</sup> ROBERTS, *supra* note \_\_\_\_\_, at 121.

<sup>24</sup> GOODALE, *supra* note \_\_\_\_\_, at 28 (quoting American Anthropological Association, *Statement on Human Rights*, 49 AMER. ANTH. 540 (1947)).

rights, a possible outcome is for the speaker's beliefs—who usually represents a government rather than speaking personally—to be pushed forward as an exemplar of universal principle. While this may be thought a problem only on the margins, disagreement on the identification of human rights arises even within an international community that shares the same political and philosophical assumptions. The United States, despite at times being perceived as a leading proponent of human rights, has declined to ratify treaties that specify the human rights of women<sup>25</sup> and children,<sup>26</sup> was one of only four nations to vote against the 2007 U.N. *Declaration on the Rights of Indigenous Peoples*,<sup>27</sup> and has most recently declined to send a representative to the body that oversees compliance with the convention on the elimination of racial discrimination.<sup>28</sup> It did not ratify the *Covenant on Civil and Political Rights* until 1992, or even the 1948 *Genocide Convention* until 1988. Such consistent rejection of enabling treaties by rhetorical advocates of human rights undermines the premise that human rights are self-evident and universal. The identification of the human right is a problem for which a methodological solution is required if the idea is to retain its salience.

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<sup>25</sup> Convention on the Elimination of All Forms of Discrimination against Women. The current status of ratification of human rights instruments is available from the United Nations, Office of the High Commissioner, at <http://indicators.ohchr.org/>.

<sup>26</sup> Convention on the Rights of the Child.

<sup>27</sup> <http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx>. The three other states who voted against the Declaration—Australia, New Zealand, and Canada—like the United States would find it inconvenient if they were compelled to recognize the rights of its colonized indigenes.

<sup>28</sup> Nahal Toosi, *Trump Passes on Making U.N. Racism Committee Nomination*, Politico (Apr. 12, 2019), <https://www.politico.com/story/2019/04/12/trump-un-committee-1272422>.

### III. The Anthropological Caution Concerning Universal Human Rights

As admitted by one author, “That a universal law of human rights has the potential to erase cultural diversity is hardly disputable.”<sup>29</sup> Cultural hegemony need not be the purpose of rights treaties, but the claim that there exists a single, universal norm to which all peoples must conform seems ill equipped to recognize variations of human conceptions of the good.

Societies display a range of normative values and organizational systems, and in at least the view of anthropologists this diversity is a good that should be respected, even encouraged and preserved. Observed variability can be markedly divergent, so that something mundane in one setting can be shockingly alien in another. As Posner points out, “foreign countries really are foreign. It is hard for us to understand their peoples, customs, institutions, and pathologies.”<sup>30</sup>

The existence of the culture-bound medical syndromes provides an example of how differently societies can shape even physical and biological experiences.<sup>31</sup> The existence of such differences complicates even talking about universal goals, much less attaining them. “For example, during translation of the 1988 Annual Report of the Yukon Human Rights Commission, it was discovered that the term ‘equal,’ in its human rights context, did not have an equivalent in any of the six Aboriginal languages used in the publication.”<sup>32</sup>

When the UDHR was initially proposed, anthropologists grew concerned that the legal regime of human rights may not be sufficiently respectful of all peoples, prompting skepticism that

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<sup>29</sup> Otto, *supra* note \_\_\_\_\_, at 7.

<sup>30</sup> POSNER, *supra* note \_\_\_\_\_, at 146.

<sup>31</sup> Ronald C. Simons & Charles C. Hughes (eds.), *The Culture-Bound Syndromes: Folk Illnesses of Psychiatric and Anthropological Interest* (Spring, 1985).

