

**THE ROLE OF INTERNATIONAL HUMAN RIGHTS LAW AND
COMPREHENSIVE HISTORICAL METHODOLOGY IN RESOLVING THE
CONFLICT BETWEEN POSITIVE LAW AND NATURAL LAW THEORIES**

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I. Introduction

An age-old dispute persists over a fundamental problem of jurisprudence: what makes law law at its greatest level of generality (“Law”).¹ There have been many schools of thought on the subject. Two of the major ones integral to solving the problem—positive law and natural law theories—have been locked in a battle royal for centuries.² Disengaging and reconciling them so as to inform the concept of Law is this article’s central agenda.

While nuances abound in demarcating how the two theories diverge, a pivotal distinction concerns the substantive content of Law and of the types of laws each side claims for its own.³ The gist of the dispute can be outlined as follows. Positive law adherents hold that what ultimately makes Law Law is promulgation by the sovereign or a human lawgiving body, and that Law’s substantive content is an irrelevancy. For the legal positivist, the morality of Law or laws is merely desirable and not constitutive.⁴ Natural law adherents counter that the defining attribute of Law and laws is precisely that the content must be moral and just.⁵ Some of these adherents also speculate that Law’s provenance is either God or the nature of man.⁶

The controversy over Law’s source may have a moral dimension and be important for technocratic reasons but, in this writer’s opinion, the issue of genealogy should take a

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¹ H. L. A. HART, *THE CONCEPT OF LAW* 1 (Oxford University Press, 2nd ed. 1994).

² LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* vii, 2 (Harvard University Press, 1987).

³ *Id.* at 12.

⁴ GEORGE P. FLETCHER, *BASIC CONCEPTS OF LEGAL THOUGHT* 32-34 (Oxford University Press 1996).

⁵ WEINREB, *supra* note 2, at 2-3.

⁶ St. Thomas Aquinas, for example, averred that God is the source of Law. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, in GEORGE C. CHRISTIE & PATRICK H. MARTIN, *JURISPRUDENCE TEXT AND READINGS ON THE PHILOSOPHY OF LAW* 132, *passim* (West Publishing Co. 2nd ed., 1995). In comparison, John Finnis deems the human condition to be the origin of Law. See WEINREB, *supra* note 2, at 111.

backseat to that of content. Content, after all, must be ethical, neutral, or invidious, and whether it is one or the other may have profound consequences for human welfare. The same cannot usually be said for source. Due to this disparity, my article proceeds upon the assumption that what is most crucial in defining Law is the kind of content it embodies, and that Law's provenance is, relatively speaking, an interesting jurisprudential grace note.⁷

It follows that, if the *content* aspect of the positive law-natural law disagreement can be settled, then the definition of Law would be largely settled too. Otherwise, Law's meaning and parameters are likely to remain a perpetual enigma. The latter alternative does not seem acceptable even though it has been and is the status quo; it is certainly becoming increasingly bizarre. For centuries, and the world over, attorneys have been performing the discrete tasks constituting legal practice while the quintessential character of Law has drifted along in an ideational haze.⁸ This ongoing counterpoint raises the surprising question of whether we jurists, either in the hurly-burly of practice or the less harried halls of academe, know what we do when we "do law." The situation is all the more incongruous given that the legal profession is supposedly founded on logic, analytical acumen, and a penchant for problem-solving. Indeed, why should the jurisprudential conundrum, of all conundrums, eternally defy our ken when innumerable societal ills and scientific challenges have succumbed to human ingenuity? Though this article has no therapeutic goals, fulfillment of its agenda should coincidentally ameliorate jurists' strange identity crisis and dispel the seeming ineptitude.

The medium for accomplishing the article's primary project (as well as any palliative unintended consequences) is methodological. The instant thesis is that legal philosophers have been using defective methodology in grappling with the contradiction between the content of positive law and that of natural law.⁹ The proffered antidote is a new kind of methodology that has the potential to yield more accurate results.¹⁰

As a preliminary matter and for the sake of thoroughness, it should be clarified that the two methodologies do have some shared characteristics as well as key incompatibilities.

⁷ I would make an educated guess that, should positive law ever metamorphose into natural law or its equivalent, the two antithetical jurisprudential camps would stop bickering over provenance. *See infra* note 84 and accompanying text.

⁸ EDWIN W. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* 66 (The Foundation Press 1953).

⁹ *See infra* notes 24-26, 30-31 and accompanying text.

¹⁰ *See infra* pp. 4-5, 9-22.

Both permit investigation of developments within positive law and natural law,¹¹ respectively. Both methodologies permit the investigations to include consideration of the role that historical events may play in instigating such developments, though conventional methodology rarely seems to take advantage of this option with respect to actual (as opposed to imagined) events.¹² Finally, both methodologies permit examination of how positive law and natural law may metamorphose into each other.¹³ None of these similarities are, however, germane here.

What, then, are the germane differences between the methodologies? It comes down to this. Traditional methodology is characterized by what will be shown to be its two major flaws:

1. This methodology looks erratically and unpredictably to actual human history as a trigger of legal change; or, to put the matter conversely, this methodology is deeply susceptible to the tug of ahistorical analysis under which the theorist either fantasizes triggering “historical facts” or baldly relies on triggering abstractions that have no pretensions to being fact-based; and
2. This methodology *never* looks to actual human history at the moment(s) of possible *junction* between the content of positive law and that of natural law.

From hereon, this methodology will be called “lapsing historical methodology” for the obvious reason of its inconsistency in using history.

¹¹ This article does, in due course, take a position on whether past and present laws belong to positive law or natural law. *See infra* notes 34-45 and accompanying text. In the meantime, it is assumed *arguendo* that the phrase “natural law,” as used in the text above, includes real-world laws within its compass.

