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THE FIDUCIARY CONSTITUTION OF HUMAN RIGHTS

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We argue that human rights are best conceived as norms arising from a fiduciary relationship that exists between states (or statelike actors) and the citizens and noncitizens subject to their power. These norms draw on a Kantian conception of moral personhood, protecting agents from instrumentalization and domination. They do not, however, exist in the abstract as timeless natural rights. Instead, they are correlates of the state's fiduciary duty to provide equal security under the rule of law, a duty that flows from the state's institutional assumption of irresistible sovereign powers.

I. INTRODUCTION

Among political theorists and philosophers, conventional wisdom holds that human rights are rights that all human beings share simply by virtue of their common humanity.¹ Since World War II, public international law has embraced the concept of human rights, accepting a wide range of international norms as full-bodied legal constraints on state action. Nonetheless, international law has yet to develop a robust theory to illuminate the philosophical basis for human rights as legal obligations. Although moral and political philosophers have endeavored to explain the theoretical basis of human rights, none of the leading theories offers a persuasive justification for international human rights law as it has been understood and practiced for the past six decades. Uncertainty regarding the philosophical basis for human rights has impeded efforts to clarify the scope, justiciability, and cross-cultural relevance of international human rights law.

In this article we develop a theory of human rights that illuminates their juridical character and furnishes a principled framework for specifying the contours and requirements of international human rights law. We argue that human rights emanate from a fiduciary relationship between the state

1. See, e.g., JACK DONNELLY, *INTERNATIONAL HUMAN RIGHTS* 18 (1998); ALAN GEWIRTH, *HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATIONS* 1 (1982); H.L.A. Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175 (1955); A. JOHN SIMMONS, *Human Rights and World Citizenship*, in *JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS* 185 (2001).

and persons subject to its powers. Fiduciary relations denote the subjection of one party to the ongoing administrative power of another, such as one finds in the trustee-beneficiary relationship. Drawing on Immanuel Kant's legal theory and account of fiduciary relations in *The Doctrine of Right*,² we show that a state's assumption of sovereign administrative powers places it in a fiduciary relationship with its people. The state-subject fiduciary relationship can be understood as a relationship mediated by legality only if the state is precluded from exploiting its position to set unilaterally the terms of its relationship with its subjects. The fiduciary principle authorizes states to exercise power on behalf of their people, but subject to strict limitations flowing from the Kantian idea that agents are to be treated as ends always (the principle of noninstrumentalization) and the republican idea that persons are not to be subject to arbitrary power (the principle of nondomination).

By reframing human rights as legal entitlements grounded in the state-subject fiduciary relationship, the fiduciary theory provides a fresh perspective. Human rights under the fiduciary theory are *relational* and *institutional* because they respond to the threats that arise from the relational interactions between public institutions and the people they serve. They are *legal* and *nonpositivist* because they constitute necessary conditions of legal order under a Kantian theory of right. They are *practical* in that they take seriously the rights enshrined in the leading international human rights conventions. Because human rights under the fiduciary theory are necessary to guarantee every person's enjoyment of secure and equal freedom, they are *aspirational* and *universal* in scope. But they are also *deliberative* in that they are amenable to refinement through democratic deliberation.

This article develops the fiduciary theory of human rights in several stages. We begin by reviewing briefly the emergence of international human rights law during the postwar era and consider how the international community's failure to adopt a unifying philosophical theory of human rights has undermined efforts to specify determinate, justiciable, and cross-cultural human rights. We then suggest that the leading contemporary accounts of human rights—including those advanced by Alan Gewirth, John Rawls, and Joseph Raz—do not provide satisfactory answers to central questions of human rights theory. As an alternative to these accounts, we defend the fiduciary theory of human rights by showing how it can clarify the character, scope, and content of international human rights law.

II. DEVELOPING THE INTERNATIONAL LAW OF HUMAN RIGHTS

Anxious to move beyond the humanitarian calamities of World War II, state parties to the United Nations (U.N.) committed to work together to achieve

2. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 98–99 (Mary Gregor trans., 1991) (1797).

“universal respect for, and observance of, human rights and fundamental freedoms.”³ Under the direction of the U.N. General Assembly, the Human Rights Commission endeavored to generate an international consensus regarding human rights through the preparation of the Universal Declaration of Human Rights (UDHR).⁴ Although the UDHR affirmed “the inherent dignity and the equal and inalienable rights of all members of the human family,”⁵ it did not propose a philosophical justification for human rights. Instead, the UDHR catalogued particular rights accepted throughout the world in an attempt to establish “a common standard of achievement for all peoples and all nations.”⁶ The commission’s effort to generate a broad consensus regarding the international salience and basic content of human rights was a resounding success: the General Assembly adopted the UDHR by a vote of forty-eight in favor and none opposed, with eight abstentions,⁷ and the UDHR’s thirty articles continue to be recognized worldwide as an authoritative statement of human rights.

Even during the UDHR’s drafting process, human rights advocates recognized that the declaration’s moral consensus regarding human rights was only a first step. For human rights to be meaningful in practice, states would also have to accept and implement these rights as genuine legal obligations. International and regional organizations set out to craft multilateral human rights conventions and to design complementary institutional frameworks to bridge the gap between moral consensus and domestic implementation. At the international level, these efforts generated an impressive series of international agreements, including the International Covenant on Civil and Political Rights (ICCPR);⁸ the International Covenant on Economic, Social and Cultural Rights (ICESCR);⁹ and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).¹⁰ International agencies such as the U.N. Human Rights Commission, the U.N. High Commissioner for Human Rights, and the U.N. High Commissioner for Refugees began monitoring state compliance with these and other agreements. Regional bodies such as the Organization of American States, the Organization of African Unity, and the Council of Europe adopted additional regional human rights agreements, complemented by

3. U.N. Charter, arts. 55(c), 56.

4. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

5. *Id.* at pmbl.

6. *Id.*

7. See MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 169–170 (2001).

8. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Doc. E, 95–2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

9. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S.23 [hereinafter ICESCR].

10. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100–20 (1988), 1465 U.N.T.S. 85 [hereinafter CAT].

their own investigatory commissions and judicial tribunals.¹¹ This wave of convention drafting, ratification, and institutionalization strengthened human rights as binding legal norms without clarifying the philosophical basis for human rights' legal authority.¹²

The past several decades have witnessed a shift in attention from the drafting and ratification of treaty instruments to the implementation and enforcement of international human rights law. Human rights norms have been enforced through a variety of political mechanisms, including diplomatic and economic sanctions, restrictions on state participation in international organizations, and even humanitarian intervention. International, regional, and municipal courts have also assumed an increasingly prominent role in the enforcement of human rights, but they have struggled to interpret and apply the vague language of human rights conventions. In the absence of an underlying theory of human rights, basic questions regarding the scope and content of international human rights law have proven to be deeply controversial, fueling skepticism about international human rights law and subverting the modern human rights movement's universalist ambitions.¹³

Until recently, for example, the prohibition against state-sponsored torture was widely viewed as one of the most well-established and least controversial principles of international human rights law, having been incorporated in the UDHR, ICCPR, and CAT, as well as in a host of regional agreements and municipal laws. The international community has defined the prohibition against torture with unusual specificity by spelling out several discrete elements in the CAT.¹⁴ Yet, notwithstanding these apparent advantages, the torture prohibition's definition, universality, and legal authority remain controversial. In recent years, the U.S. government has challenged the prohibition against torture by employing and later defending "enhanced" interrogation techniques such as waterboarding, prolonged sleep deprivation, and hanging by the wrists.¹⁵

11. See Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123; Organization of African Unity, African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58; Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS 5.

12. See Jack Donnelly, *The Relative Universality of Human Rights*, 29 HUM. RTS. Q. 281 (2007) (observing that by May 2006, "six core international human rights treaties" had "a truly impressive 85% ratification rate").

13. See Charles Beitz, *What Human Rights Mean*, 132 DAEDELUS 36, 37 (2003); Allen Buchanan, *Human Rights and the Legitimacy of the International Order*, 14 LEGAL THEORY 39, 40–41 (2008).

14. CAT, *supra* note 10, art. 1(1) (defining torture to mean "any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted on a person for [various] purposes . . . when such pain or suffering is inflicted by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity.>").

15. See Jeremy Waldron, *Torture, Necessity, and Existential Politics*, 95 CAL. L. REV. 235, 235–236 & n.3 (2007).

Critics of enhanced interrogation techniques have struggled to explain why these practices should be considered human rights violations when the CAT fails to provide straightforward answers to many important questions regarding the torture prohibition's scope. For example, how should the international community determine whether an individual's "pain and suffering" are sufficiently "severe" as to constitute "torture"?¹⁶ Are states prohibited from employing torture under circumstances of perceived necessity?¹⁷ If states have not ratified the CAT and other human rights conventions, are they nonetheless prohibited from engaging in acts of torture? As the international community continues to debate these questions, it has become increasingly apparent that the prohibition against torture lacks a coherent theoretical foundation capable of delimiting its scope. Moreover, judicial efforts to define human rights norms with precision are likely to remain highly controversial unless those efforts can be grounded in a broader theory of human rights amenable to judicial inquiry.

In a sense, international human rights law has become a victim of its own success. As Allen Buchanan observes, "[t]he more seriously the international legal system takes the protection of human rights and the more teeth this commitment has, the more problematic the lack of a credible public justification for human-rights norms becomes."¹⁸ Looking to the future, the legal and political legitimacy of international human rights will depend in no small part upon the principled specification of human rights norms. To achieve this objective, international human rights law must develop a more rigorous theory of human rights—one capable of distinguishing authentic human rights, determining who may claim human rights violations against whom, and making human rights effective as justiciable legal rights. Indeed, after decades of relative neglect, there is a growing awareness within the human rights community that international law cannot achieve all three elements of its human rights agenda—transnational application, binding legal effect, and specification—without re-engaging the fundamental philosophical questions of human rights theory.¹⁹

16. CAT, *supra* note 10, art. 1(1).

17. See John T. Parry, *Escalation and Necessity: Defining Torture at Home and Abroad*, in TORTURE 145, 158 (Sanford Levinson ed., 2004) ("If torture provides the last remaining chance to save lives in imminent peril, the necessity defense should be available to justify the interrogators' conduct.")

18. Buchanan, *supra* note 13, at 41; see also CHARLES R. BEITZ, THE IDEA OF HUMAN RIGHTS xi (2009) ("[A]lthough the idea and language of human rights have become increasingly prominent in public discourse, it has not become more clear what kinds of objects human rights are supposed to be, why we should believe that people have them, or what follows from this belief for political practice.")