<sup>32</sup> Allan McChesney, *Aboriginal Communities, Aboriginal Rights, and the Human Rights System in Canada*, in *HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS* 221, 229 (Abdullahi Ahmed An-Na’im, ed., 1992).

parochial values of the victorious West would be projected outward as the only suitable aspirations for all peoples.<sup>33</sup>

No matter how well-intentioned the [UN Commission on Human Rights] effort the result of any internationally sanctioned statement of rights would be the imposition of hegemonic moral values on less powerful groups of people whose patterns of behavior were misunderstood and reviled by Western elites.<sup>34</sup>

Anthropologists feared the document's normative assumptions would disproportionately favor "the personality of the individual" at the expense of the equally important "cultures of differing human groups." Given that "the individual realizes his personality through his culture," and that it is not possible to qualitatively evaluate and rank the world's different cultures,<sup>35</sup> the risk was high that any expression of idealized values, while seemingly self-evident and even uncontroversial to those who shared compatible cultural backgrounds, would be incomprehensible or offensive to others: "What is held to be a human right in one society may be regarded as anti-social by another people."<sup>36</sup>

The risk, at least from the perspective of the anthropologists, would be that local values would be elevated to the status of human universals and then reverse-engineered to impose them

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<sup>33</sup> American Anthropological Association, *Statement on Human Rights*, 49 AMER. ANTH. 539 (1947).

<sup>34</sup> Mark Goodale, *Toward a Critical Anthropology of Human Rights*, 47 CURR. ANTH. 485, 486 (2006).

<sup>35</sup> The belief that some cultures are intrinsically inferior to others has become a revived opinion. See, e.g., Shalailah Medhora, *Tony Abbott Says Political Future Not "Entirely Resolved", But Hints He Will Stay in Parliament*, *The Guardian*, Dec. 8, 2015, THE GUARDIAN, <https://www.theguardian.com/australia-news/2015/dec/08/tony-abbott-political-future-not-resolved-but-hints-he-will-stay-in-parliament> ("All cultures are not equal, and frankly, culture that believes in decency and tolerance is much to be preferred than one that thinks that you can kill in the name of God, and you've got to be prepared to say that."); David Brooks, *All Cultures Are Not Equal*, *NEW YORK TIMES*, Aug. 11, 2005, <http://query.nytimes.com/gst/fullpage.html?res=990CE2DA143EF932A2575BC0A9639C8B63>.

<sup>36</sup>AAA, *supra* note \_\_\_\_\_, at 542.

upon nonconforming societies under the authority such as that expressed in UDHR Article 28: “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.” The “social and international order” envisioned is expressly the modern sovereign state containing economic systems sufficiently complex to require rights to trade unions (Article 23) and “periodic holidays with pay” (Article 24), which leaves little room for the simpler societies historically favored by anthropologists.

Today’s engagement by anthropology with human rights is part pragmatic, and part theoretic. On the one hand, human rights rhetoric is now part of the milieu in which most of the world’s societies exist to one extent or another, and on the other, the understanding of culture upon which the earlier objection was based has been modified. The earlier tendency had been to speak of culture as timeless and unchanging, and thus an unyielding obstacle to the introduction of new values such as international human rights without inevitably “breaking” or damaging the society. That blanket premise is no longer widely held. “The tendency in much of anthropology over the past fifteen years [has been] to complicate or even abandon the notion of culture.”<sup>37</sup> Rather than a receptacle to preserve the past, culture’s function is to solve problems in the present, which requires that it be capable of adapting to a changing environment.

Cultures consist of repertoires of ideas and practices that are not homogeneous but continually changing because of contradictions among them or because new

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<sup>37</sup> Karen Engle, From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947 to 1999, in *Engaging Cultural Differences: The Multicultural Challenge in Liberal Democracies* 344, 345 (Richard Shweder, Martha Minow & Hazel Rose Markus, eds., 2002).

ideas and institutions are adopted by members. They typically incorporate contested values and practices. Cultures are not contained within stable borders but are open to new ideas and permeable to influences from other cultural systems, although not all borders are equally porous. Cultural discourses legitimate or challenge authority and justify relations of power.<sup>38</sup>

Whereas formerly anthropologists were pessimistic about the influence of human rights norms upon traditional societies, the realization is now that a culture can absorb and interpret almost any new information especially if that information is properly introduced over adequate time. This openness may result in change, but no healthy society remains objectively static, even when its rhetorical self-image is that of unbroken continuity. This revised culture concept means that groups are more active in their responses to the introduction of new and sometimes contradictory values.