¹² With respect to the above-described aspects of the new methodology, *see infra* pp. 4, 9-10, 13. With respect to such aspects of traditional methodology, *see, e.g.*, THOMAS HOBBS, LEVIATHAN, *in* GEORGE C. CHRISTIE & PATRICK H. MARTIN, JURISPRUDENCE TEXT AND READINGS ON THE PHILOSOPHY OF LAW 405, 407, 442-43 (West Publishing Co. 2nd ed., 1995) (1651) [hereinafter HOBBS, *in* JURISPRUDENCE] (mentioning that an actual state of nature may have existed, and discoursing, in the abstract, on how a sovereign’s positive laws dictate natural law); Jerome Hall, *Concerning the Nature of Positive Law*, 58 YALE L. J. 545, 556-57 (1949) (embracing the effects of human history in understanding positive law only); C.M.A. McCauliff, *Cognition and Consensus in the Natural Law Tradition and in Neuroscience: Jacques Maritain and the Universal Declaration of Human Rights*, 54 VILL L. REV. 435, 462-63 (2009) (describing the way in which Jacques Maritain focused on the progression of human knowledge of natural law even as natural law itself remains inert).

¹³ For a description of the metamorphic process under the proposed methodology, *see infra* pp. 13-23. Under the old approach, social contract theorists appear to have had a particular proclivity for analyzing a metamorphosis, as between natural law and positive law, through the instrumentality of an idealized social contract device. *E.g.*, HOBBS, *in* JURISPRUDENCE 442-43; JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, *in* GEORGE C. CHRISTIE & PATRICK H. MARTIN, JURISPRUDENCE TEXT AND READINGS ON THE PHILOSOPHY OF LAW 239, 244-60 (West Publishing Co. 2nd ed., 1995) (1689) [hereinafter LOCKE, *in* JURISPRUDENCE].

In contradistinction, the methodology proposed to supplant the traditional approach rectifies both flaws in the following ways:

1. The new methodology takes into account the potential effects of actual, *and never fantasized*, human history on legal development; and
2. The new methodology focuses especially on the potential effects of actual human history on the *relationship* between the content of positive law and that of natural law.¹⁴ From hereon, this methodology will be referred to as “comprehensive historical methodology,” again, for obvious reasons.

The results of applying comprehensive historical methodology are, I think, startling. Once it is accepted that real-world historical phenomena can trigger legal development but that fictitious phenomena cannot, then the intrinsic fluidity of Law and laws declares itself; Law and laws are, it turns out, ever in a process of becoming.¹⁵ That epiphany, combined with overwhelming evidence that we have been living in a world governed by positive law theory,¹⁶ sets in motion a cascade of other insights. Briefly, we learn that a transition in the content of Law and laws was triggered by the advent of international human rights law (“IHRL”), qua body of law, close on the heels of World War II and the Holocaust; that the transition consists of positive-law prescriptions for the content of Law and laws gradually becoming natural-law prescriptions; and, that eventually Law, in its content, will stand revealed as a process of becoming the equivalent of natural law.¹⁷

The article is organized along the following lines. Part II is an aperçu. Its first purpose is confined to illustrating positive law and natural law thinkers’ diverging views on the content of Law and laws. Its second purpose is to showcase these thinkers’ inconsistent use of historical analysis, i.e., lapsing historical methodology. Part III elaborates upon the operation of comprehensive historical methodology during the course of applying the methodology to the positive law-natural law impasse. It is explained how IHRL in particular should remove the impasse and enable Law’s content to be defined.

II. Lapsing Historical Methodology: Two Representative Examples

Robert Frost’s musing that “[] [s]omething there is that doesn’t love a wall”¹⁸ could have been written just as aptly about needless intellectual compartmentalization as it was

¹⁴ See *infra* pp. 9-22.

¹⁵ See *infra* pp. 10, 22.

¹⁶ See *infra* pp. 10-13.

¹⁷ See *infra* pp. 13-22.

¹⁸ Robert Frost, *Mending Wall*, at <http://www.bartleby.com/104/64.html>.

about needless personal isolation; the same goes for his plaint that the builders of these walls “move[] in darkness.”¹⁹ For, both positive law and natural law theorists have needlessly built a towering wall between them. And, they have “achieved” this by means of a methodology that, if it has not gone in darkness, has been myopic in the extreme.

It may be somewhat surprising that the jurisprudential wall has endured when positive law and natural law doctrines, each within its own category, have varied greatly. The permutations have been so numerous that some scholars have almost despaired of ever pinning down what exactly positive law and natural law are.²⁰ Nevertheless (and it bears repeating from the Introduction), in relation to substance, positive law theory maintains that Law, in order to be Law, need be neither moral nor just, though, as a policy matter, morality and justice are generally desirable; natural law theory, in contrast, would have it that Law, in order to be Law, must be moral and just.²¹

It goes without saying that an encyclopaedic exegesis on positive law and natural law thinking to date is not feasible here. This Part is thus compelled to settle for marshalling two archetypes. They are Thomas Hobbes, a legal positivist, and John Locke, a devotee of natural law and natural rights.²² These men are among the leading exponents of their respective legal philosophies, and, hence, their discourse should be fairly representative, each on his side of the hoary wall. Their writings also both exemplify use of the lapsing historical methodology that has made the wall so impenetrable and insurmountable.

Despite his descent into some dizzying circular reasoning, Hobbes is a model spokesman in *The Leviathan* for the ultimate and exclusive primacy of positive Law and laws. “Square one” for him was an envisioned state of nature which operated in accordance with envisioned internal natural laws. Intriguingly, Hobbes seems to have been aware that his envisioning was vulnerable to criticism. He wrote: “It may peradventure be thought, there was never such a time, nor condition of warre [constituting a Hobbesian state of nature] as this; and I believe it was never generally so, over all the world: but there are many places, where they live so now.”²³ He cited the “*America*” of his era as such a place, but then promptly and inexplicably repudiated his momentary flirtation with history.²⁴ From there on, Hobbes hewed to a purely ahistorical methodology.

¹⁹ *Id.*

²⁰ See BRIAN BIX, JURISPRUDENCE THEORY AND CONTENT 31-32, 61-72 (Carolina Academic Press 2nd ed., 1999) (surveying a wide range of positive law and natural law theories).

²¹ See *supra* notes 4-5 and accompanying text.

