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Author(s): Marie-Bénédicte Dembour

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## What Are Human Rights? Four Schools of Thought

Marie-Bénédicte Dembour\*

### ABSTRACT

A close reading of academic literature reveals that we do not all conceive of human rights in the same way. This contribution proposes that “natural scholars” conceive of human rights as *given*; “deliberative scholars” as *agreed upon*; “protest scholars” as *fought for*; and “discourse scholars” as *talked about*. The position of each of these four schools on the foundation, universality, possible realization, and legal embodiment of human rights is reviewed, as well as is the schools’ faith, or lack thereof, in human rights. Quotations from academic texts illustrate how the four school model cuts across the academic disciplines with examples drawn from philosophy, politics, law, and anthropology.

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\* Marie-Bénédicte Dembour is Professor of Law and Anthropology at the University of Sussex. Her early work was on the Belgian Congo and the memory of colonialism. She then redirected her academic interests towards conceptual critiques of human rights and the case law of the European Court of Human Rights. She has published widely in this field, most prominently a monograph entitled *Who Believes in Human Rights? Reflections on the European Convention* (2006). She is currently the holder of a Leverhulme Major Research Fellowship to work on a project entitled “Migrants have human rights too! Critical perspectives on the Strasbourg case law.” She is a co-editor of *Culture and Rights: Anthropological Perspectives* (Jane K. Cowan, Marie-Bénédicte Dembour & Richard A. Wilson eds., 2001) and *Paths to International Justice: Social and Legal Perspectives* (Marie-Bénédicte Dembour & Tobias Kelly eds., 2007).

The contribution presented here formed the basis for the Torkel Opsahl Memorial Lecture 2009 given by Dembour at the University of Oslo. It is a streamlined and more systematic version of Chapter 8, entitled “The human rights creed in four schools”, of her 2006 monograph. Dembour has benefited from presenting and/or having discussed her four-school model at the Danish Centre for Human Rights, the Glasgow Law School and the Norwegian Centre for Human Rights in springs 2007, 2008, and 2009 respectively. She is grateful to Richard Hustad for pointing out that human rights orthodoxy has been moving. She also expresses her thanks to Yuri Borgmann-Prebil, Elizabeth Craig, Neil Stammers, Paul Stenner, and Louis Wolcher for discussing with her particular choices of materials and phrases. Responsibility for the text remains hers.

## I. INTRODUCTION

Different people hold different concepts of human rights. This proposition might initially appear somewhat at odds with the commonly heard assertion that human rights are both universal and obvious (in the sense that they are derived from reason), which may suggest that human rights are unambiguous and uncontroversial. However, there is in practice a lack of agreement on what human rights are. Based on an analysis of the human rights academic literature, this contribution identifies four schools of thought on human rights.<sup>1</sup> It proposes that “natural scholars” conceive of human rights as *given*; “deliberative scholars” as *agreed upon*; “protest scholars” as *fought for*; and “discourse scholars” as *talked about*. It further proposes that these four schools act as ideal-types, which, arranged around two axes, potentially cover the whole conceptual field of human rights (see Figure 1). This mapping exercise is useful in that it clarifies positions from which various arguments about human rights are made, helping to understand where, why, and to what extent agreements are reached and disagreements persist in the human rights field. It also highlights the pregnancy of a variety of positions, which are far less idiosyncratic than the received orthodoxy would suggest.<sup>2</sup>

## II. THE SCHOOLS IN A NUTSHELL

### A. Introducing Each School

The natural school embraces the most common and well-known definition of human rights: a definition that identifies human rights as those rights one possesses simply by being a human being. This definition, where human rights are viewed as given, can be considered the credo of the natural school. For most natural scholars, human rights are entitlements that, at their core, are negative in character and thus, are absolute.<sup>3</sup> These entitlements