19. See, e.g., BEITZ, IDEA, *supra* note 18, at xi–xii; JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS 53 (2d ed. 2007); L. W. SUMNER, THE MORAL FOUNDATION OF RIGHTS 1–14 (1987); Joseph Raz, *Human Rights Without Foundations*, March 2007, Oxford Legal Studies Research Paper No. 14/2007, in THE PHILOSOPHY OF INTERNATIONAL LAW (John Tasioulis & Samantha Besson eds., forthcoming 2010); Buchanan, *supra* note 13, at 44; Michael Freeman, *The Philosophical Foundations of Human Rights*, 16 HUM. RTS. Q. 491, 491 (1994); Jerome J. Shestack, *The Philosophical Foundations of Human Rights*, 20 HUM. RTS. Q. 201 (1998).

III. IN SEARCH OF A THEORY OF HUMAN RIGHTS

To be credible, a general theory of human rights must offer principled answers (or at least guidance) to certain fundamental questions regarding the basis, character, and scope of human rights. These questions include the following:

- In what sense are human rights *rights*?
- Do human rights constitute *legal* rights, as distinguished from moral or political rights?
- What is the relationship between human rights and state lawmaking authority?
- Do human rights generate duties for both state and nonstate actors?
- How does the theory provide guidance for identifying human rights and clarifying the scope of those rights?
- Do human rights generate *positive* duties, such as a duty to provide education, in addition to negative duties of noninterference?
- If human rights derive from the inherent human dignity of the individual, as is often supposed, can they apply to certain classes of individuals (such as children) and to collectivities or groups (such as indigenous peoples)?
- Are human rights culturally relative or universal?

These issues rank among the most pressing and vexing in contemporary theoretical debates concerning human rights. They are also matters of immense practical importance for the future development of international human rights law.

As we have seen, the UDHR and subsequent human rights conventions were never intended to provide a full-fledged philosophical justification for human rights. At most, human rights conventions offer a few scattered philosophical fragments. For example, the UDHR declares that “[a]ll human beings are born free and equal in dignity and rights.”²⁰ The U.N. Charter characterizes human rights as “fundamental” and links them to “the dignity and worth of the human person” and the “the equal rights of men and women and of nations large and small.”²¹ The ICCPR and ICESCR similarly purport to “derive” their schedules of rights “from the inherent dignity of the human person.”²² To the extent that these instruments share a common vision of human rights (however imperfect and incomplete), it is one that emphasizes human beings’ freedom and equal dignity as a basis for international legal obligation. None of the leading human rights conventions explains precisely what the “inherent dignity of the human person” means, however, nor do they explain how particular rights might be “derived” from any particular conception of human dignity. For answers to these and other important questions regarding human rights, international

20. UDHR, *supra* note 4, art. 1.

21. U.N. Charter, *supra* note 3, pmb1.

22. ICCPR, *supra* note 8, pmb1.; ICESCR, *supra* note 9, pmb1.

law must look beyond these agreements to the complementary insights of moral and political philosophy.

Most theorists have grounded human rights in common values or attributes of humanity. For Locke, human rights represent the inalienable rights that all humanity enjoys by divine endowment in the prepolitical “state of nature” and retain thereafter upon entry into civil society.²³ In contrast, Kant derives individual entitlements from a theory of freedom according to which every individual has the right to as much freedom as can be reconciled with a like freedom enjoyed by others.²⁴ As we discuss in Part IV, human rights on the Kantian account reflect persons’ moral capacity as agents to place others under legal obligations. Critics have complained that such efforts to derive human rights from first principles rely on contestable assumptions regarding the essential character of human nature.²⁵ Nonetheless, many contemporary human rights theorists such as John Finnis, James Griffin, and Michael Perry continue to insist that human rights cannot be fully understood or specified without recourse to a foundationalist justification.²⁶

One prominent foundationalist theory is Alan Gewirth’s principle of generic consistency. Drawing on the Kantian tradition, Gewirth argues that human rights follow analytically from the idea that human freedom provides “necessary conditions of human action.”²⁷ Gewirth observes that the very concept of human freedom presupposes human purposiveness, which in turn presupposes an agent’s capacity to set her own purposes and make judgments about the good (i.e., the moral, philosophical, or religious doctrine she wishes to affirm and pursue). Once an agent recognizes that she is able to set her own purposes and make judgments about the good, she must accept that her “freedom and well-being are necessary”²⁸ for purposive action and that she has a right to these generic features of successful action.²⁹ Because others also possess agency, the agent “must admit, on pain of self-contradiction,”³⁰ that others have rights to freedom and well-being.³¹

Gewirth’s principle of generic consistency has not escaped criticism. Joseph Raz disputes Gewirth’s assertion that “freedom is a necessary condition of human purposeful action,” noting that slaves act purposefully without enjoying freedom.³² In addition, even if Gewirth’s principle of generic

23. See JOHN LOCKE, *THE SECOND TREATISE ON CIVIL GOVERNMENT* 4–11 (Thomas P. Peardon ed., 1952) (1690).

24. KANT, *METAPHYSICS OF MORALS*, *supra* note 2.

25. See, e.g., Freeman, *supra* note 19, at 494; Shestack, *supra* note 19, at 208.

26. See John Finnis, *NATURAL LAW AND NATURAL RIGHTS* 198, 210–213 (1980); James Griffin, *ON HUMAN RIGHTS* (2008); Michael J. Perry, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* (1998).

27. GEWIRTH, *HUMAN RIGHTS*, *supra* note 1, at 20.

28. Alan Gewirth, *The Epistemology of Human Rights*, 1 *SOC. PHIL. & POL’Y* 14, 15 (1984).

29. ALAN GEWIRTH, *REASON AND MORALITY* 63–64 (1978).

30. *Id.* at 26.

31. Gewirth, *Epistemology*, *supra* note 28, at 17.

32. *Id.* at 4.

consistency were persuasive as a theory of moral obligation, it would remain incomplete because it fails to elucidate human rights' legal character. On Gewirth's account, human rights could conceivably bind agents morally without imposing any correlative legal duty.

Another influential tradition in human rights theory draws on John Rawls's practical political philosophy of human rights. Instead of seeking to deduce rights analytically from fundamental assumptions about human nature, Rawls argues that rights claims can be grounded in a political conception of justice based on an "overlapping consensus" between rival social, cultural, and religious traditions.³³ The representatives of peoples from behind the veil of ignorance will agree that certain minimum norms (including human rights) are constitutive of a decent or well-ordered political order, and so it is unnecessary to reach agreement on the particular social, cultural, or religious considerations that ground human rights. Many human rights theorists have found this political conception of human rights appealing not only because it mediates ideological conflict and addresses concerns about cultural relativism but also because it furnishes a persuasive positive theory for the development of international human rights law. As James Nickel observes, "[p]ostwar efforts to formulate international human rights have gone forward despite obvious and persistent philosophical and ideological divisions."³⁴

Efforts to ground human rights in political conceptions of justice or contingent social practices have foundered, however, on a common problem: the idea of an overlapping consensus, without more, does not specify the scope or legal implications of human rights nor even why they should be thought to have legal rather than moral or political implications. As the prohibition against torture illustrates, the mere fact that virtually all states have recognized a particular human right often tells us little about the scope or legal consequences of the right. For international courts and other institutions charged with interpreting human rights, it is not enough to identify some norms as human rights; they must also be able to define human rights' scope and explain their legal consequences. As presently constituted, however, the political conceptions of human rights defended by Rawls and others do not enable them to do this.

Responding to Rawls and Gewirth, Raz dismisses human rights theory generally as a field "rife with hollow hypocrisy" and "infected with self-serving cynicism and . . . self-deception."³⁵ According to Raz, human rights are not "grounded in a fundamental moral concern" such as inherent moral

33. See John Rawls, *The Law of Peoples*, in ON HUMAN RIGHTS 42, 46, 68 (Stephen Shute & Susan Hurley eds., 1993).

34. NICKEL, *supra* note 19, at 7–8. For a theory that combines Rawls's political conception of human rights with foundationalism, see JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 41 (2d ed. 2003); Donnelly, *Relative Universality*, *supra* note 12, at 15.

35. Raz, *Human Rights*, *supra* note 19, at 19.

equality or the necessary preconditions for a just political order.³⁶ In Raz's view, human rights are similar to all other rights in that they are protective of individual interests but are different in that their legality rests on the agreement of states to honor them.³⁷ Human rights operate in the international sphere insofar as states that honor them are entitled to noninterference by other states. In this sense, human rights are grounded in interests but ultimately serve to govern claims of sovereignty.

Raz's positivist, interest-based theory denies many core principles of the postwar human rights movement. On Raz's theory, human rights are not universal; states may choose for themselves whether particular individual interests warrant legal protection as human rights. Human rights are never permanent; they evolve over time in response to "the contingencies of the current system of international relations."³⁸ Human rights are neither fundamental nor inalienable; states may subordinate even the most essential individual interests to governmental or commercial objectives. Now, Raz would condemn on moral grounds state-sanctioned crimes against humanity and other atrocities. Nonetheless, the fact that Raz's theory can exclude abhorrent practices from consideration as human rights violations raises serious questions about its practicality as a general theory of international human rights law.

Some utilitarians also express skepticism about human rights discourse, arguing that the international community should shift its focus from enforcing individual rights to maximizing global human welfare.³⁹ These criticisms of human rights theory share a commendable purpose of advancing global justice on a broad scale. The international community cannot reasonably develop an agenda for improving the human condition, however, without elucidating both the ideals to which states should strive and the law's role in advancing those ideals. Nor can the international community enforce human rights effectively without a reasonably clear sense of the content of the particular rights that merit protection. Plausibly, the international community's human rights and global justice projects will both benefit from a robust theory capable of illuminating human rights' juridical character, scope, and authority.

IV. FIDUCIARY STATES AND HUMAN RIGHTS

We argue here that human rights are best conceived as rights emanating from a fiduciary relationship that exists between the state and persons subject to its powers, including citizens, resident aliens, and nonresident aliens. We begin by adumbrating a Kantian account of fiduciary relations and then

36. *Id.*

37. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 191 (1986).

38. Raz, *Human Rights*, *supra* note 19, at 19.

39. See, e.g., Eric Posner, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758 (2008).

apply this account to show that the state and its institutions stand in a fiduciary relationship to the citizens and noncitizens subject to their power.⁴⁰ The Kantian basis of fiduciary relations is the moral capacity of one person to place another under legal obligation whenever the former is subject to the unilateral administrative power of the latter. This moral capacity reflects Kant's principle of noninstrumentalization: persons are to be regarded as ends always, rather than mere means.

Within the fiduciary framework, human rights emerge as entitlements to be treated in certain ways by public institutions. In particular, public institutions are duty-bound to secure individuals against arbitrary power by promoting the republican ideal of nondomination. We see below that the human rights enshrined in international law provide a normative structure conducive to nondomination. They are mid-range or intermediary norms that reside between the amorphous demands of dignity and the concrete institutionalization of sovereign power, and they are susceptible to modification pursuant to democratic deliberation. In short, human rights under the fiduciary theory are normative consequences of the state's assumption of sovereign powers and are thus constitutive of sovereignty's normative dimension. A state that fails to satisfy its fiduciary duty to respect human rights subverts its claim to govern and represent its people as a sovereign actor.