²² HOBBS, in JURISPRUDENCE 405, *passim*; LOCKE, in JURISPRUDENCE 239, *passim*.

²³ HOBBS, in JURISPRUDENCE, *supra* note 22, at 407.

²⁴ *Id.*

Indeed, Hobbes' next step was to postulate a social contract as the *deus ex machina* effectuating mankind's changeover to society governed by a sovereign. Hobbes claimed that, once the sovereign was established, the positive law emanating therefrom would contain natural law precepts and, further, would mandate the precepts' content.²⁵ It should be noted that the changeover, with its accompanying transmutation of the natural laws into positive laws, is utter abstraction. Though Hobbes paid heed to "movement" from the state of nature and its laws to a sovereign-dominated society and its laws, the movement was only in Hobbes' head. It is upon this shaky stack of abstractions that Hobbes was emboldened to pronounce Law to be positive Law forevermore.²⁶

Among the expositors of natural law, Locke is a seminal figure. *The Second Treatise of Government* posits as a starting point for his analysis a state of nature functioning according to its own endogenous "laws of nature." The laws consisted of each person's power to preserve his life, freedom, and property, and to punish other peoples' transgressions against those objects of power.²⁷ Locke preemptively tried, more adroitly than Hobbes, to dispose of possible objections against the apparent lack of evidence for a state of nature. Whereas Hobbes had resorted to childishly contradicting himself, Locke suggested that the state of nature had been so ephemeral and so early in man's existence that there were no records documenting it; in the alternative, Locke also offered historical evidence of both the state of nature and of the social contract which he conceived as the vehicle for transitioning to civil society.²⁸ Known for his empiricism, Locke was, up to this point, true to form, though still well within the parameters of lapsing historical methodology.²⁹

Locke went on to imagine that, under the social contract, individuals in the state of nature ceded their power to government in civil society. The *quid pro quo* was government's obligation to protect the common good, i.e., the inhabitants' lives, liberties and estates. Locke further conceived government as fulfilling its end of the contract chiefly by enacting positive laws. But, not just any positive law would do. Locke added the caveat that positive laws must conform to "fundamental natural law" by protecting the tripartite common good. Otherwise, Locke warned, the government would lose legitimacy before God, and the people could exercise their natural right to replace the legislature.³⁰ Post-social contract, then, Locke slid into legal fiction, seemingly unbothered that he had done so.

²⁵ *Id.* at 409-10, 425-30, 441-47.

²⁶ *Id.* at 441-47.

²⁷ LOCKE, *in* JURISPRUDENCE, *supra* note 13, at 240.

²⁸ *Id.* at 245-48.

²⁹ *See supra* pp. 3-4.

³⁰ LOCKE, *in* JURISPRUDENCE, *supra* note 13, at 239-40, 244-47, 255-60, 264, 275-76.

Though his argument is ultimately a house of cards, Locke resolved—or more accurately, thought he had resolved—the opposition between positive law and natural law by ostensibly merging the two. The merger, however, was simple philosopher’s fiat. Locke arbitrarily pronounced that Law and laws in civil society have a natural law pith within the positive law shell of legislative enactment.³¹ Ergo, insofar as the content of Law and laws in civil society are concerned, Locke declared victory for natural law. Or, to put the matter more crudely, Locke’s ossified abstractions, even resting atop some empirical data, solved nothing much—unless fiat is a solution.

In sum, lapsing historical methodology has had its day and had its chance. Despite the cleverness of Hobbes, Locke, and their many methodological fellow travelers, the methodology’s unrelieved sterility in producing viable results has amply demonstrated its speciousness. It is puzzling why a visible philosophical movement has not coalesced to jettison ahistorical thought in this context. Then again, perhaps the puzzlement is premature. It cannot be discounted that, among all of jurisprudence’s professoriate, a few lonely souls have altered course and experimented with applying a comprehensive historical methodology to the natural law-positive law conundrum. At least one such experiment appears in Part III below.

III. Comprehensive Historical Methodology: Application and Results

Robert Frost declaimed about the psychological wall he loathed, “[s]omething there is... [t]hat wants it down.”³² Legal philosophers would do well to work up some fuming intolerance of their own vis-à-vis the wall separating positive and natural law theories. For this one not only alienates us from the meaning of our work product, i.e., Law, it also hides vital psychological truths which alienates us from ourselves. But, more on that momentarily.³³

Though the comprehensive historical methodology on offer here is not result-driven, it should at last demolish Law’s canonical partition. It will be recalled that this is a methodology that looks for the effect of human history on Law and laws at all and any points on the continuum of their existence. As such, the methodology undermines legal philosophers’ preoccupation with fixed abstraction, and redirects their gaze toward those historical events which cause the content of Law and laws to be in perpetual movement (movement that we misperceive as ceasing when *we stop* to scrutinize Law and laws). And, as Part II mentions, comprehensive historical methodology encompasses examination not only of real events’ effects on developments within the confines of

³¹ *Id.* at 257-59.

³² Frost, *supra* note 18 .

³³ *See infra* pp. 22-23.

either positive law or natural law, but, most importantly, those events' effects in causing movement from one type of law toward or into another.

Thus, under comprehensive historical methodology, Law's essential content is a process, a movement, or a development. However, it should be borne in mind that, unless Law's content is nothingness or chaos, that movement cannot be movement alone and the movement cannot go any which way. It cannot, over the long haul, move randomly because human history has manifested certain trends, and Law and laws have generally manifested a tendency to respond accordingly.

Ironically, this fluidity is apt to give the comprehensive historical methodologist pause, if not temporary paralysis. How and where is one to begin an analysis when all is in ferment? The only viable solution is to freeze-frame Law and laws during the period of interest while recognizing that they are unabatingly kinetic. The period of interest here must be Law and laws as we know them, inasmuch as no meaningful subset suggests itself. The instant analysis accordingly freeze-frames Law and laws throughout human history and into the present. From this perspective, a panoramic still is produced of Law's and laws' entire period of existence, and, being a still, permits inspection and interpretation to proceed.