Nevertheless, there is a limit to the flexibility that a culture can be expected to demonstrate while still remaining true to its own history. Cultural teachings concerning what is right, good, and normal form the building blocks of identity and default worldview, and thus cannot be easily rewritten. The norms of culture are deeply embedded with the definitions of self and are the standards by which we each find meaning and purpose in life.<sup>39</sup> The powerful influence of these formative assumptions become especially visible when migrating into a new context with different conclusions on those questions. Dissonance can result in even well-intentioned people

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<sup>38</sup> Merry (2006) at 11.

<sup>39</sup> See, e.g., RALPH LINTON, THE TREE OF CULTURE 39 (1961) (“[even] the most deliberately unconventional person is unable to escape his culture to any significant degree.”).

inadvertently violating the normative expectations of the new society.<sup>40</sup> Change is possible, but it should be expected to be neither easy nor painless.

That insight compels us to be more explicit about what are the assumptions generating the global roster of human rights. Where the supposedly universal human right reflects locally favored but ultimately arbitrary preferences we should question the appropriateness of imposing it upon societies with different but equally valid ideas. To perform that sorting task, we can invoke the least common denominator criterion.

#### IV. The UDHR Drafting History

That a feasible argument can be constructed concerning the ethnocentricity of human rights instruments does not mean that it is accurate. At least in the case of the UDHR, the history of its drafting tells us that the underlying values are not quite as parochial as the AAA had feared.<sup>41</sup> In addition to widely sampling existing state constitutions, the drafting committee had access to a UNESCO report that surveyed an eclectic roster of philosophers concerning their thoughts on human rights. The responses ranged “from Chinese, Islamic, Hindu, and customary law perspectives, as well as from American, European, and socialist points of view.... Several respondents from non-Western backgrounds noted that the sources of human rights were present in their traditions, even though the language of rights was a relatively modern European development.”<sup>42</sup> We have good reason to believe that from such exposures to

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<sup>40</sup> Alison Dundes Renteln, *Cultural Defense* (Oxford University Press, 2004).

<sup>41</sup> See MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001).

<sup>42</sup> Glendon, at 73.

alternative perspectives the drafters of the UDHR thought themselves to be speaking in the more inclusive sense of *human*.

It is another matter, though, whether the committee was consistent in maintaining this universal viewpoint. The fear had not been that the implementation of the UDHR was necessarily a cynical attempt to extend dominance over subordinate societies, but only that domination was the likely practical outcome despite good intentions otherwise. Lapses that appear within the drafting history offer troubling foreshadowing in this regard. For example, members with colonies resisted the suggestion that the full scope of human rights should be available to their dependent territories.<sup>43</sup> Perhaps relatedly, no indigenous peoples were invited to participate in the discussions. Even at the level of nation-states, the fifty-eight that then constituted the United Nations left the continents of Africa and Asia “grossly under-represented.”<sup>44</sup> References were frequently made to “civilized nations”<sup>45</sup> and the fact that some states were less evolved than others,<sup>46</sup> all suggesting that a hierarchy of nations existed and that it was the more evolved that would dictate appropriate norms to the backward states. Finally, influential members on the drafting committees who might have appeared to be representing non-Western perspectives, such as Pen-Chun Chang of China, and Charles Malik of Lebanon, have been criticized on this point because they had been educated in the West and were thus already inclined to accept and mirror those viewpoints.<sup>47</sup>

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<sup>43</sup> CHRISTOPHER N.J. ROBERTS, *THE CONTENTIOUS HISTORY OF THE INTERNATIONAL BILL OF HUMAN RIGHTS* 137 (2015).

<sup>44</sup> Morsink, p. 96.

<sup>45</sup> Morsink, p. 54.