Put another way, human rights are correlates of the state's duty to secure conditions of noninstrumentalization and nondomination. We see below that instrumentalization and domination are distinct, but both reflect an ideal of independent agency. Independent agency is the capacity of an agent to exercise her powers of self-determination without wrongful interference (instrumentalization) or the threat of such interference (domination). For ease of reference, we sometimes refer to the conjunction of noninstrumentalization and nondomination as simply "independence," though at various points we treat the two ideas separately. Thus the state's duty to secure conditions of both noninstrumentalization and nondomination is a duty to secure conditions of independence.

The fiduciary conception of human rights has numerous characteristics that we outline now and elaborate below. It is *relational* in that it justifies and explains human rights on the basis of a state-subject fiduciary relationship. It is *institutional* in that it posits human rights as norms that respond to the power assumed and threats posed by public institutions. It is *legal* in that its key normative precepts are taken from Kant's theory of right. It is *nonpositivist* in that it reveals human rights as the progeny of a necessary connection between law and morality. It is *republican* in that the structure of fiduciary relations, including the state-subject relation, expresses the general structure

40. For discussion of the fiduciary theory's cosmopolitan application to noncitizens as well as citizens, see Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331, 359, 380–382 (2009).

of relations of nondomination when one party holds discretionary power over another (such as the state's power to establish legal order on behalf of legal subjects). It is *practical* in the sense that it takes seriously the current practice of international human rights law, including the extensive schedule of rights set out in the so-called International Bill of Human Rights (the UDHR, ICCPR, and ICESCR). The fiduciary conception is also *universal* and *aspirational* in that it aspires to facilitate universally relations of non-instrumentalization and nondomination (or independence), since these relations are necessary to every person's enjoyment of secure and equal freedom. And finally, it is *deliberative* in that international human rights law is viewed as provisional and susceptible to revision in light of democratic deliberation.

Fiduciary relationships include trustee-beneficiary, agent-principal, director-corporation, lawyer-client, and parent-child relations. They arise from circumstances in which one party (the fiduciary) holds discretionary power of an administrative nature over the legal or practical interests of another party (the beneficiary), and the beneficiary is vulnerable to the fiduciary's power in that he is unable, either as a matter of fact or law, to exercise the entrusted power.⁴¹ Discretionary power of an administrative nature is other-regarding, purposive, and institutional. It is other-regarding in the strictly factual sense that another person is involved; a landowner's administrative power over her land is not other-regarding, whereas a director's administrative power over a corporation is. The fiduciary's power is purposive in that it is held for limited purposes, such as an agent's power to contract on behalf of her principal. Lastly, the power is institutional in that it must be situated within a legally permissible institution, such as the family or the corporation, but not, for example, within a kidnapping ring. The kidnapper is not a lawful fiduciary because kidnapping is premised on wrongful interference and domination. The law seeks to extinguish rather than regulate relationships of this kind.

Beneficiaries are peculiarly vulnerable in that they generally are unable to protect themselves or their entrusted interests against an abuse of fiduciary power. In many fiduciary relationships of private law (e.g., lawyer-client, agent-principal), the fiduciary is empowered to act on the beneficiary's behalf so as to change the beneficiary's legal position, and the things he is empowered to do for the beneficiary (e.g., defend a suit, sign a contract) are things the beneficiary is legally entitled to do for herself. In other cases, the vulnerability is of a different kind because the beneficiary cannot in principle exercise the fiduciary's power. Artificial persons, for instance,

41. One of us has defended this conception of fiduciary relationships as well as a fiduciary conception of the state. See Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 *QUEEN'S L.J.* 259 (2005). We also argue that administrative law rests on fiduciary foundations. See Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 *UCLA L. REV.* 117 (2006); Evan Fox-Decent, *Democratizing Common Law Constitutionalism*, 55 *MCGILL L.J.* (forthcoming 2010).

such as corporations, cannot act except through their agents or representatives. But most relevant for present purposes are fiduciary relationships involving multiple beneficiaries subject to the same fiduciary power, such as pension fund beneficiaries with competing claims on the same fund.⁴² In these cases, the contending beneficiaries are not entitled to exercise the fiduciary's power because no person can be judge and party to the same cause.

Although the hallmark fiduciary duty of a trustee to a discrete beneficiary is a duty of loyalty, the content of this duty necessarily changes if multiple classes of beneficiaries are involved. The fiduciary duty necessarily becomes one of fairness or evenhandedness as between beneficiaries, and reasonableness in the sense that the fiduciary must have due regard for the distinct beneficiaries' separate interests.⁴³ In all cases, the fundamental fiduciary duty is to exercise the entrusted power exclusively for the other-regarding purposes for which it is held.

Kant provides a noninstrumental account of the moral basis of fiduciary obligations in an argument concerning the duties that parents owe their children, duties that arise as a consequence of the parents' unilateral act of procreation:

[C]hildren, as persons, have by their procreation an original innate (not acquired) right to the care of their parents until they are able to look after themselves, and they have this right directly on the basis of principle (*lege*), that is, without any special act being required to establish this right.

For the offspring is a *person*. . . . [I]t is quite correct and even necessary Idea to regard the act of procreation as one by which we have brought a person into the world without his consent and on our own initiative, for which deed the parents incur an obligation to make the child content with his condition so far as they can. They cannot destroy their child . . . since they have brought not merely a worldly being but a citizen of the world into a condition which cannot now be indifferent to them even just according to concepts of Right.⁴⁴

To understand Kant's argument, we need to review briefly his theory of right (or legality), which includes a very specific conception of the idea of innate right. For Kant, legal rights embody our moral capacity for putting others under legal obligations and are either acquired or innate.⁴⁵

42. See, e.g., *Equitable Life Assurance Soc'y v. Hyman*, [2000] 2 All E.R. 331 (C.A.), *aff'd* [2002] 1 A.C. 408 (H.L.) (U.K.).

43. See *id.*; *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245 (Can.); P.D. FINN, *FIDUCIARY OBLIGATIONS* 59–74 (1977).

44. See KANT, *METAPHYSICS OF MORALS*, *supra* note 2, at 98–99 (emphasis in original) (footnote omitted). It is settled law in Canada that parents owe their children fiduciary duties. See *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6 (Can.). For an argument that U.S. family law should follow suit, see Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995).

45. KANT, *METAPHYSICS OF MORALS*, *supra* note 2, at 63. The summary of Kant's discussion of rights in the text refers exclusively to coercively enforceable legal rights and their correlative legal obligations. Kant is not referring to unenforceable ethical duties arising from the

Property and contractual entitlements are acquired rights because some act is required on the part of the right-holder for her to acquire them. An innate right, on the other hand, “is that which belongs to everyone by nature, independently of any act that would establish a right.”⁴⁶ Persons have one, and only one, innate right, which all possess equally by virtue of their shared humanity—that is, the right to as much freedom as can coexist with the freedom of everyone else. Freedom, Kant explains, is simply “independence from being constrained by another’s choice.”⁴⁷ It follows that in a world where interaction with others is unavoidable, law must enshrine and secure rights within a regime of equal freedom in which no party can unilaterally impose the terms of interaction on another.

Rights under Kant’s theory protect the freedom and dignity of agents rather than their welfare or interests.⁴⁸ Correlative duties arise from rights because their absence would signal a deprivation of freedom or an insult to dignity. That a breach of duty might set back interests is irrelevant to whether there is a duty in the first place. Under Kant’s legal theory, inquiry into liability addresses whether there has been a breach of duty, and this inquiry is categorically distinct from the subsequent inquiry into damages which tracks the effect of the breach on the relevant interests. The distinction between harms and wrongs illuminates the point. An actor can wrong without harming, such as when she invades your privacy by reading your junk mail without permission. And she can harm without wronging, as might occur if she launched a business to compete with yours. While it is true that many rights (including human rights) protect important interests, for Kant they are properly designated as rights only if their infringement would constitute a breach of duty (understood as a deprivation of freedom or an insult to dignity) and regardless of whether the purported breach leads to a setting back of interests.

Consider now Kant’s claim that children have an innate and legal right to their parents’ care. To connect the parent’s duty to the child’s right, Kant points to the act of procreation, an act that brings a helpless and vulnerable child into the world without the child’s consent. When parents unilaterally create a person who cannot survive without their support, the child’s innate moral capacity to place the parents under obligation is triggered to ensure the child’s security. The parents’ freedom to procreate can thus coexist with the child’s right to security from the perils of a condition to which she never

categorical imperative under his doctrine of virtue, such as the duty of beneficence. For a discussion of the intimate relationship in Kant between legality and coercion, see Arthur Ripstein, *Authority and Coercion*, 32 PHIL. & PUB. AFF. 2 (2004).

46. KANT, METAPHYSICS OF MORALS, *supra* note 2, at 63.

47. *Id.*

48. Cf. SUMNER, *supra* note 19 (arguing that rights are best conceived as protected choices, but grounded on consequentialist considerations). But see JOSEPH RAZ, THE MORALITY OF FREEDOM 165–192 (1986) (defending the interest theory under which rights protect interests). For subsequent defense of the interest theory, see Andrei Marmor, *On the Limits of Rights*, 16 LAW & PHIL. 1 (1997).

consented. The child is treated as a person worthy of respect and not as a thing the parents can destroy or abandon.

As persons, children cannot be treated as mere means or objects of their parents' freedom to procreate. Rather, they are beings who, by virtue of their moral personhood, have dignity, and dignity proscribes regarding them as if they were things. By the same token, legal personality and the idea of dignity intrinsic to it supply the moral basis of the beneficiary's right to the fiduciary obligation. A relationship in which the fiduciary has unilateral administrative power over the beneficiary's interests can be understood as a relationship mediated by law only if the fiduciary (like the parent) is precluded from exploiting his position to set unilaterally the terms of his relationship with the beneficiary. The fiduciary principle renders the beneficiary's entrusted interests immune to the fiduciary's appropriation, because those interests are treated as inviolate embodiments of the beneficiary's dignity as a person. In other words, the fiduciary principle authorizes the fiduciary to exercise power on the beneficiary's behalf but subject to strict limitations arising from the beneficiary's vulnerability to the fiduciary's power and his intrinsic worth as a person. Bearing in mind the constitutive features of fiduciary relations and Kant's theory of right, we are now in a position to explain how the state and its institutions stand in a fiduciary relationship to their people.

The state's legislative, judicial, and executive branches all assume discretionary power of an administrative nature over the citizens and noncitizens affected by their power. For example, the state assumes discretionary authority to announce and enforce law over everyone within its territory. The legislative, executive, and judicial powers entailed by sovereignty, in their own familiar ways, are institutional, purpose-laden, and other-regarding. Furthermore, legal subjects, as private parties, are not entitled to exercise public powers. For this reason, legal subjects are peculiarly vulnerable to public authority, notwithstanding their ability within democracies to participate in democratic processes. It follows that the state's assumption of sovereign powers—public powers that private parties are not entitled to exercise—places it in a fiduciary relationship with its people.