Unwieldy as this diuturnal time span may sound, it is analytically manageable because the legal past and present both fit, in one way or the other, within the ambit of a single categorization, i.e., positive law.³⁴ Hard as one might wish that Law and laws were always moral and just, wishing does not make it so. Indeed, legal history demonstrates conclusively that the body politic, wittingly or not, has always strung with legal positivism. Societies have enacted iniquitous laws more frequently than it is comfortable to remember. The very phrase "iniquitous laws" says it all. The phrase would be gibberish if laws, to be laws, had to be moral and just. However, it plainly is not gibberish; the two words in tandem, or their synonyms (e.g., "bad laws"), are part of juridical and lay parlance to refer to laws accepted as laws in spite of their immorality or unfairness.

³⁴ The assertion, in the text above, that past and present law have been and are positive law in "one way or the other" employs the modifying phrase because some scholars have distinguished domestic positive law from international positive law. That is, these scholars categorize international law as a special kind of positive law that does not conform to the Austinian formulation of law as the sovereign's commands. See David J. Bederman, Review Essay, *Constructivism, Positivism, and Empiricism in International Law*, 89 GEO. L.J. 469, 482-92 (2001); Ali Khan, *The Dignity of Labor*, 32 COLUM. HUM. RTS. L. REV. 289, 340 n. 210 (2001); Martin V. Totaro, *Legal Positivism, Constructivism, and International Human Rights Law*, 48 VA. J. INT'L L. 719, 723-26 (2008).

Laws of this ilk are legion. But, a few examples should suffice to prove, as a logical matter, that positive law has ruled the day. For, once it is shown that iniquitous laws have existed, then, it cannot be the case that laws have exclusively conformed to natural law. And, inasmuch as all laws have not been iniquitous, then past and present legal regimes have been and are a hodge-podge of iniquitous laws and laws imbued with natural law values. While natural law theory demands all laws to be moral and just, positive law theory does not demand all laws to be immoral or unjust; nor does positive law theory exclude moral and just laws from being positive law.³⁵ Therefore, the fact that both good and bad laws have crowded the legal landscape makes past and present laws entirely consonant with positive law doctrine, though the existence of the bad ones is what is crucial to the consonance.

So, here is an admittedly miniscule sampling of past and present immoral or unjust laws that nevertheless prove the point. In 700 B.C., law provided Roman fathers with the right to sell, abandon, sacrifice, devour, or kill their children.³⁶ During the same period, a Roman husband also had the legal prerogative to rape his wife.³⁷ Jumping ahead a few centuries, imprisonment for debt became well entrenched in England with the passage of the Debtors' Act of 1350, authorizing private creditors to imprison their debtors.³⁸ Between 1450 and 1750 in Europe, more than half of the people tried for witchcraft were executed, usually, by burning at the stake.³⁹ English laws of the sixteenth and seventeenth centuries mandated the expulsion or execution of any Roma found in that country.⁴⁰ The world also has had considerable experience in instituting and maintaining lawful slavery. For instance, during the late eighteenth and early nineteenth centuries, Slave Codes were legislated throughout the American South.⁴¹ These laws relegated slaves to chattel and protected slaveholders' ownership of them, including by liberal use of the lash.⁴² On yet another horrific front, the 1935 Nuremberg Laws excluded Jews

³⁵ See *supra* pp. 1, 6.

³⁶ See Owen D. Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 N. C. L. REV. 1117, 1195 (1997).

³⁷ See Michelle J. Nolder, Note, *The Domestic Violence Dilemma: Private Action in Ancient Rome and America*, 81 B. U. L. REV. 1119, 1125 (2001).

³⁸ Jayne S. Ressler, *Civil Contempt Confinement and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: An Examination of Debtor Incarceration in the Modern Age*, 37 RUTGERS L. J. 355, 359 (2006).

³⁹ See Brian P. Levack, *Possession, Witchcraft, and the Law in Jacobean England*, 52 WASH. & LEE L. REV. 1613, 1614 (1995).

⁴⁰ See Adam M. Warnke, *Vagabonds, Tinkers, and Travelers: Statelessness Among the East European Roma*, 7 IND. J. GLOBAL LEGAL STUD. 335, 340 (1999).

⁴¹ See JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 124 (McGraw-Hill, Inc. 7th ed., 1994).

⁴² *Id.* at 125.

from virtually all walks of German life and set the stage for the Holocaust.⁴³ Among the many inhumane laws extant around the globe, two standouts are the legality of prolonged solitary confinement of prisoners in the United States⁴⁴ and the Kafkaesque detainments, without charges, trial, or any apparent end, at Guantanamo Bay.⁴⁵

That billions of people over thousands of years have abided by or enforced these awful laws is persuasive evidence that the latter were perceived as Law and laws and were Law and laws. It is common sense, founded on ordinary human experience, that such laws have not been downgraded, merely by their iniquity, into detestable homilies or public relations campaigns run amok. We have been and are creatures still largely under positive law theory's thumb.

Does this record foretell a future of more of the same? Do the annals of lawmaking mean that all laws—the good, the bad and the dreadfully ugly—will continue to qualify under the concept of Law? Is this really the best that jurisprudence and, more fundamentally, human beings can achieve? The short answer is that we can and are in the process of doing better than positive law doctrine, by itself, might lead one to believe. It is actual historical events, our very own actions en masse, that are ever so slowly turning the tide.

With the end of World War II and the Holocaust at the twentieth century's midpoint, the global community stood aghast and repulsed by what it had done. The wholesale revulsion at man's inhumanity to man on a grand scale helped to inspire the advent of international human rights law ("IHRL"), qua *body of law*, in 1945.⁴⁶ Before, there had been only isolated instances of international human rights law, usually single-issue treaties few and far between.⁴⁷ The drama of 1945 should not, however, eclipse the related development of international humanitarian law ("IHL"), a then separate body of law containing many of the same norms as IHRL. Though IHL was well underway in the

⁴³ Tom Kuntz, *Word for Word/The Nuremberg Laws; On Display in Los Angeles: Legal Foreshadowing of Nazi Horror*, N. Y. TIMES, July 4, 1999, <http://www.nytimes.com/1999/07/04/weekinreview/word-for-word-nuremberg-laws-display-los-angeles-legal-foreshadowing-nazi-horror.html>.