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1. Using the word “schools” is misleading both in that lay people (rather than just scholars) participate and share in this conceptualization and in that scholars associated with one particular school may dislike being bracketed together. The word nonetheless usefully connotes explicit or implicit adherence to a number of precepts, which is why it is adopted here.
  2. At the end of a presentation that I gave to the Danish Centre for Human Rights, two members of the perhaps twenty-strong audience came to me (independently from each other) to say that my identification of four schools was a relief to them, lifting their sense of being almost a fraud in the Centre due to their fear that their position on human rights was just too unorthodox to be acceptable.
  3. The natural school tends to conceive of human rights as entailing negative obligations that can be expressed as an obligation (e.g. on the government) to refrain from doing

are based on "nature," a short-cut which can stand for God, the Universe, reason, or another transcendental source. The universality of human rights is derived from their natural character. Natural scholars believe that human rights exist independently of social recognition, even though recognition is preferable. They welcome the inscription of human rights in positive law. The natural school has traditionally represented the heart of the human rights orthodoxy.

The orthodoxy is increasingly moving, however, towards the deliberative school of thought, which conceives of human rights as political values that liberal societies *choose* to adopt. Deliberative scholars tend to reject the natural element on which the traditional orthodoxy bases human rights. For them, human rights come into existence through societal agreement. Deliberative scholars would like to see human rights become universal, but they also recognize that this will require time. In addition, they understand that this will happen only when and if everybody around the globe becomes convinced that human rights are the best possible legal and political standards that can rule society and therefore, should be adopted. This school invariably stresses the limits of human rights, which are regarded as fit to govern exclusively the polity and not being relevant to the whole of moral and social human life. Deliberative scholars often hold constitutional law as one of the prime ways to express the human rights values that have been agreed upon.

The protest school is concerned first and foremost with redressing injustice. For protest scholars, human rights articulate rightful claims made by or on behalf of the poor, the unprivileged, and the oppressed. Protest scholars look at human rights as claims and aspirations that allow the status quo to be contested in favor of the oppressed. As such, they are not particularly interested in the premise that human rights are entitlements (though they do not reject it). Protest scholars advocate relentlessly fighting for human rights, as one victory never signals the end of all injustice. They accept that the ultimate source of human rights lies on a transcendental plane, but most of them are more concerned with the concrete source of human rights in social struggles, which are as necessary as they are perennial. Even if they sometimes regard the elaboration of human rights law as a goal, they nonetheless tend to view human rights law with suspicion as participating in a routinization process that tends to favor the elite and thus may be far from embodying the true human rights idea.

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something (e.g. torturing). Only negative obligations can be absolute, for positive obligations (e.g. to provide education) are never as clear-cut as a simple prohibition to do something. On the way human rights orthodoxy's logic has been able to accommodate positive obligations, see MARIE- BÉNÉDICTE DEMBOUR, WHO BELIEVES IN HUMAN RIGHTS? REFLECTIONS ON THE EUROPEAN CONVENTION 78–85 (2006).

The discourse school is characterized by its lack of reverence towards human rights. In its perspective, human rights exist only because people talk about them. Discourse scholars are convinced neither that human rights are given nor that they constitute the right answer to the ills of the world, but they do recognize that the language surrounding human rights has become a powerful language with which to express political claims. Discourse scholars fear the imperialism of human rights imposition and stress the limitations of an ethic based on individualistic human rights. Nonetheless, some accept that the human rights discourse, as the prominent political ethical discourse of our time, occasionally yields positive results. But they do not *believe* in human rights and often wish superior projects of emancipation could be imagined and put into practice.

## B. Mapping the Field

The four schools identified above should be approached as Weberian ideal-types rather than fixed categories that neatly and perfectly describe single track thought processes. The model does not assume or claim that social reality (here, academic writings on human rights) always *exactly* conforms to its propositions. Moreover, for two people to belong to the same school does not mean that they conceive of human rights in precisely the same way—in many respects, they may fiercely disagree with each other. Nonetheless, the model is able to identify the connections among broad orientations, as the next section demonstrates by exploring the way each of the four schools approaches various issues, including human rights law, the foundation of human rights, their concrete realization, what it means to say they are universal, and whether one can/should believe in them.