The fiduciary model compares favorably to the social contract theory relied on by many human rights scholars.⁴⁹ Like social contract theory, the fiduciary view appeals to a familiar kind of legal relationship from private law, but with the advantage that the state-subject fiduciary relationship is actual, whereas the social contract is a fiction. The state's fiduciary duties are therefore actual rather than hypothetical.

Perhaps the most salient advantage of the fiduciary theory, however, is that it draws on a legal relationship expressly designed to govern relations of proclaimed authority involving nonconsensual coercion, such as

49. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (1971); FERNANDO R. TESÓN, *A PHILOSOPHY OF INTERNATIONAL LAW* (1998).

the parent-child relationship. These relationships can be rightful (i.e., consistent with the secure and equal freedom of both parties) if and only if the law rather than the power-holder sets the terms of the relationship. The fiduciary principle does just this; it is the law's means of regulating the possession and use of entrusted power over those who are not able or entitled to exercise it. Because the problem of justifying the state is precisely the problem of articulating the conditions under which the state can exercise nonconsensual coercion, the fiduciary model is well suited to the task. Rather than fudge or wish away the nonconsensual nature of state authority, as the contractarian tradition tends to do, the fiduciary theory posits a concrete normative structure that aspires to make rightful the possession and exercise of explicitly nonconsensual sovereign power. While social contract theories rely on (the fiction of) consent, the fiduciary theory is shaped by its absence. But the fiduciary theory remains staunchly democratic because it insists that every person must have an equal opportunity to participate in political processes that ultimately culminate in the state's possession and exercise of nonconsensual coercive power.⁵⁰

Our suggestion is that the state's overarching fiduciary duty to citizens and noncitizens is to establish a regime of secure and equal freedom under the rule of law.⁵¹ Human rights provide the blueprint or structure of this regime. That is, the fiduciary principle authorizes the state to secure legal order, but subject to fiduciary constraints that include human rights. Under this theory, the state's sovereignty to govern domestically and represent its people internationally consists in its fiduciary authorization to do so. And because this authorization is constrained and constituted by a duty to respect, protect, and implement human rights, state sovereignty is likewise constrained and constituted by human rights.⁵²

The idea of a state-subject fiduciary relationship reveals the relational character of the fiduciary conception of human rights. In what follows, we flesh out the other features of the fiduciary model mentioned above, beginning with its institutional nature.

50. See Criddle & Fox-Decent, *supra* note 40, at 356–360 (distinguishing the fiduciary theory from the contractarian tradition).

51. Cf. JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 283 (1998) ["public authority is not merely a moral liberty but essentially a responsibility (a liberty coupled with, and ancillary to, a duty)."]. For insightful discussion of Finnis's "duty to govern" and its relationship to authority (the right to govern) and legal obligation (the duty to obey the law), see Leslie Green, *The Duty to Govern*, 13 LEGAL THEORY 165 (2007).

52. The fiduciary theory therefore satisfies Jon Mahoney's criterion that "a liberal conception of human rights must . . . justify the claim that human rights (a) *limit* and (b) *authorize limited* exercises in *political power*." Jon Mahoney, *Liberalism and the Moral Basis for Human Rights*, 27 LAW & PHIL. 151, 152 (2008). An advantage of the fiduciary theory is that it demystifies the role of human rights within a framework of limited authorization. Human rights denote limits through the obligations they impose, but rights (e.g., all negative rights to noninterference) do not typically imply authorization. A separate principle is required for purposes of authorization, and in contexts of nonconsensual coercion, the best candidate is the fiduciary principle.

The fiduciary model is institutional in two senses. First, as shown above, it is institutional in the constitutive sense that fiduciary relations must arise within legal institutions such as the family or corporation—frameworks in which the relationship is not defined by domination or wrongful interference with the vulnerable party. Second, the fiduciary theory is institutional in that it does not rely on preinstitutional and timeless natural rights, which are sometimes said to ground human rights. A. John Simmons provides an especially clear account of the preinstitutional view:

[H]uman rights are possessed by all human beings simply in virtue of their humanity. . . . Human rights are those natural rights that are innate and that cannot be lost (i.e., that cannot be given away, forfeited, or taken away). Human rights, then, will have the properties of universality, independence (from social and legal recognition), naturalness, inalienability, non-forfeitability, and imprescriptibility. Only so understood will an account of human rights capture the central idea of rights that can always be claimed by any human being.⁵³

Charles Beitz refers to this account as the “orthodox” view of human rights.⁵⁴ As both he and Simmons observe, the orthodox view is inconsistent with a wide range of rights recognized by international human rights law, since these rights require or presuppose legal institutions. Consider, for example, rights enshrined in the ICCPR to due process (arts. 9, 14, 15), unionization (art. 22), protection of family life (art. 23), political participation (art. 25), and equality under the law (art. 26). Rights found in the ICESCR are even less amenable to the orthodox view. The ICESCR includes entitlements to work under “just and favourable conditions” (arts. 6–8), social security (art. 9), an adequate standard of living (art. 11), health (art. 12), education (art. 13), and enjoyment of cultural life (art. 15). These rights cannot exist in a prepolitical state of nature devoid of public institutions, nor is it plausible to think that they existed in premodern societies, when the institutions necessary for their realization did not exist.

Rather than denying, as some philosophers do, that these rights are human rights,⁵⁵ the fiduciary theory takes their institutional preconditions to heart because under this theory human rights are viewed as normative demands arising from the subjection of persons to public institutions. In

53. A. JOHN SIMMONS, JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS 185 (2001) (citing inter alia Alan Gewirth, *The Epistemology of Human Rights*, in HUMAN RIGHTS 1, 3 (E.F. Paul, J. Paul & F.D. Miller, Jr., eds., 1986)) (other citations omitted) (emphasis in original).

54. Charles Beitz, *Human Rights and the Law of Peoples*, in THE ETHICS OF ASSISTANCE: MORALITY AND THE DISTANT NEEDY 193, 196 (Deen K. Chatterjee ed., 2004); see also *id.* at 197–198 (citing Maurice Cranston as a proponent of this view: MAURICE CRANSTON, WHAT ARE HUMAN RIGHTS? 65–71 (1973)).

55. See, e.g., Maurice Cranston, *Are There Any Human Rights?* 112 DAEDALUS 1 (1983); FINNIS, NATURAL LAW, *supra* note 26, at 214–215.

modern industrial societies, these include the institutions of private property and markets as well as legislatures, courts, and administrative agencies. International human rights law protects individuals against threats of instrumentalization and domination made possible by the existence of these institutions.⁵⁶ Because these and other institutions are liable to change over time and vary across jurisdictions, there is no reason to think that the present catalogue of human rights is complete or invariant. The catalogue may change because threats to agency and dignity may change or because contemporary threats may be newly apprehended by human rights law, as the proliferation of instruments protective of vulnerable groups attests.⁵⁷ What is provisionally fixed within the fiduciary theory, however, is a commitment affirmed on legal grounds to noninstrumentalization and nondomination.

The legal character of the fiduciary model derives from its reliance on Kant's theory of right.⁵⁸ The rights available under this theory are enforceable claim-rights, and in this context they correlate to the state's duty to respect, protect, and implement human rights. Just as a child's right to parental care is correlative to the parent's duty to provide support, the legal subject's human right to x is correlative to the state's duty to guarantee x . In both cases the fiduciary principle triggers the duty. And in both cases the reason for imposing a duty on the power-holder is the same as the reason for acknowledging the beneficiary's right: recognition of the right and the duty are necessary to avoid subjecting the beneficiary to instrumentalizing or dominating power. Right and duty coalesce to protect the dignity and independence of the vulnerable party.

One of the advantages of relying on a legal conception of human rights is that it treats international human rights law on its own terms, within its own self-image, as law rather than as merely the aspirational goals of liberal political morality. The fiduciary theory does so by offering a distinctively legal explanation of the state's duty to guarantee human rights. We argue elsewhere that the fiduciary model explains the peremptory status of *jus cogens* norms, such as the prohibitions against torture, slavery, and genocide.⁵⁹ As a matter of international law, states must comply with these

56. For discussion of rights as guarantees against "standard threats," see HENRY SHUE, *BASIC RIGHTS* (2d ed. 1996). See also THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS* 64 (2002) (arguing that human rights are "moral claims on the organization of one's society").

57. See, e.g., Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, Annex, U.N. Doc. A/RES/34/180 (Dec. 18, 1979); Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, G.A. Res. 45/158, U.N. GAOR, 45th Sess., Supp. No. 49, U.N. Doc. A/45/49 (Dec. 18, 1990); Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter Indigenous Peoples Declaration].

58. Compare JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 104–11 (1996) (arguing for a "legal" conception of human rights, but where "legal" is intended to denote a positivist detachment from morality).

59. See Criddle & Fox-Decent, *supra* note 40.

norms whether they consent to them or not. The fiduciary theory explains the nonderogability of such norms on grounds that their violation could never be consistent with the state's fiduciary duty to secure legal order, which includes the provision of fundamental equal security under the rule of law. Practices that arbitrarily kill or systematically dominate a state's subjects, as well as practices that infringe key aspects of the rule of law (such as corrupt adjudication), are prohibited by *jus cogens* under the fiduciary theory.

The fiduciary model also points to three substantive desiderata of derogable and nonderogable human rights. The fiduciary principle's authorization of state power requires the state and its institutions to act for the good of the people rather than for the good of its officials or rulers. The first desideratum is therefore a principle of *integrity*: human rights must have as their object the good of the legal subject rather than the good of the state's officials. Second is a principle of *formal moral equality*: the fiduciary state owes a duty of fairness or evenhandedness to legal subjects because they are separate persons subject to the same fiduciary power. Human rights, therefore, must regard individuals as equal cobeneficiaries of the fiduciary state. Third is a principle of *solicitude*: human rights must be solicitous of the legal subject's legitimate interests because those interests, like the interests of the child vis-à-vis the parent, are vulnerable to the state's nonconsensual coercive power. These desiderata offer a substantive justification of international human rights law, a justification that operates independently of whether states have ratified particular conventions. Freedom of expression and the right to work, for example, have the good of the subject as their object and are consistent with the principles of formal moral equality and solicitude.

These principles reveal that the fiduciary theory, as a legal conception of human rights, is normatively substantial but metaphysically thin. The theory is normatively substantial because principles such as integrity, formal moral equality, and solicitude all have content that facilitates the specification and justification of human rights norms. But the theory is metaphysically thin because it does not affirm nor presuppose a comprehensive conception of the good.⁶⁰ Nor does the fiduciary theory affirm or imply that individuals are in fact moral equals. As a legal conception, the fiduciary theory merely insists that for public institutions to act legally, they must regard individuals *as if* they were moral equals, because public institutions must regard all individuals as equal cobeneficiaries of legal order. Public institutions must adopt this attitude because the fiduciary principle authorizes the state to secure legal order on behalf of every agent subject to it. Each agent is an equally valid subject of the fiduciary authorization of public authority, and because the fiduciary principle is a principle of legality, it must treat like

60. See, e.g., JOHN RAWLS, *The Idea of an Overlapping Consensus*, in JOHN RAWLS: COLLECTED PAPERS 421, 424–425 (Samuel Freeman ed., 1999).

cases alike.⁶¹ The fiduciary principle therefore has no capacity to discriminate arbitrarily between agents who, by virtue of the state-subject fiduciary relationship, enjoy equal status vis-à-vis the state as cobeneficiaries of public authority. Slavery and arbitrary discrimination are ruled out simply because the fiduciary principle cannot authorize such practices, which are inconsistent with the fiduciary principle that all agents are entitled to be treated as equal under the law—none of which presupposes or implies that individuals actually possess equal moral worth or dignity.