⁴⁴ See Centerforconstitutionalrights, Torture: The Use of Solitary Confinement in U.S. Prisons, <http://ccrjustice.org/solitary-factsheet>.

⁴⁵ See Amnesty International, Guantanamo, Bagram and Illegal U.S. Detentions, <http://www.amnestyusa.org/our-work/issues/security-and-human-rights/guantanamo>.

⁴⁶ Thomas C. Buergenthal, *The Human Rights Revolution*, 23 ST. MARY'S L. J. 3, 4 (1991); Jo M. Pasqualucci, *Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law*, 38 STAN. J. INT'L L. 241, 243-44 (2002).

⁴⁷ E.g., Treaty for the Suppression of the African Slave Trade, Dec. 20, 1841, 30 British and Foreign State Papers 269 (1858).

nineteenth century,⁴⁸ its impact, at least until the Nuremberg trial in 1945-1946,⁴⁹ was not widely felt among the general public inasmuch as IHL governs rights under very limited circumstances, i.e., within the framework of armed conflict,⁵⁰ and as IHL protects only a closed cohort of persons, i.e., prisoners of war, noncombatants, and combatants who have been injured or otherwise placed hors de combat.⁵¹ Because IHL and IHRL have modernly been viewed as starting to merge and because there are, in fact, substantive overlaps between the two bodies of law, they collectively will be referred to from hereon as “IHRL.”

IHRL is unique in comparison to other types of law. Its *raison d’être* and only agenda is to protect and further human well-being in all significant respects, e.g., physical and mental health, intellectual development, physical integrity, etc. It cannot, without writing a multivolume tome on all bodies of law at all times, be established to a certainty that IHRL is the *sole* body of law with human well-being as its exclusive overarching mission; but, it must be the only *major* body of this kind of law or the legal community would be busy critiquing, praising, and invoking the other one too. At any rate, the mission and prominence of IHRL lends itself to objective verification.

IHRL contains such a wealth and variety of rights that it has become fashionable to break them down into “generations.”⁵² Among the first generation, the civil and political rights,⁵³ are the prohibition on torture or cruel, inhuman, or degrading treatment or punishment; the right to liberty and security of the person; the ban on slavery; the protection of privacy; the right to freedom of expression; and so on.⁵⁴ The second generation, the economic, social and cultural rights,⁵⁵ include the right to enjoy the “highest attainable standard of physical and mental health”; the right to “just and

⁴⁸ Jaime Saura, *Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations*, 58 HASTINGS L. J. 479, 487 (2007).

⁴⁹ Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT’L L. REV. 321, 330, 334 (1999).

⁵⁰ Saura, *supra* note 48, at 487-88.

⁵¹ Sarah L. Wells, *Crimes Against Child Soldiers in Armed Conflict Situations: Application and Limits of International Humanitarian Law*, 12 TUL. J. INT’L & COMP. L. 287, 293-94 (2004).

⁵² Dianne Otto, *Rethinking the “Universality” of Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 1, 5-6 (1997).

⁵³ *Id.* at 5.

⁵⁴ The first-generation rights, some of which are listed in the text above, come from the International Covenant on Civil and Political Rights (“ICCPR”), among other human rights treaties. *See* ICCPR, *opened for signature* Dec. 16, 1966, 999 U. N. T. S. 171, art. 7 (prohibiting torture and cruel, inhuman or degrading treatment or punishment); art. 8, para. 1 (prohibiting slavery); art. 9, para. 1 (interdicting violation of the right to liberty and security of the person); art. 17, para. 1 (setting forth the right to privacy); art. 19, para. 2 (providing the right to freedom of expression).

⁵⁵ Otto, *supra* note 52, at 6.

favorable conditions of work”); the right to education; the right to be free from hunger; etc.⁵⁶ The third generation, solidarity or collective rights, deals with such matters as development, environment, and community.⁵⁷

This laundry list is by no means intended to give a full or even representative picture of the quantity, diversity, or importance of the rights comprising contemporary IHRL. But, the list, at a minimum, should convey the complexion and temper of IHRL, its single-minded preoccupation with shielding human dignity, salubrity, and fulfillment.

IHRL’s mission in this regard has repeatedly proclaimed itself through a huge corpus of resolutions and treaties. The rapid rate at which these international law instruments have proliferated and their burgeoning numbers are indicative of the influence that IHRL wields.⁵⁸ The process commenced with the U.N. Charter, a treaty that came into force on October 24, 1945. The Charter, among other things, established the United Nations and committed the organization and its member nations to “respect for” and “observance of, human rights and fundamental freedoms for all.”⁵⁹ This was the first time that a substantial bloc of the world’s countries pledged themselves to universal and transcending human rights.⁶⁰ Although this was a breathtaking step, the Charter’s human rights provisions are so vague and cryptic that dissatisfaction with them led to the call for a more specific enumeration. In response, the United Nations adopted the 1948 Universal Declaration of Human Rights setting forth an extensive list of more particularized human rights.⁶¹ This was a welcome improvement on the Charter, but the Declaration too was found wanting because it did not have the binding force of a treaty. After an eighteen-year hiatus, the United Nations produced the International Covenant on Economic, Social and Cultural Rights (“ICESCR”)⁶² and the International Covenant

⁵⁶ The second-generation rights, some of which are listed in the text above, may be found in the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) as well as in other human rights treaties. See ICESCR, *opened for signature* Dec. 16, 1966, G. A. Res. 2200A (XXI), 16, at 49, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, art. 7 (enunciating the right to “just and favorable conditions of work”); art. 11, para. 2 (stating the right to be free of hunger); art. 12, para. 1 (providing the right to health); art. 13, para. 1 (announcing the right to education).