<sup>46</sup> Morsink, p. 116.

<sup>47</sup> Morsink, p. 245.

It was thus perhaps inevitable that the vision of the good life assumed by the UDHR has been accused of being characteristically western, modern, and capitalist, with little to no tolerance for those societies that do not share these attributes.<sup>48</sup> Yet its norms have been pushed out as generically “human,” barely hiding the resulting implication that societies which are not western, modern, and capitalist are backward, in some sense not fully human, and almost certainly vulnerable to corrective interventions. Unsurprisingly, the lack of implementation of human rights goals has in many cases been “exacerbated by the prevailing perception among the local population that the general civil and criminal law, as opposed to customary law and practice, enshrines ‘alien ideas’ that have been forcibly imposed on them by more powerful outsiders.”<sup>49</sup> The reported lack of improved conditions on the ground, in other words, can be linked to individuals’ perceived foreignness of the mandated standards “to which they have never agreed and in the creation of which they have played no part.”<sup>50</sup> “Our Kantian ethics invites us to assume that everyone wishes to be treated like we would like. This is rubbish.”<sup>51</sup>

## V. Cross-Cultural Salience of the UDHR: Methodology Explained

If human rights are to live up to their promise, all peoples should be able to relate in some positive way to the asserted claims. The details may differ, but it would be odd if something that is held out as a fundamental requirement for the development of human potential would

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<sup>48</sup> Jennifer Hendry & Melissa L. Tatum, *Human Rights, Indigenous Peoples, and the Pursuit of Justice*, 32 YALE L. & POL’Y REV. 351, 356 (2016) (“Individual natural rights became synonymous with modernity, which was, in turn, irrevocably and undeniably Western.”); see also Merry, *supra* note \_\_\_\_\_, at 29 (“Human rights is obviously based on Western liberal-legalist ideas, [even if] in the postcolonial world, it is no longer exclusively owned by the West.”).

<sup>49</sup> *Id.* at 143.

<sup>50</sup> *Id.* at 180.

<sup>51</sup> Dianne Otto, *Rethinking the “Universality” of Human Rights Law*, 29 COLUM. HUM. RGTS. L. REV. 1, 2 (1997) (quoting Martti Koskenniemi).

be alien, even incomprehensible to a nontrivial portion of the world's population. Even in a society that denied those rights and repressed those freedoms, the citizens should recognize that the proffered human right would be a general good, all things considered. To adopt a different understanding of what it means for something to be a "human" right risks casting noncompliant societies as outliers, being either not fully human, or ignorant of the way to properly manage their own humanity, and defeats the announced purpose of human rights advocacy.

This paper examines the extent to which the identification of human rights at least began on a defensibly cross-culturally meaningful basis. The following method has been designed to ascertain the existence of cross-cultural analogues to the norms underlying the thirty articles of the UDHR.

First, the in-depth drafting history compiled by Johannes Morsink's *The Universal Declaration of Human Rights: Origins, Drafting & Intent* (1999), provided information on the drafters' legislative intent for the articles. Especially useful was the appendix offering the UDHR text annotated with brief summaries of the backgrounds of each.

These details were then used to generate a list of key words intended to capture the general point of each of the articles. These were initially as search terms to identify matching ethnographic extracts within the electronic version of the Human Resource Area Files. The assigned subject categories of such matches were then examined to identify the one most compatible with the broader sense of the UDHR article.

The eHRAF keyword search was then repeated to include the identified subject heading. In order to survey results from a representative sample of societies, search results were limited to the Probability Sample Files (PSF), defined by HRAF as

a subset of *eHRAF World Cultures* and a special kind of random sample called a stratified random sample. For the PSF sample the world was divided into 60 culture areas (strata) and one case from each area was randomly chosen from a list of societies that met certain data quality control criteria (such as whether one of the ethnographers stayed for more than a year and claimed to be fluent in the native language).<sup>52</sup>

A list of the PSF cultures is found in Appendix I.