Rawls claims that a “law of peoples” can embrace “hierarchal” as well as liberal societies as long as the hierarchical societies are “well-ordered.”⁶² Hierarchical societies are nonliberal in that they are organized by comprehensive religious, moral, or philosophical doctrines. Borrowing from Philip Soper’s Kantian account of law, Rawls asserts that part of what it means for a hierarchical society to be well-ordered is for it to have a legal system “that takes impartially into account what it sees not unreasonably as the fundamental interests of all members of society.”⁶³ Within this system, judges and officials must be prepared to listen to dissent and justify their pronouncements. A well-ordered hierarchical society must also respect an abridged catalogue of “basic” human rights, since its legal system must be capable of imposing enforceable moral duties on persons within its territory and could not do so if it violated those rights.⁶⁴

Rawls argues that the moral presuppositions of well-orderedness are sufficiently thin that some hierarchical societies would be willing to accept them. The point is to distinguish tyrannical regimes, which cannot be accepted into the “reasonable society of peoples,” from other nonliberal societies that can.⁶⁵ The result is that liberal and (well-ordered) hierarchical societies can relate to one another on the basis of a stable and overlapping consensus conducive to a law of peoples.

While it is beyond the scope of this paper to assess either Rawls’s law of peoples or Soper’s legal theory, four points are worth underscoring. The first is that the fiduciary theory as a legal conception resembles Rawls’s theory in that it relies on a Kantian account of the right rather than a comprehensive conception of the good. Second, the fiduciary theory is at least

61. Hart acknowledges that “[i]f we attach to a legal system the minimum meaning that it must consist of general rules . . . this meaning connotes the principle of treating like cases alike.” H.L.A. HART, *Positivism and the Separation of Law and Morals*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 49, 81 (1983).

62. John Rawls, *The Law of Peoples*, 20 *CRITICAL INQUIRY* 36, 37 (1993). A law of peoples is a “political conception of right and justice that applies to the principles and norms of international society.” *Id.*

63. *Id.* at 51. Rawls draws on PHILIP SOPER, *A THEORY OF LAW* (1984). Soper claims we have a prima facie obligation to show respect to others who do necessary jobs. Because the state’s officials do a necessary job when they announce and enforce law, we have a defeasible obligation to obey the law when they do their job in good faith. To be clear, Soper’s idea of respect for others is Kantian in a loose sense, but his legal theory is not Kant’s.

64. Rawls, *Law of Peoples*, *supra* note 62, at 52.

65. *Id.* at 37.

as thin as Rawls's political conception, since Rawls's conception trades on a legal theory alleged to be capable of justifying the imposition of moral duties. Third, the fiduciary theory *explains why* rather than *assumes that* a well-ordered society cannot discriminate arbitrarily between individuals: it cannot do so because its institutions are under a fiduciary obligation to treat people evenhandedly as equal cobeneficiaries of the fiduciary state. Rather than assuming impartiality as an entrance condition into the "reasonable society of peoples," the fiduciary theory explains why impartiality participates directly in the constitution of human rights.

The fourth point is perhaps the most important: both Rawls's theory and the fiduciary theory trade on a moral space between preinstitutional natural rights and conventional rights, a domain we might call the normative space of legal order. For Rawls, if a state wishes to belong to the "reasonable society of peoples," it must be well-ordered; to be well-ordered, it must have a legal system capable of imposing enforceable moral duties; and a necessary condition of such a system is that it respect basic human rights. The requirement to respect human rights flows not from an assumption that these rights exist in some preinstitutional sense (as Gewirth and others assert), nor from their stipulation in positive law (as positivists such as Raz contend), but from the idea that a failure to respect them would subvert a legal system's capacity to impose moral duties. Such a failure would thereby undercut the society's claim to well-orderedness and membership in the reasonable society of peoples. We see above that the fiduciary theory also relies on moral requirements internal to legal order rather than preinstitutional natural rights or positive law. But whereas for Rawls the idea that states must respect human rights is a hypothetical imperative (if a state wants to be well-ordered, it must respect human rights),⁶⁶ under the fiduciary theory the imperative is categorical: the state must respect human rights because it has a fiduciary duty to do so.

Many philosophers reject the idea that there is normative space between natural/moral rights and conventional/legal rights because they take these two categories to represent watertight compartments exhaustive of the domain within which rights operate. The rejection is present in the consequentialist account of rights defended by Wayne Sumner but is also present in the work of a number of natural rights theorists, including Simmons.⁶⁷

66. Rawls purports to set aside the jurisprudential question of whether a scheme of rules must have the structure and content Soper assigns to it to count as a system of law, insisting that his only interest is in specifying the conditions of well-orderedness for the purpose of determining membership in a reasonable society of peoples. *Id.* at 51 n.22. Yet it is just the structure and content Soper specifies that are alleged to authorize a scheme of rules to impose enforceable moral duties on the people subject to those rules, an authorization not possessed by schemes that merely issue commands backed by coercive force. Notwithstanding Rawls's protest to the contrary, implicit in his theory of well-orderedness is a commitment to the nonpositivist idea that legal systems per se, as such and without more, are capable of imposing enforceable moral duties.

67. SUMNER, *supra* note 19, at 90–91; SIMMONS, JUSTIFICATION, *supra* note 53, at 186–194.

Simmons recognizes that Kant's theory of right complicates the picture. He admits that Kant can be read to support human rights that require institutions; our innate right of humanity to equal freedom entitles us to compel others to leave the state of nature and enter civil society so as to guarantee secure and equal freedom. But on Simmons's interpretation, the natural/conventional paradigm remains intact because the justificatory work is performed entirely by our innate right of humanity and in abstraction from the necessary contribution that Kant insists legal institutions make to the determinacy and security of our rights. Simmons in fact rejects Kant's claim that the state's institutions are morally required. What unites Sumner and Simmons, despite the chasm that separates their substantive moral theories, is a commitment to the positivist idea that there is no necessary connection between law and morality; law is viewed as purely conventional, with no necessary grounding in or connection to morality.

The fiduciary theory, by contrast, affirms a nonpositivist framework in which law is necessarily connected to morality precisely because law is necessarily institutional. Human rights are the normative consequence of law's institutional nature because all legal institutions stand in a fiduciary relation to the persons subject to them. Human rights, in other words, both occupy and partially constitute the normative space of legal order and thus are intrinsic to legality. Because positivists such as Sumner and Simmons work within a rights paradigm defined by a hard distinction between the natural and the conventional (a paradigm that implicitly rejects the normative space of legal order), and because positivism such as theirs dominates contemporary legal scholarship, it is not surprising that the fiduciary theory has gone unnoticed.⁶⁸

Let us consider now the sense in which the fiduciary theory of human rights is republican. It is republican because the fiduciary principle applies exclusively to relationships, including the state-subject relationship, in which the threat of the powerful dominating the vulnerable is always present and domination is the evil that republicanism opposes. One person dominates another to the extent that he has the capacity to interfere on an arbitrary basis in certain choices that the other is in a position to make.⁶⁹ Domination is exemplified by the master-slave relationship, in which the master can interfere arbitrarily with the choices of the slave. The master dominates the slave because she can command the slave with impunity with

68. In reviewing this article, James Nickel has suggested to us that a positivist could contend that legitimate or rights-respecting law embodies moral requirements, and so the fiduciary theory is not committed to nonpositivism because it can be interpreted to inform the legitimacy or rights-respecting conditions of legitimate or rights-respecting law. It is well beyond the scope of this paper to argue persuasively against this interpretation, but it is at odds with the Kantian theory of law on which the fiduciary theory rests. For a defense of Kant's nonpositivist legal theory, see ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* (2009). For defense of the fiduciary theory's nonpositivist credentials, see Evan Fox-Decent, *Is the Rule of Law Really Indifferent to Human Rights*, 27 *LAW & PHIL.* 533 (2008).

69. PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 52 (1997).

no regard for the interests or opinions of the slave. Crucially, she dominates the slave whether she interferes with the slave or not. A constitutional legal authority guided by the rule of law, on the other hand, does not dominate its subjects. Although law interferes with an individual's choices by threatening sanctions, the threat of sanctions is not made on an arbitrary basis. Subjection to the rule of law is thus consistent with the republican ideal of nondomination and indeed contributes to it, since the rule of law limits the ability of the powerful to dominate the weak.

Fiduciary relations possess the structure and form that relations of non-domination must assume whenever one party holds power over another, since they require the power-holder to act with due regard for the best interests of the beneficiary, taking into account her views and opinions. Philip Pettit gestures in this direction when he writes that if someone is able to interfere in my affairs but only on condition that he further my interests and take my opinions seriously, the power-holder "relates to me, not as a master, but more in the fashion of an agent who enjoys a power of attorney in my affairs."⁷⁰ Agents are fiduciaries, and as such, they are subject to other-regarding fiduciary duties that make domination impossible from a legal point of view. The threat of de facto domination is controlled de jure by the fiduciary principle.

Pettit rightly observes that the "abuse of human rights, and the existence of a power of such abuse, epitomizes domination; it means that those who are subject to such abuse live at the mercy of their actual or potential abusers, and under their effective control."⁷¹ Conditions of nondomination, then, denote conditions in which the vulnerable are not at the mercy of the powerful nor subject to abuse. Because the fiduciary theory requires respect for human rights, it supports a framework of nondomination in which the human rights of those subject to public power are protected against abuse. And because the fiduciary theory of human rights explains how respect for human rights can be demanded as a matter of law, it likewise explains how nondomination can operate as a legal principle as well as a political ideal.

Under the fiduciary theory, nondomination complements Kant's principle of noninstrumentalization in the following way. Whereas noninstrumentalization prohibits the state from wrongfully interfering with its subjects, nondomination bars the state from holding arbitrary power that ipso facto would pose a wrongful threat because it could be exercised wrongfully at any time. In other words, noninstrumentalization controls the actual exercise of power, while nondomination controls the omnipresent threat of its exercise, which is to say, the terms on which power is held and can be used.

An implication of the control nondomination asserts over the possession of public power is that public institutions cannot become sectional instruments for treating certain classes of people as mere means to others' ends.

70. *Id.* at 23.