⁵⁷ Claire Moore Dickerson, *Human Rights: The Emerging Norm of Corporate Social Responsibility*, 76 TULANE L. REV. 1431, 1445-46 (2002).

⁵⁸ Douglass Cassel, *Does International Human Rights Law Make a Difference?*, 2 CHI. J. INT’L L. 121, 126 (2001).

⁵⁹ U.N. Charter, June 26, 1945, 59 Stat. 1031, T.S. NO. 993, 3 Bevans, *entered into force* Oct. 24, 1945, arts. 55, 56.

⁶⁰ Cf. Amy E. Eckert, *Free Determination or the Determination to Be Free? Self-Determination and the Democratic Entitlement*, 4 UCLA J. INT’L & FOREIGN AFF. 55, 76-77 (1999) (observing that the U.N. Charter was revolutionary in permanently removing human rights from the exclusive jurisdiction of states parties).

⁶¹ Universal Declaration of Human Rights, G. A. Res. 217 (111)A, U. N. Doc. A/RES/217 (111) (Dec. 10, 1948).

⁶² ICESCR, *supra* note 56.

on Civil and Political Rights (“ICCPR”),⁶³ treaties further detailing and supplementing Declaration rights. The ICESCR and ICCPR are universal in the sense that they provide human rights on a broad range of issues and are applicable to protect inhabitants of any nation that becomes a state party, and because nations from every region are eligible to become states parties.⁶⁴ The United Nations has subsequently generated many additional human rights treaties each of which typically zeros in on a specific issue and/or a specific group of people.⁶⁵

The United Nations, though, has not been the exclusive source of IHRL. All continents except Asia have generated regional human rights treaties and declarations that operate only within the generating region and under the jurisdiction of that region’s monitoring bodies, e.g., courts, commissions, or committees. These treaties are equally rich with human rights protections.⁶⁶ Nor should it be forgotten that the International Committee of the Red Cross is responsible for having brought into existence myriad IHL treaties,⁶⁷ and that the judgment of the International Military Tribunal at Nuremberg memorably etched in our consciousness the principle that individuals, as well as nation states, may be held accountable for violating IHL.⁶⁸ More recently, international law experts have begun to conclude that some human rights treaties do the same.⁶⁹ Finally, certain human rights norms have attained the status of customary international law, i.e., non-treaty law that

⁶³ ICCPR, *supra* note 54.

⁶⁴ ICESCR, *supra* note 56, at art. 26, para. 1; ICCPR, *supra* note 54, at art. 48, para. 1.

⁶⁵ See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination, 660 U. N. T. S. 195, *entered into force* Jan 4, 1969; Convention on the Elimination of All Forms of Discrimination Against Women, G. A. res. 34/180, U. N. GAOR Supp. (No. 46) at 193, U. N. Doc. A/34/180, *entered into force* Sept. 3, 1981; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G. A. res. 39/46, annex, 39 U. N. GAOR Supp. (No. 51) at 197, U. N. Doc. A/39/51 (1984), *entered into force* June 26, 1987; Convention on the Rights of the Child, G. A. res. 44/25, annex, 44 U. N. GAOR Supp. (No. 49) at 167, U. N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990; International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G. A. res. 61/106, Annex I, U. N. GAOR, 61st Sess., Supp. No. 49, at 65, U. N. Doc. A/61/49 (2006), *entered into force* May 3, 2008.

⁶⁶ See, e.g., African [Banjul] Charter on Human and Peoples’ Rights, *adopted* June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I. L. M. 58 (1982), *entered into force* Oct. 21, 1986; American Convention on Human Rights, Nov. 22, 1969, O. A. S. Treaty Series No. 36, at 1, OEA/Ser. L./V/II. 23 doc. rev. 2., *entered into force* July 18, 1978; European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U. N. T. S. 222, *entered into force* Sept. 3, 1953, as amended by Protocols Nos. 3, 5, 8, and 11 *which entered into force on* 21 Sept 1970, 20 Dec. 1971, 1 Jan. 1990, and 1 Nov. 1998 *respectively*.

⁶⁷ François Bugnion, *The International Committee of the Red Cross and the Development of International Humanitarian Law*, 5 CHI. J. INT’L L. 191 *passim* (2004).

⁶⁸ HENRY J. STEINER ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT; LAW, POLITICS, MORALS* 115 (Oxford University Press 3rd ed., 2008).

⁶⁹ See ANDREW CLAPHAM, *HUMAN RIGHTS IN THE PRIVATE SPHERE* 91-124 (Oxford University Press, 1993).

binds all countries. The prohibition on torture, for example, falls within this classification.⁷⁰

In sum, within sixty-eight years—a short time for a new body of law to debut and gain creditability as law—IHRL has increased and spread at breakneck speed. The sheer number of human rights treaties shows that IHRL has struck a chord, intensifying the desire for yet more of these instruments. IHRL's geographical breadth has been universal from the beginning. The heterogeneity of rights now protected under IHRL is positively exuberant. And, IHRL has further extended its reach to particularly vulnerable populations, such as children and refugees, so as to bestow rights tailored to their needs; at the same time, interpreters of IHRL have been endeavoring to extend treaties' reach to rein in the private sector when it trenches upon human rights. Nor does there seem to be an end in sight or any reason for a slowdown or about-face. The point is this: IHRL is poised to exert massive influence on the world and has already gotten that process energetically under way.

However, it must be bluntly acknowledged that IHRL's influence, via this vitality and growth, is not matched by commensurate success in enforcement. IHRL has been notoriously weak on that score. The causes for IHRL's feeble enforcement record are multifarious and complicated, but often seem to have less to do with the substance of IHRL and more to do with politics, especially, regarding international relations. The veto power in the U.N. Security Council and defensive assertions of national sovereignty, for instance, have been cumbersome obstacles blocking increased IHRL implementation.⁷¹ The enforcement problem undercuts the argument that IHRL has been and will continue to be influential enough to shape the contents of domestic legal systems. While it is unlikely that these and other impediments to enforcement will be dismantled any time soon, it is also the case that IHRL's influence can make and has made itself felt by alternative means that may counterbalance and outlast the impediments.