An illustration of the planned process can be offered by reexamining the claim by Renteln, described earlier, that “all cultures have mechanisms which are intended to limit violence and to prevent needless killing.”<sup>53</sup> On its face, this conclusion appears uncontroversial, but a more careful reading of the terms suggest it may hide points of disagreement. Who, for example, is to say whether a killing is “needless”? Is this a subjective determination to the actor, or an objective one ascertainable to an onlooking outsider?

Examining references to “retribution” within the database, the controlled subject heading most closely approximating the sense of Renteln’s identified norm was judged to be “ingroup antagonisms”: “Prevalence and importance of antagonisms within the society; sources (e.g.,

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<sup>52</sup> Human Relations Area Files, *Probability Sample Files*, <https://hraf.yale.edu/resources/reference/probability-sample-files-psf/>.

<sup>53</sup> Renteln. at 133.

economic deprivation, sexual rivalry, political repression, ethnic and religious cleavages, rigor of socialization or social control); expression in individual behavior (e.g., snobbishness, intentional impoliteness, ridicule, insults, vituperation); prevalence, causes and forms of quarrels; participants (e.g., husband and wife, business competitors, rival claimants to property); manifestations (e.g., verbal exchanges, fist fights, duels); reaction of onlookers; repression and control of aggression; etc.”

Searching the database of 322 cultures for the combination of keyword and subject, eHRAF returned 87 paragraphs in 64 documents in 54 cultures. Limiting this initial result to the PSF sample resulted in 17 paragraphs in 16 documents in 15 cultures.

Each of the seventeen paragraphs was examined to see whether the society imposed norms to limit the retaliatory violence that a transgression can provoke. Results are offered in Appendix II. Of the fifteen societies, eight support Renteln’s generalization, while seven retrieved paragraphs do not. (The nonsupporting texts are available in the table in blue.) This outcome cannot be counted as a convincing replication of Renteln’s conclusion. At the very least, it is not quite the self-evident and uncontroversial conclusion that the reader may have taken away from Renteln’s discussion.

A possible criticism is that the results would have been different had alternative terms been used to construct the sample. For example, “vengeance” returns a larger set of ethnographic descriptions than does “retribution.” But the two terms, despite significant overlap are not synonyms, and even Renteln does not treat the terms as interchangeable, as illustrated by the index to her book. The position adopted here is that the most meaningful results for the current

project, at least in its initial inquiries, will be obtained if we take seriously the language actually used, especially when it can be paired with the semantic connotations of the broader statement of the asserted right.

The presentation will report on the progress to apply this method to the itemized rights with the UDHR, to identify which survive the examination to see if the purported “human” right has any cross-cultural normative analogues.

## Appendix I: eHRAF Probability Sample Files

SUBREGION	CULTURE
Southern Africa	Lozi
Polynesia	Tikopia
Northern Africa	Shluh
Maya Area	Tzeltal
Central Africa	Mbuti
South Asia	Andamans
Central Andes	Aymara
British Isles	Highland Scots
Amazon and Orinoco	Yanoama
Southeast Asia	Iban
Melanesia	Trobriands
East Asia	Taiwan Hokkien
Australia	Aranda
North Asia	Chukchee
Southern South America	Ona
Middle East	Kurds
South Asia	Khasi
Eastern Africa	Maasai
Eastern South America	Bororo
Eastern Woodlands	Iroquois
Scandinavia	Saami
Arctic and Subarctic	Copper Inuit
Polynesia	Lau Fijians
Southeast Asia	Eastern Toraja
Southern Africa	Bemba
Northwest Coast and California	Tlingit
South Asia	Sinhalese
Northwestern South America	Kogi
Western Africa	Hausa
Northern Mexico	Tarahumara
Eastern Africa	Somali
Southern South America	Mataco
Southeastern Europe	Serbs
North Asia	Yakut
Plains and Plateau	Pawnee
Western Africa	Kanuri
Eastern Africa	Amhara
Western Africa	Tiv
South Asia	Santal
Eastern Africa	Ganda
East Asia	Korea
Plains and Plateau	Klamath
Melanesia	Kapauku
Eastern South America	Guaraní
Amazon and Orinoco	Tukano
Central Africa	Azande
Plains and Plateau	Blackfoot
South Asia	Garo
Eastern South America	Bahia Brazilians
Central America	Kuna