71. Philip Pettit, *A Republican Law of Peoples*, 8 *EUR. J. POL. THEORY* 70, 88 (2010).

The principle of nondomination embodies institutionally the principle of noninstrumentalization and shows again why the fiduciary state is under a legal obligation to treat individuals as moral equals. In sum, the fiduciary theory of human rights is republican because it envisions those rights as intermediary legal precepts that shield vulnerable persons from both instrumentalization and domination, thereby providing for their independent agency.⁷²

We can now set out the related senses in which the fiduciary theory is practical, universal, and aspirational. It is practical because it takes seriously the practice of international human rights law on its own terms, finding a place for both dignity and the view that human rights, as Beitz puts it, “are standards appropriate to the institutions of modern or modernizing societies coexisting in a global political economy in which human beings face a series of predictable threats.”⁷³ The normative grounds of such rights are universal in that they derive from the idea that public institutions must always relate to the people subject to them on a basis of nondomination and noninstrumentalization.⁷⁴ Human rights are the concrete embodiments of these principles, and as such, they promise the emancipation and independence of those who suffer oppression. The fiduciary theory thereby casts human rights as the aspirational demands of a political program in the service of the vulnerable.

The final aspect of the theory we sketch is its deliberative character. Amartya Sen and Allen Buchanan have both sought to ground human rights in deliberative practices of public reasoning.⁷⁵ Buchanan, for example, argues that international human rights institutions have important epistemic functions in that they contribute to the specification of the content of human rights norms by both fact-finding and providing a public deliberative forum for their ongoing development and interpretation.⁷⁶ These open and inclusive deliberative practices legitimate human rights in a way that mitigates the risk of human rights assuming parochial cultural biases. We endorse this view. While it is well beyond the scope of this article to set out the appropriate relationship between democratic deliberation and human rights, we indicate briefly how and why the fiduciary model can bring democratic deliberation into its fold.

72. For an argument that republicans should “connect the idea of domination to a basic set of vulnerabilities,” see Simon Hope, *Republicanism and Human Rights: A Plausible Combination?*, 21 *CAMBRIDGE REV. INT’L AFF.* 367, 379–381 (2008).

73. Beitz, *What Human Rights Mean*, *supra* note 13, at 44.

74. We argue elsewhere that the fiduciary principle obligates states to respect not only the human rights of their own citizens but also the human rights of foreign nationals subject to state power. See Criddle & Fox-Decent, *supra* note 40. We leave to another day consideration of the relationship between human rights and citizenship.

75. See Amartya Sen, *Elements of a Theory of Human Rights*, 32 *PHIL. & PUB. AFF.* 315 (2004); Buchanan, *supra* note 13.

76. Buchanan, *supra* note 13, at 61–65.

Deliberation is required by the idea of a state-subject fiduciary relationship because this relationship is the legal expression of popular sovereignty—the idea that the state’s sovereignty belongs to the people subject to sovereign power. A state that engages in inclusive public deliberation over human rights, soliciting public input and providing reasoned justifications for laws and policies, demonstrates an appropriate solicitude for the legitimate interests of citizens and noncitizens. Conversely, a state that does not engage in public deliberation and reasoned justification regarding human rights ordinarily fails to take seriously the dignity of legal subjects by reserving for itself the capacity to treat citizens and noncitizens arbitrarily, raising the specter of domination. Thus, whether or not public deliberation has epistemic value in the specification of human rights, it performs an indispensable function within the state-subject fiduciary relation as an expression of the state’s respect for its subjects’ dignity and independent agency.⁷⁷

Buchanan summarizes nicely the main procedural constraints under which deliberation over human rights ought to occur:

[I]nstitutions that contribute to the articulation of human rights norms ought to provide venues for deliberation in which the authority of good reasons is recognized, in which credible efforts are made to reduce the risk that strategic bargaining or raw power will displace rational deliberation, in which principled contestation of alternative views is encouraged, in which no points of view are excluded on the basis of prejudicial attitudes toward those who voice them, and in which conclusions about human rights are consistent with the foundational idea that there are moral rights that human beings (now) have, independent of whether they are recognized by any legal system.⁷⁸

Deliberation under the fiduciary theory would take international human rights law as its provisional starting point, because the rights enshrined therein are broadly conducive to independent agency. Deliberative inquiry would be guided prospectively by the substantive principles that are constitutive of the state-subject fiduciary relation itself. Perhaps the most basic of these principles is the idea that persons must be regarded as moral equals

77. See HENRY S. RICHARDSON, *DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY* 242–246 (2002); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 *TEX. L. REV.* 441 (2010). We recognize that public deliberation and justification regarding human rights may be constrained to some extent by limited public resources and that national security and other compelling interests may necessitate a measure of governmental secrecy. To the extent that states rely on such constraints as a basis for limiting public deliberation and justification, the fiduciary principle dictates that they must justify the limits of public deliberation and justification on the basis of reasonable, public-regarding factors, thereby ensuring that citizens and noncitizens are not subject to domination. See Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 *GEO. WASH. L. REV.* 99, 104 (2007) (“Unreasoned coercion denies our moral agency and our political standing as citizens entitled to respect as ends in ourselves, not as mere means in the effectuation of state purposes.”).

78. Buchanan, *supra* note 13, at 62.

and thus are entitled to institutions supportive of their secure and equal freedom. Other, more specific principles include those we canvass above: integrity, formal moral equality, solicitude, and equal security under the rule of law. Each of these principles should inform both the substantive content and deliberative process of human rights development, helping to traverse the normative terrain that lies between dignity and specific human rights, a terrain these principles share with the ideal of independence.⁷⁹

V. THE QUESTIONS REVISITED

Above we list several questions that any credible theory of human rights must be able to address in a principled way. While in some cases the argument can be just sketched or put by way of illustration, the fiduciary theory yields principled guidance to all of them.

In what sense are human rights rights?

The fiduciary theory views human rights as the consequence of persons' moral capacity as self-determining agents to place public institutions under legal obligations. Human rights protect individual dignity against state domination and instrumentalization by entitling all persons to be treated in certain ways by public institutions as a matter of right.

Do human rights constitute legal rights, as distinguished from moral or political rights?

Human rights are legal rights because they are constitutive of the state's legal authority to provide security and legal order as a fiduciary of the people subject to its power. They are legal rights correlative to the state's fiduciary (and therefore legal) duty to establish legal order on behalf of those people. A state that fails to respect human rights transgresses the fiduciary authorization of state sovereignty, an authorization that flows from the fiduciary principle, which is itself a principle of legality.

What is the relationship between human rights and state lawmaking authority?

Because human rights constrain and constitute state legal authority, states must comply with human rights norms whether they consent to these norms

79. The fiduciary theory thus arguably supports efforts to synthesize substantive principles and deliberative procedure in democratic theory. See AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 95–124 (2004) (reviewing and challenging arguments for separating deliberative procedures from substantive principles).

or not. A state may not wantonly disregard human rights through the exercise of its own lawmaking authority, because to do so would violate its fiduciary obligation to treat subjects as equal cobeneficiaries under the rule of law. One important implication of the fiduciary constitution of human rights is that the state must comply with *jus cogens* norms. State lawmaking authority is also constrained by derogable human rights, where applicable.

Do human rights generate duties for both state and nonstate actors?

Under the fiduciary theory, any entity that exercises powers of public administration assumes a fiduciary obligation to respect human rights. States have special obligations to respect human rights because international law confers upon them the primary legal authority to establish security and legal order. But sovereign states are not the only entities that may exercise public administrative powers. In many areas of the world, nonstate actors exercise administrative powers comparable to those of conventional sovereign states. The fiduciary principle dictates that any entity exercising unilateral administrative powers over individuals—whether it be an international body such as the U.N. Interim Administration for East Timor, a subnational government such as the State of New York, or a political/paramilitary group such as Hezbollah—bears a fiduciary obligation to honor human rights.

How does the fiduciary theory provide guidance for identifying human rights and clarifying the scope of those rights?

The fiduciary theory aids in identifying human rights by prescribing substantive principles for distinguishing genuine human rights from counterfeits. According to the fiduciary theory, all human rights serve a common purpose: to protect persons subject to state power from domination and instrumentalization. Norms qualify as human rights if they further these objectives and satisfy the fiduciary theory's substantive criteria of integrity, formal moral equality, and solicitude. For human rights norms to qualify further as nonderogable *jus cogens*, their violation must never be consistent with a state's fiduciary duty to secure legal order, including the guarantee of individuals' fundamental equal security under the rule of law.

These substantive criteria offer a practical, principled framework for clarifying human rights' content and legal force. As shown above, norms such as freedom of expression and the right to work satisfy the basic criteria for human rights because they are designed to further the good of the state's subjects and do not offend the principles of integrity, formal moral equality, and solicitude.⁸⁰ Other human rights, such as the prohibitions against

80. The ICCPR and ICESCR provide that freedom of expression, the right to work, and various other human rights are subject to state derogation under certain circumstances. *See*

genocide and slavery, likewise satisfy these three substantive criteria but also qualify as peremptory norms, because their violation could never be consistent with the state's fiduciary obligation to safeguard individuals' fundamental equal security under the rule of law.⁸¹ As these examples attest, the fiduciary theory bolsters the determinacy of international human rights law and enables states to specify genuine human rights and distinguish peremptory norms from ordinary, derogable human rights.

The fiduciary theory also elucidates the scope of particular human rights. Consider once again the much-debated prohibition against torture. In the leading judicial decision on the torture prohibition, *Ireland v. United Kingdom*,⁸² the European Court of Human Rights (ECHR) asserted that torture can be distinguished from cruel, inhuman, and degrading treatment (CID) and other abusive acts based on the relative "intensity of the suffering inflicted."⁸³ According to the ECHR, the prohibition against torture captures only the most heinous acts of "cruelty"—those which impose mental or physical suffering of "particular intensity."⁸⁴ This vision of torture and CID as distinct zones of wrongfulness along an ascending scale of pain and suffering has dominated human rights discourse since the 1970s.⁸⁵ But states have found the ECHR's ascending-scale test to be extraordinarily difficult to apply in practice. There is little agreement among courts and publicists about how states should measure the pain or suffering caused by a particular practice, let alone where they should draw the lines between torture, CID, and other types of mistreatment.⁸⁶ As a consequence, human rights advocates have struggled to explain why the pain and suffering imposed by waterboarding, hanging by the wrists, sleep deprivation, and other enhanced interrogation practices should be considered sufficiently "severe" to trigger the prohibition against torture.

ICCPR, *supra* note 8, arts. 4 & 19(2)–(3); ICESCR, *supra* note 9, arts. 4 & 7. While consideration of the circumstances supporting state derogation from these nonabsolute human rights lies beyond the scope of this article, we note that the fiduciary theory supports a requirement of state deliberation and justification guided by the substantive principles of integrity, formal moral equality, solicitude, and equal security as well as the procedural demands of the rule of law.

81. See Criddle & Fox-Decent, *supra* note 40, at 3.

82. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 66 (1978).

83. *Id.*, para. 167.