These means are immanent in law, and may be described as pedagogical or expressive. Law is made to be known; it could neither restrain nor mandate behavior if the contents were kept secret. By knowing the law, citizens not only react to the particular rule obedience expected of them on pain of suffering some governmentally-imposed

⁷⁰ David Weissbrodt & Cheryl Heilman, *Defining Torture and Cruel, Inhuman, and Degrading Treatment*, 29 LAW & INEQ. 343, 361 (2011).

⁷¹ See Paul R. Williams & Meghan E. Stewart, *Humanitarian Intervention: The New Missing Link in the Fight to Prevent Crimes Against Humanity and Genocide?*, 40 CASE W. RES. J. INT'L L. 97, 108-09 (2007-2008) (discussing instances of using the Security Council veto to block humanitarian interventions); Bruce P. Frohnen, *A Problem of Power: The Impact of Modern Sovereignty on the Rule of Law in Comparative and Historical Perspective*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 599, 604 (2012) (opining that national sovereignty doctrine may function to thwart human rights enforcement).

unpleasantness; they also receive and are additionally influenced by the government's official message on a matter. This message may have an especially strong pedagogical influence, *even without active enforcement of significant penalties*, because it carries the imprimatur of the state. And, the state, until it is overthrown, collapses, or is on the verge of one of those calamities, is the voice of legitimacy.⁷² Some salient though prosaic examples of the didactic role of law include, in the United States, seatbelt laws, anti-smoking ordinances, and child car-seat laws.⁷³ Interestingly, most of these laws concern maintenance of human safety and health—goals identical to and as appealing as the goals of IHRL.

Human rights treaties are typically drafted and adopted under the auspices of intergovernmental organizations (“IGOs”) such as the United Nations. IGOs, whatever their shortcomings, tend to be eminent—big players on the world stage. They command our notice. Furthermore, when a nation ratifies a treaty, the latter becomes, to one degree or another, part of that nation's legal regime and carries that government's imprimatur as well.

IHRL is, in fact, already showing signs of affecting human praxis toward the moral and just. One example arises from article 19, paragraph 1 of the U.N. Convention on the Rights of the Child (“Children's Convention”), which provides:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.⁷⁴

⁷² See ARISTOTLE, *Nicomachean Ethics*, in THE BASIC WORKS OF ARISTOTLE 952, 1105 (Richard McKeon ed., 1941); PLATO, *Laws VII*, in THE COLLECTED DIALOGUES OF PLATO, INCLUDING THE LETTERS 1418-19, 1502 (Edith Hamilton & Huntington Cairns eds. 5th prt. 1969) (A. E. Taylor trans., 1934); Anne Norton, *Transubstantiation: The Dialectic of Constitutional Authority*, 55 U. CHI. L. REV. 458, 459, 469 (1988). It should be noted that the pedagogical dynamics of law, even beyond the deterrence stemming from penalties, are very real. There is a nascent, but growing, literature empirically verifying law's norm-creating impacts. See, e.g., Patricia Funk, *Is There an Expressive Function of Law? An Empirical Analysis of Voting Laws with Symbolic Fines*, 9 AM. L. & ECON. REV. 135, 135, 146-56 (2007).

⁷³ See, e.g., Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 64, 68-69 (2002) (reporting the pedagogical effects of seatbelt laws, laws requiring car seats for children, and helmet laws for motorbike riders).

⁷⁴ Convention on the Rights of the Child, art. 19, para. 1, G. A. Res. 44/25, U. N. GAOR, 44th Sess., Supp. No. 49, U. N. Doc. A/RES/44/25 (Nov. 20, 1989) [hereinafter “Children's Convention”].

The Convention's monitoring body, the Committee on the Rights of the Child ("Children's Committee"), has repeatedly taken the position that article 19, paragraph 1, as well as certain other Convention provisions, ban all corporal punishment of children.⁷⁵ Initially, the Children's Committee was only one of two outliers condemning the punishment. The other was the Swedish government which, even prior to the adoption of the Children's Convention, had enacted a prohibition on all corporal punishment of children within its borders.⁷⁶

The passage of years has seen these two outliers transformed into the avant-garde of a veritable abolitionist movement. The movement is occurring within both the international human rights community and within individual countries. An advisory opinion from the Inter-American Court of Human Rights has ruled that spanking children is a human rights violation, and at least four human rights treaty monitoring committees (besides the Children's Committee) plus the U.N. Special Rapporteur on Torture have come to the same conclusion.⁷⁷ More to the point, as of this writing, 32 countries (besides Sweden) have enacted or adjudicated absolute bans on the practice,⁷⁸ and over 100 other nations have banned it in the schools.⁷⁹ Since corporal punishment of children has been an entrenched practice in families and educational institutions around the globe, these bans are cogent evidence of the Children's Convention's galvanizing power.⁸⁰

⁷⁵ For a partial though extensive listing of such Children's Committee pronouncements, see SUSAN H. BITENSKY, CORPORAL PUNISHMENT OF CHILDREN: A HUMAN RIGHTS VIOLATION 55-75, 121 nn. 44, 46; 122 nn. 50, 52, 57; 124 nn. 75-76; 125 n. 89; 126 n. 98; 128 n. 134; 129 nn. 144, 149, 158 (Transnational Publishers 2006); Susan H. Bitensky, *The Poverty of Precedent for School Corporal Punishment's Constitutionality Under the Eighth Amendment*, 77 U. CIN. L. REV. 1327, 1386, 1387 & nn. 412-413 (2009) [hereinafter Bitensky, *Poverty of Precedent*]; Susan H. Bitensky, *Spare the Rod, Embrace Our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children*, 31 U. MICH. J. L. REFORM 353, 392 & n. 193, 393 & n. 193, 395 & n. 200, 396 & n. 202, 397 & n. 209, 398 & n. 219, 399 & nn. 223-224 (1998).

⁷⁶ BITENSKY, *supra* note 75, at 154-56.