Western Africa	Wolof
Northern Africa	Libyan Bedouin
Southeast Asia	Ifugao
Micronesia	Chuuk
Amazon and Orinoco	Saramaka
Western Africa	Akan
Arctic and Subarctic	Ojibwa
Western Africa	Dogon
Southeast Asia	Central Thai
Southwest and Basin	Hopi

## Appendix II: eHRAF Results on Norm of Limited Retribution

### Africa (6 paragraphs in 5 documents in 5 cultures)

Culture Name	Subsistence Type	No. Documents	No. Paragraphs
<u>Azande</u>	Horticulturalists	1	1
Mani is not bad magic: initiates are strictly taught that when using magic for vengeance their motives must be bape, legal <b>retribution</b> for an offence, not sogote, vengeance actuated by jealousy or spite.			
<u>Amhara</u>	Intensive Agriculturalists	1	2
While it is true that Amhara culture provides means and a certain amount [Page 249] of moral pressure for the reconciliation of conflict, it appears to place greater emphasis on the acting out of aggression. It does this, first of all, by defining a number of acts as offenses which justify violent <b>retribution</b> of some sort. Appropriation of one's land, seduction of one's wife, and injury of one's relatives are acts of this nature, and it is incumbent on the offended party to seek personal revenge or, as the Amhara put it, "to return the debt" (bedder mammalas ).			
<u>Akan</u>	Horticulturalists	1	1
Ashanti children, even at the present day, are specially admonished to avoid quarrels with any one outside their own immediate circle. 'Pilfering from father and pilfering from mother, that is how real stealing is learned,' is a saying which well exemplifies this idea; in other words, only theft outside the family group is really considered a crime, and this applies to all offences save those involving the violation of a tribal taboo. It is perfectly true of course, as Mary Kingsley states, that this respect, which I maintain an Ashanti was taught from an early age to show for the lives and property of others outside his own group, was not due to any abstract regard for the 'sanctity of the lives' or property of his neighbours; it was due to purely materialistic considerations, a desire for his own preservation and safety;			
<u>Dogon</u>	Intensive Agriculturalists	1	1
the dead despise bad words because they bring about an even greater thirst. This is why their <b>retribution</b> is feared when a serious argument is being waged.-			
<u>Kanuri</u>	Intensive Agriculturalists	1	1
Peasants seeking <b>retribution</b> for bad debts, adultery, or some other malfeasance committed by a district head's follower must then take the matter before the district head.			

## Asia (2 paragraphs in 2 documents in 2 cultures)

Culture Name	Subsistence Type	No. Documents	No. Paragraphs
<u>Korea</u>	Intensive Agriculturalists	1	1
<p>The discord angered other villagers a great deal and, although I did not hear talk of <b>retribution</b> by the Mountain Spirit, many people said. "After this, village affairs will not go well," and, "We must get rid of this lack of village harmony by getting rid of the Christian church."</p>			
<u>Taiwan Hokkien</u>	Intensive Agriculturalists	1	1
<p>Many disputes cannot be resolved within the village and must be referred to the courts. Acts contrary to the public interest often cannot be effectively dealt with. For <b>retribution</b> villagers either turn to the local police or simply look to the heavens.</p>			

## Europe (1 paragraphs in 1 documents in 1 cultures)

Culture Name	Subsistence Type	No. Documents	No. Paragraphs
<u>Serbs</u>	Intensive Agriculturalists	1	1
<p>But an unsettled feud always tended to spread and involve a gradually widening circle of kin and even neighbors. Fear of <b>retribution</b> stimulated the parties directly involved to settle; fear of involvement stimulated others to mediate.</p>			