84. *Id.*

85. See, e.g., *Prosecutor v. Brdjanin*, Case No. IT-99-36-T, Judgment (Sept. 1, 2004), para. 483 (ICTY) ("The seriousness of the pain or suffering sets torture apart from other forms of mistreatment.").

86. See *id.*, para. 484 (considering objective factors such as the "nature, purpose, and consistency of the acts committed," and subjective factors such as "the physical or mental condition of the victim, the effect of the treatment," and "the victim's age, sex, state of health, and position of inferiority"); *Z and Others v. United Kingdom*, App. No. 29392/95, 34 Eur. H.R. Rep. 97, 121 (2002) (considering subjective factors such as "the physical and mental effects on the person experiencing the harm, the duration of the act, and the age, sex, and culture of the person experiencing the harm"); GAIL H. MILLER, *DEFINING TORTURE* 2, 8 (2005) (observing that there are "a staggering number of legal definitions" and that it is "virtually impossible to quantify 'severe pain and suffering' or to define it in absolute terms").

The fiduciary theory draws the prohibitions against torture and CID into sharper relief. According to the fiduciary theory's principle of noninstrumentalization, any use of physical or mental violence that denies an individual's dignity by treating her as a mere means to the state's ends qualifies as CID. Thus enhanced interrogation techniques such as waterboarding, hanging by the wrists, and prolonged sleep deprivation all qualify as CID under the fiduciary theory.

Before we may label such practices "torture," however, we must consider an additional inquiry. Whereas the CID prohibition addresses the principle of noninstrumentalization generally, the torture prohibition targets a critical subset of CID in which the state deliberately inflicts mental or physical suffering for the purpose of breaking a subject's will in order to conscript the subject as a means to accomplish an end the subject does not share with the state. For example, public officials engage in torture when they use violence to extract intelligence or coerce confessions from detainees.⁸⁷ The torture prohibition is also triggered when public officials intentionally inflict pain and suffering to compel subjects to renounce human rights such as their freedoms of expression, association, or religion.⁸⁸

Whatever the state's purpose may be, the fiduciary theory suggests that torture is distinguishable from CID based on the state's means to achieve its purpose—the conscription of a subject against her will through the illicit use of violence—rather than the relative "severity" or "intensity" of the subject's pain and suffering.⁸⁹ One important consequence of this definition is that public officials who deliberately inflict pain or suffering in any degree for the purpose of extracting information from unwilling subjects (whether through waterboarding, prolonged sleep deprivation, or any other enhanced interrogation technique) violate the prohibition against torture.

Viewed in this light, the fiduciary theory confirms and clarifies much of the CAT's definition of torture but disputes one element. Under the fiduciary theory, the intentional infliction of "pain and suffering, whether mental or physical," constitutes torture if it is intentionally inflicted "by or at the instigation of or with the consent or acquiescence of a public official" for the purpose of breaking a subject's will in order to conscript the subject as a means to the state's ends.⁹⁰ Consistent with the CAT, torture may involve physical or mental harm and it must have a nexus to "the instigation of or the consent or acquiescence of a public official or other person acting in an official capacity."⁹¹ As the ECHR observes in *Ireland*, however, the CAT stipulates that an act constitutes torture only if it results in "severe pain and

87. CAT, *supra* note 10, art. 1(1).

88. *Id.*; see also David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 425, 433–436 (2005) (discussing these and other purposes).

89. This principle is reflected obliquely in CAT art. 1(1), which provides that torture "does not include pain or suffering"—however intense—that is not purposeful but merely "incidental to lawful sanctions." CAT, *supra* note 10, art. 1(1).

90. *Id.*

91. *Id.*

suffering.”⁹² On the fiduciary theory, acts of torture are not to be defined by the *degree* of pain or suffering inflicted—whether measured objectively or subjectively—but instead by the torturer’s illicit *purpose* for inflicting pain and suffering: the conscription of a victim’s will. The fiduciary theory thus offers a principled framework for clarifying and critiquing the scope and content of the international prohibition against torture.

The fiduciary theory also affirms that states cannot justify acts of torture by invoking state necessity or citing their failure to ratify human rights treaties. States are never authorized to torture their subjects—not even when other lives may hang in the balance—because the fiduciary principle entitles all subjects to be treated as equal beneficiaries under the rule of law. To permit a state to instrumentalize any subject through violence for the benefit of others would eviscerate the fiduciary authorization of state legal authority. For this reason, the fiduciary theory dictates that torture can never be justified under the rule of law, irrespective of whether perceived state necessity or national lawmakers would dictate otherwise.

Do human rights generate positive duties, such as a duty to provide education, in addition to negative duties of noninterference?

The controversy in moral and political philosophy over positive duties roughly tracks disputes in human rights law over economic, social, and cultural rights (“economic rights”).⁹³ Positive duties are duties that typically require positive action and impose costs or burdens on the duty-bearer. In moral and political philosophy, libertarians hold that individuals have rights to bodily integrity and property, but these are said to give rise to only negative duties of noninterference that impose no cost on their bearers. For Robert Nozick and others, contract is the only legitimate source of positive duties.⁹⁴ The imposition of noncontractual positive obligations is alleged to violate the liberty or property rights of the duty-bearer, while negative duties are consistent with those rights because they require only that the duty-bearer refrain from interfering with others.

In human rights law, libertarians support civil and political rights because these rights protect bodily integrity, liberty, and property. Libertarians claim that the state can respect these rights through self-restraint alone and

92. *Id.* (emphasis added).

93. Economic rights are also frequently challenged on the grounds that the judiciary would have to enforce them and that judges lack institutional competence and democratic authorization to assess economic and social policy. For discussion and replies to this argument, see, e.g., NICKEL, *supra* note 19, at 142–144; PATRICK MACKLEM, *INDIGENOUS DIFFERENCE AND THE CONSTITUTION OF CANADA* (2001).

94. ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974); RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); LOREN LOMASKY, *PERSONS, RIGHTS AND THE MORAL COMMUNITY* (1987).

without imposing redistributive costs on others.⁹⁵ Economic rights, on the other hand, are seen as suspect because they require positive state action and do imply redistributive costs. Defenders of economic rights counter that civil and political rights, such as the right to due process, also require positive state action and may be just as expensive to secure as economic rights.⁹⁶ Yet libertarians insist that positive state action to guarantee civil and political rights is distinguishable from measures that effectively require wealth transfers from the well-off to the disadvantaged; the well-off benefit directly from the presence of universal civil and political rights, whereas in the case of wealth transfers, they receive no direct benefit. It is not the cost per se that bothers the libertarian, but that the cost of economic rights is paid by one party in favor of another who is alleged to have no claim to the transferred resources.

The fiduciary theory offers a fresh, if surprising, rejoinder to the libertarian's concern. The rejoinder may be surprising, because the fiduciary view relies on Kant's theory of right, which is coldly indifferent to needs and interests. Within Kant's theory there is no duty of easy rescue, because the imposition of such a duty would let the need (even the urgent need) of the rescuee unilaterally set the terms of interaction with the rescuer. In the absence of a legal relationship capable of sustaining positive duties, the only duties that exist under Kant's theory are the negative duties of non-interference cherished by libertarians. These are the only general duties that can be owed equally by all so as to respect the bodily integrity and property of others; they are the only kinds of general duties that can let everyone enjoy an equal freedom in which no party can impose terms unilaterally on another. Libertarians happily concede that the state is entitled to enforce these duties as well as positive obligations arising from contract; both kinds of duties are necessary to respect the rights and equal freedom of separate persons. What libertarians overlook is that fiduciary relations, like contractual relations, give rise to positive duties, as demonstrated by the parent-child case. Although Kant's theory does not impose a duty of easy rescue on strangers, it does impose this obligation on parents, and it imposes on other fiduciaries positive duties of a similar nature.

As a fiduciary, the state is under an obligation to secure its subjects' independence. To the extent that the economic rights set out in the ICESCR are necessary to protect agents from instrumentalization and domination, the state is under an obligation to respect, protect, and fulfill them. To see how such duties may arise under the fiduciary theory, consider the right to

95. See, e.g., CRANSTON, WHAT ARE HUMAN RIGHTS?, *supra* note 54.

96. See, e.g., NICKEL, *supra* note 19, at 148–149; DONNELLY, UNIVERSAL HUMAN RIGHTS, *supra* note 34, at 30–32. Proponents of economic rights also claim that these rights, like civil and political rights, have a negative dimension, though it is the redistributive effect of the positive side of economic rights that makes them so controversial. See, e.g., DONNELLY, UNIVERSAL HUMAN RIGHTS, *supra* note 34, at 30.

education.⁹⁷ Article 13 of the ICESCR provides for a universal right to education that includes compulsory and publicly funded primary education. Secondary and higher education is to be made available to all and accessible by the progressive introduction of free education. Within a modern state with complex rules of private law and public law, an individual lacking in literacy and civic education would depend on the grace of others to know her legal rights. Although those educated others, like the beneficent slave master, might never abuse their power, they would necessarily dominate anyone forced to depend on them for want of education. Furthermore, the illiterate would be unable to access public offices, participate in public debates, or otherwise engage in democratic processes that presuppose literacy and civic education.

Because the fiduciary conception of the state views its subjects as agents of coequal status, it must provide the resources necessary for them to be able to know their rights and participate in political life on an equal footing. A necessary feature of this capability is education, and so the fiduciary state is under an obligation to provide it.⁹⁸ The libertarian citizen can be asked to contribute a fair share because the state on which she relies for liberty and property can retain its legitimacy only by complying with its fiduciary duty to provide education.

To put the point within the human rights vocabulary of “respect, protect, and fulfill,” it is not enough for states to respect the right to education by refusing to interfere with private education schemes. Nor is it enough for states to protect the right if this means only that states will prosecute third parties that interfere with others’ enjoyment of the right to education. States must actually fulfill the right so as to provide subjects with coequal legal and political status and secure them against dependence on others. States must do this because all state action must be authorized by the fiduciary principle on behalf of everyone subject to the state’s power, and the fiduciary principle cannot authorize states to create a kind of order in which some are entirely dependent on the choices of others.

The fiduciary theory’s injunction against dependence or domination has implications that extend beyond the right to education. The theory supports a right to minimal resources broadly consistent with the right to “an adequate standard of living” enshrined in Article 11 of the ICESCR. The state’s fulfillment of this right is necessary to ensure that the propertyless

97. Our discussion is indebted to Arthur Ripstein’s careful analysis of how a right to publicly funded education and poverty relief flows from Kant’s legal and political theory. See RIPSTEIN, *FORCE*, *supra* note 68, ch. 9.

98. While we do not explore the link here, the fiduciary theory is congenial to the “capabilities” approach to freedom defended by Amartya Sen and Martha Nussbaum, one that stresses the importance of persons’ capabilities to “lead the kind of lives they value—and have reason to value.” AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 18 (1999); see also Martha Nussbaum, *Nature, Function and Capability: Aristotle on Political Distribution*, in *OXFORD STUDIES IN ANCIENT PHILOSOPHY* (1988). The relevant capabilities under the fiduciary theory are those necessary to lead lives free of domination and instrumentalization.

are not left to depend for their survival on the charity of others. The same rationale applies to the right to public health care (ICESCR art. 12): fiduciary states must fulfill this right because a failure to do so would place the disadvantaged ill at the mercy of others.