⁷⁷ See Bitensky, *Poverty of Precedent*, *supra* note 75, at 1386, 1388 n. 415, 1389 (describing positions taken by the Inter-American Court of Human Rights and at least four human rights treaty monitoring committees that corporal punishment of children is a human rights law violation); BITENSKY, *supra* note 75, at 61 (recounting statement of U.N. Special Rapporteur on Torture condemning all corporal punishment of children as violative of several treaties' bans on torture and cruel, inhuman, or degrading treatment).

⁷⁸ To date, countries that have banned all corporal punishment of children are: South Sudan, Kenya, Albania, Tunisia, Republic of Congo, Poland, Liechtenstein, Luxembourg, Republic of Moldova, Costa Rica, Togo, Spain, Venezuela, Uruguay, Portugal, New Zealand, Netherlands, Greece, Hungary, Romania, Ukraine, Iceland, Germany, Israel, Bulgaria, Croatia, Latvia, Denmark, Cyprus, Austria, Norway, Finland, and Sweden, http://www.endcorporalpunishment.org/pages/progress/prohib_states.html.

⁷⁹ *Id.*

⁸⁰ BITENSKY, *supra* note 75, at 26.

Another example of IHRL's impressive capacity to affect other laws is the ban on torture. There is general agreement among international law scholars that the ban, which is contained in multiple human rights treaties, has also attained the status of customary international law.⁸¹ This is no minor feat inasmuch as a norm can only be elevated to this rank if it is the widespread, consistent practice of nations to shun torture and if they shun it due to *opinio juris*, a sense of legal obligation.⁸² In part, the widespread practice against torture has been inspired by IHL and IHRL treaties outlawing this sort of persecution.⁸³

The foregoing examples of IHRL's pedagogical prowess are by no means the only ones. But, perhaps, examples are superfluous. IHRL's undeniable purchase on domestic laws' content is also evinced by mankind's psychological development. Consider that the collective mindset which ideated IHRL in the first place, is symptomatic of a qualitative shift in human beings' emotional and intellectual yearning for more humane attitudes and behavior.

As was mentioned above, prior to the end of World War II and the Holocaust, it appears that there had never been a *body of law* completely dedicated in spirit and word to human well-being and flourishing. In order to create IHRL, the necessary inference is that people had to have the mental state to desire and conceive such a new body of law. This deduction is, moreover, confirmed by historical fact: by 1945, whole populations were reeling in disgust and shame at the bloodletting man had perpetrated during those cataclysmic events. IHRL was a prophylactic against further failures of human decency; as such, it was touchingly optimistic and a determined grab at reaffirming the dignity of the self. Thus, IHRL was a revolution in mind and law. And, once having made this fundamental moral leap, neither mind nor law were or are likely to regress, barring nuclear winter or other planetary catastrophe.

Lest the argument's thread be lost, and in light of IHRL's demonstrated pedagogical leverage and its rootedness in the modern human psyche, IHRL appears almost destined to gradually intromit its content into other laws. The content of those laws, in turn, should, gradually become more and more consistent with the content of IHRL.

Since IHRL's norms and standards derive, in part, from the values espoused by natural law theory, it is axiomatic that the content of non-IHRL laws will simultaneously

⁸¹ See *supra* note 70 and accompanying text; see also K.A.M. HENRARD & J.D. TEMPERMAN, HUMAN RIGHTS 91-92 (Boom Juridische Uitgevers 2011).

⁸² MALCOLM D. EVANS, INTERNATIONAL LAW 122 (Oxford University Press 2nd ed., 2006) (generally laying out the legal requirements for a norm to attain the status of customary international law).

⁸³ Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 400 & n. 156 (1985).

become more consistent with the content of natural law, i.e., will embrace morality and justice. If this trajectory holds, our descendants will have witnessed an epochal movement not only of laws, but of the very concept of Law as well: through IHRL's pressure and conductivity, Law's essential substance should eventually and overwhelmingly take on natural law's substance.⁸⁴

If this happens some day in the far, far future, the jurisprudential wall between positive law and natural law theories should come tumbling down. What was needed to end the impasse was to consider the "conflict" from a different angle, one that is receptive to Law as a process, including especially its transitional phases, shaped by real historical forces. That different angle is comprehensive historical methodology.

IV. Conclusion

After futilely wandering within the intellectual prison of Law as mostly static abstraction, it is not so easy to shift gears and credit comprehensive historical methodology with validity. There are, of course, obvious if not spectacular potential gains from using the new approach. Yes, yes, the methodology may lead to genuine closure of the positive law-natural law dispute, thereby, allowing closure on the question of what Law is. But, here's a thought. What if the use of comprehensive historical methodology in this context also gives us a more accurate reading of who we are as a species?

On the one hand, the history of mankind's moral progress appears to occur in telescopic arcs of time⁸⁵; the progress is so slow and takes so many centuries that it is hard to detect until an advance is actually achieved or on the brink of being achieved. On the other hand, there is a regularly occurring surfeit of brutality and gross deprivation, and the modern media doses us with it on a daily basis.

So, a wondrous thing about applying comprehensive historical methodology to define Law's content is not only that the methodology can and should accomplish just that, but that the methodology should also concurrently reveal the arc of Law's moral advance

⁸⁴ Given all of the jurisprudential sturm and drang described in this article's text, it is probably somewhat perverse to acknowledge at the article's end that law too may end. Some Marxist legal theorists have averred that Law and laws will indeed eventually cease to exist. *See, e.g.*, EVGENY B. PASHUKANIS, THE GENERAL THEORY OF LAW AND MARXISM 61, 63-64 (Transaction Publishers, 2nd pntg., C. J. Arthur ed., 2003).

⁸⁵ The Rev. Dr. Martin Luther King once remarked that "the arc of the moral universe is long, but it bends toward justice", NEW YORK TIMES, Aug. 29, 2013, at A20. President Barack Obama has enlarged upon this thought with the observation that, while the arc "may bend towards justice, ... it doesn't bend on its own." *Id.*

which, being our own creation, unveils our evolution as a species towards a more generous capacity for humaneness and civilized behavior.