## Middle America and the Caribbean (2 paragraphs in 2 documents in 2 cultures)

Culture Name	Subsistence Type	No. Documents	No. Paragraphs
<u>Tzeltal</u>	Horticulturalists	1	1
<p>The Bachajon carry out long feuds between families and individuals in the form of occasional murders. These have their origin in delayed <b>retribution</b> for some wrong received by one party from the other, for which, in turn, there is retaliation, and so on indefinitely.</p>			
<u>Tarahumara</u>	Agro-pastoralists	1	1
<p>Not all tenanchis are eager office holders, and some must be [Page -223-] made to perform their duties by special pressures. The fear of supernatural <b>retribution</b> or the disregard of neighbors is not enough. The egocentric impulse to protect one's own property comes into conflict with social obligations which require a large expenditure of material resources. Unless bolstered by special threats of sanction, the egocentric impulses may well prevail.</p>			

### North America (3 paragraphs in 3 documents in 2 cultures)

Culture Name	Subsistence Type	No. Documents	No. Paragraphs
<u>Copper Inuit</u>	Hunter-gatherers	1	1

even today the primary emphasis in conflict resolution among Inuit is the restoration of peace rather than the administration of justice. Once the immediate conflict is resolved, any judicial proceedings designed to exact **retribution** are viewed by many as unimportant and superfluous.

<u>Iroquois</u>	Horticulturalists	2	2
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usually a known killer would come to his senses, admit himself wrong, repent, and offer **retribution** in goods or services to the mourning family, who unless exceptionally embittered by an unprovoked and brutal killing were then expected to accept the blood money and end the matter.

### Oceania (1 paragraphs in 1 documents in 1 cultures)

Culture Name	Subsistence Type	No. Documents	No. Paragraphs
<u>Chuuk</u>	Other Subsistence Combinations	1	1

That men even in the past were frequently not really angry enough to want to fight is evident from the readiness with which the public hearing and its resultant sentences in the calaboose were accepted as substitutes for fighting—honor was satisfied without the risk and anxiety of open physical aggression.

### South America (2 paragraphs in 2 documents in 2 cultures)

Culture Name	Subsistence Type	No. Documents	No. Paragraphs
<u>Saramaka</u>	Other Subsistence Combinations	1	1

A kúnu is the avenging spirit of a person (or of certain types of gods) who was wronged during his lifetime, which dedicates itself to tormenting eternally the matrilineal descendants and the close matrilineal kinsmen of the offender. The creation of a kúnu is fairly automatic for certain crimes, such as murder, but whether or not lesser offenses will bring such **retribution** depends largely on the goodwill of both parties and on their current political relationship. Even the theft of a pocket knife, for example, can lead to kúnu, but only in the presence of animosity between the two groups involved, and if the offender or his kinsmen fail to make proper compensation to the wronged party before his death. In extreme cases, people make use of the kúnu belief to assure themselves eternal revenge against a personal enemy, by publicizing the injustice and drinking a vegetable poison before there is time for the two groups to arrange for compensation. As far as I know, there is no other motive recognized by Saramakas for suicide, which, incidentally, seems to occur fairly frequently. Moreover, the public threat of suicide is almost the standard reaction to any strongly felt injustice since death brings the only guarantee that justice will be done.

Culture Name	Subsistence Type	No. Documents	No. Paragraphs
<u>Bahia Brazilians</u>	Intensive Agriculturalists	1	1

Wills were commonly contested by relatives, disputes even between children and parents were not unknown, and violence against neighbors over land and water was common. The senhores de engenho were, in the words of Antonil, like Cain and Abel, “linked by blood but little united in charity, needing only a missing piece of wood or a stray ox in a canefield to provoke hidden hatred, and to cause legal actions or mortal **retribution**.” Incidents of violence between senhores de engenho can be found from the beginning of the sugar economy to the end of the colonial era and beyond. The Inquisition investigations of 1591 noted the burning of canefields in Passé during a dispute, and similar actions were a fact of life in the Recôncavo.