A skeptic might think that the fiduciary theory is too demanding. James Nickel, for example, affirms that economic rights are human rights but suggests that their scope should “aim at preventing the terrible rather than achieving the best.”⁹⁹ One might think that the idea of progressive realization set out under Article 2.1 of the ICESCR goes too far by requiring states to “take steps . . . to the maximum of available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant.”¹⁰⁰ The fiduciary theory, however, supplies a principled benchmark against which to assess whether economic rights have attained “full realization”: such rights are fully realized if their enjoyment permits agents to lead lives marked by independence rather than domination. In the case of education in developed countries, this would mean, at a minimum, equal access to free primary and secondary education.

The implication of this right is that the state is entitled to assess and collect taxes to pay for public education. But students might properly be expected to contribute to professional postsecondary education provided that such education remains accessible to all, through loans if necessary. Presumably an individual need not become a professional to enjoy independence. The fiduciary theory is thus consistent with the prevailing view that human rights establish a minimal threshold rather than a complete theory of distributive justice, though the threshold is set comparatively high.

If human rights derive from the inherent human dignity of the individual, as is often supposed, can they apply to certain classes of individuals (such as children) and to collectivities or groups (such as indigenous peoples)?

Human rights under the fiduciary model can apply to particular classes of individuals, such as children, women, migrants, prisoners, the elderly, and so on, because these individuals possess certain attributes or live under certain conditions that render them vulnerable to instrumentalization and domination. Children, for example, are vulnerable to their parents’ discretionary power as well as to the state’s analogous power when it acts in its *parens patriae* role. The Convention on the Rights of the Child emphasizes throughout that the state must act with due regard for the child’s best interests, securing the child against abuse and domination.¹⁰¹

99. NICKEL, *supra* note 19, at 36, 140.

100. ICESCR, *supra* note 9, art. 2.1.

101. CRC, *supra* note 57, arts. 3, 9, 18, 20, 21, 37 & 40. For thoughtful discussion of the amenability of universal human rights norms to discrete classes of individuals, see NICKEL, *supra* note 19, at 162–163.

The idea that collective or group rights are in some sense human rights is more problematic, since the putative right-holder in this case is not an individual but a group. In the case of indigenous peoples, for instance, the right-holder is an indigenous people (or nation) rather than an indigenous individual. But in what sense does a people have dignity analogous to the dignity of the individual? Peoples may be thought to have dignity analogous to individuals because both are *persons*. For Kant, a person is simply “a subject whose actions can be *imputed* to him.”¹⁰² If peoples, like states, may have the actions of their institutions and representatives imputed to them, then they, too, may be viewed as artificial persons that require agents to act for them. Peoples, in other words, are persons in the relevant, Kantian sense. From this perspective, the primary difference when compared to individuals is that someone must act on a people’s behalf. But as long as those actions can be attributed to a people as such, a given people is a person and therefore worthy of respect in its own right. Whereas for liberalism the basic unit of moral value is the natural person or individual, in Kant’s theory of the right, the basic unit of value is the person, including artificial persons such as states and peoples.

Peoples are vulnerable to “alien control” or domination as typified by colonialism.¹⁰³ Alien control renders a people vulnerable to the will of another state or agency and undermines the ability of the dominated people’s institutions to govern and represent their members. Viewed from the bottom up, alien control subverts the ability of individuals to act collectively, since by hypothesis, their institutions are under alien control rather than their own domestic control. Ultimately, alien control of a nation dominates the nation’s members as well as the nation’s collective legal personality.

The value of a people’s institutional capacity to represent its members is acknowledged by Article 1 of the ICCPR, which affirms, inter alia, that “[a]ll peoples have the right of self-determination.”¹⁰⁴ The placement of self-determination at the very outset of the ICCPR hints that its drafters viewed self-determination as a precondition to the enjoyment of individual human rights. The fiduciary model, through its accommodation of group rights as human rights, vindicates the priority that self-determination enjoys in international human rights law. Self-determination is necessarily a group right in international law because to grant an individual a unilateral right to secede or assert political autonomy is antithetical to law. Practical considerations aside, the individual-as-political-sovereign would be in a state of nature vis-à-vis all others and would stand as judge and party of her own causes. The right of self-determination therefore must be a group right rather than an individual right, and this right is a human right because

102. KANT, *METAPHYSICS OF MORALS*, *supra* note 2 at 50.

103. For discussion of domination as alien control in international affairs, see Pettit, *Republican Law*, *supra* note 71.

104. ICCPR, *supra* note 8, art. 1; see also Indigenous Peoples Declaration, *supra* note 57, arts. 3 & 4.

its realization is necessary for human beings to live under conditions of nondomination.¹⁰⁵

Are human rights culturally relative or universal?

On the fiduciary theory, the human rights norms of international law are provisional legal norms of universal application within and across institutionalized societies. These norms are of “universal” application in that some of them, such as the torture prohibition, apply to every human being, while others apply to everyone falling within the stipulated class of right-holder, such as women and children. Yet others attach universally to certain kinds of groups, such as the right of all peoples to self-determination. Human rights norms are provisional because they are subject to ongoing amendment and refinement pursuant to democratic deliberation, a deliberative process both structured and guided by the ideal of independence.

Several features of this conception of human rights mitigate concerns about Western parochialism. First, the conception is limited to addressing threats of instrumentalization and domination, with a special emphasis on those posed by the salient and ubiquitous institutions found in every state today. It does not impose its more institutional norms on traditional societies that lack the relevant threat-posing institutions. For example, the fiduciary conception does not require traditional aboriginal societies that rely on restorative justice mechanisms to provide a public defender for what might be a criminal trial in a formal Western legal system. General fiduciary obligations can be institutionalized in very different ways in different contexts. The fiduciary theory universalizes agents’ independence but it is democratic and sensitive to local conditions at the point of interpretation and application.

The deliberative, democratic aspect of the fiduciary theory, as indicated above, also mitigates the threat of Western bias by inviting representatives of traditional or non-Western societies to participate in the development of human rights law. Relying on democratic deliberation necessarily raises the difficult issue of who is to decide controversial disputes. Still, there is no obvious reason to think that this issue would prove any more intractable in international relations than in the democratic politics of multinational

105. An objection to this analysis is that business corporations are legal persons but are not usually thought to have human rights. One reply is that recognition of “peoples” is necessary to the purposive self-determination of their constituents in a way that recognition of corporations is not and that the Kantian concern for personhood is really a concern for purposive self-determination. Admittedly, this reply makes the justification of the group right of self-determination depend on a concern for the group’s members. Yet the right is still a group right because peoples are separate legal persons who represent the group’s members, and these members individually cannot claim the right. This conception of purposive self-determination offers a plausible basis for distinguishing peoples from corporations.

states; in both cases, minorities exist and are entitled to a fair opportunity to participate, one that includes protection from majoritarian domination. And in both, the participation of minorities lends (or would lend) legitimacy to the process and its outcomes.

Finally, the fiduciary concept resonates with analogous legal concepts found in non-Western societies. Legal scholars trace the fiduciary concept as far back as the Code of Hammurabi in Ancient Mesopotamia (present-day Iraq) and show that the idea of fiduciary obligation informed Islamic law and the Jewish law of agency.¹⁰⁶ The modern Anglo-American law of trust owes a considerable debt to the *waqf* from Islamic law—a donor-created endowment under the administration of a trustee for use by designated beneficiaries. Franciscan friars returning from the Crusades in the thirteenth century introduced the *waqf* to England.¹⁰⁷ Moreover, scholars in non-Western societies that traditionally emphasize collective identities (e.g., family, clan, nation, religion) over individual freedom and dignity likewise observe that implied fiduciary obligations structure public and private legal institutions.¹⁰⁸ For example, one contemporary Chinese philosopher describes “the ideal Confucian society as a ‘fiduciary community’ in which the corporate effort of the entire membership turned the group into ‘a society of mutual trust instead of a mere aggregate of individuals.’”¹⁰⁹

Thus, while the debate over cultural relativism in international human rights discourse cannot be addressed fully in this article, the fiduciary theory’s sensitivity to local conditions, its democratic aspect, and its resonance in non-Western societies all suggest that it is less vulnerable to complaints of Western bias than are other theories.¹¹⁰

106. See TAMAR FRANKEL, *FIDUCIARY LAW* 7–14 (2007); Avisheh Avini, *The Origins of the Modern English Trust Revisited*, 70 *TUL. L. REV.* 1139 (1996); Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan*, 35 *U. RICH. L. REV.* 191 (2001).

107. Avini, *supra* note 106, at 1140–143.

108. See, e.g., Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 *STAN. L. REV.* 1599, 1607–1608 (2000); see also SEN, *DEVELOPMENT*, *supra* note 98, at 240 (“The valuing of freedom is not confined to one culture only, and the Western traditions are not the only ones that prepare us for a freedom-based approach to social understanding.”).

109. Ruskola, *supra* note 108, at 1627 (quoting TU WEI-MING, *CENTRALITY AND COMMONALITY: AN ESSAY ON CHUNG-YUNG* 67, 81 (1976)).

110. Naturally, we recognize that certain aspects of the fiduciary model may challenge traditional norms and practices in some societies. For example, some public officials may persist in viewing citizens or noncitizens as resources of the state (or its ruling class) rather than as ends in themselves. Others may pursue policies emphasizing collective security and collective prosperity in ways that transgress the fiduciary principles of nondomination and noninstrumentalization. We take comfort, however, in the fact that few states persist in defending practices of exploitation and arbitrary discrimination under the banner of cultural relativism. And in any event, the fiduciary theory is primarily a normative theory, so it is no failing that some state practices flagrantly violate its requirements.

VI. CONCLUSION

Debates over human rights have been waged largely between foundationalist theorists, who appeal to natural rights, and proponents of practical theories, who insist that international human rights law must be understood on its own terms. The fiduciary theory offers an attractive way forward by taking seriously, on the one hand, the foundational idea that agents must be regarded as possessing equal dignity, and on the other, the practical idea that human rights law is the international community's best provisional estimate of the rights that states must honor. The linchpin to the fiduciary theory is the idea that human rights cannot be understood or specified in the abstract; they arise only from a legal relationship in which public institutions hold administrative powers over vulnerable agents who, as private parties, are not entitled to exercise those powers.

This relational aspect of the fiduciary theory is especially potent because it permits the theory to relativize particular human rights to the institutional circumstances of their application, but in a way that remains true to the spirit of the human rights agenda through a commitment to noninstrumentalization and nondomination. This same commitment calls for democratic deliberation, a requirement that reveals the fiduciary theory's allegiance to popular sovereignty, as well as independent agency. Taken together, the various implications of the fiduciary principle comprise a unified theory capable of justifying the legal status and enduring appeal of human rights.