The four-school model leads to a mapping of the entire human rights conceptual field, as Figure 1 suggests. In this figure, the top half of the field corresponds to an orientation that tends to ground human rights transcendently and the bottom half to an orientation that tends to see human rights as a society/language-based reality; the left hand-side of the field corresponds to a liberal and individualistic orientation and the right hand-side to a more collective orientation of social justice.<sup>4</sup>

The model was constructed abductively: while trying to make sense of academic writings, the author identified two, three, and then four schools of

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4. The scholars who identify with the liberal and individualistic orientation corresponding to the left side need not be in favor of the status quo. For natural scholars who are denouncing a situation and calling—and indeed acting—for its immediate change, see, for example GUGLIELMO VERDIRAME & BARBARA HARRELL-BOND, *RIGHTS IN EXILE: JANUS-FACED HUMANITARIANISM* (2005).

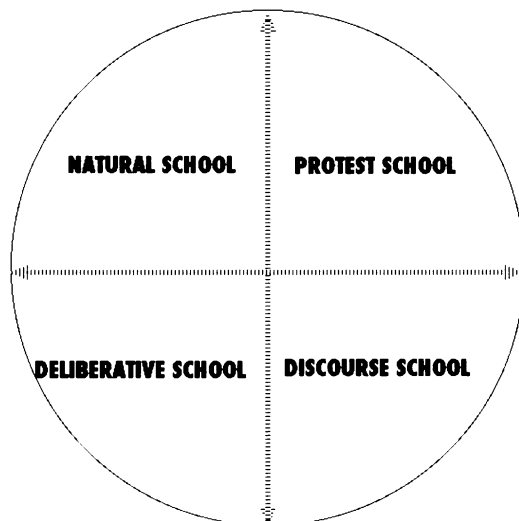


Figure 1. The Human Rights Field

thought. It is only when relationships among schools were examined that it suddenly appeared that the four schools could cover the whole conceptual human rights field. Empirically, so far, the model has been able to accommodate existing views on human rights. However, its heuristic value over time will need to be confirmed through persistence in its ability to associate any human rights thinker with a particular school(s).

### III. THE POSITION OF THE SCHOOLS

#### A. On Human Rights Law

Natural scholars tend to celebrate human rights law. For the great majority of them, human rights law embodies the human rights concept: the law exists in direct continuation with the transcendental existence of human rights. Admittedly, a small minority is not convinced that human rights law, as it has been developed, corresponds to human rights. Nonetheless, most natural scholars regard the development of international human rights law in the last half-century as undeniable progress. For natural scholars, societies where human rights, by and large, are respected either already exist or can be created.

Deliberative scholars also have great faith in the potential of human rights law. All of their efforts are geared toward identifying, agreeing, and

entrenching principles that allow for democratic decision and fair adjudication. For them, there are no human rights beyond human rights law: the law, especially as it is embodied in constitutional principles of deliberation, is all there is to human rights. This law is more procedural than substantive in nature: it acts as a guide on how to do things in the political sphere.

By contrast, it would be hard to persuade protest scholars that conditions of effective human rights protection have been realized. In their perspective, there is always further injustice (human rights abuses) in need of redress. They tend to distrust human rights law: they fear that it may be hijacked by the elite and are wary of bureaucratization. They generally do not believe that institutions, including so-called human rights institutions, can be trusted to realize the human rights ideal. For them, human rights law is unlikely to be true to the human rights ideal. They regard human rights law as a mitigated progress at best and a sham at worst.

The position of the discourse scholars, the nihilists on the concept of human rights, believe that human rights law is as good or as bad as any other law. It must be judged in each different situation on its merits.

## **B. On the Foundation of Human Rights**

Natural scholars believe human rights are founded in nature. However, they are aware that founding human rights on something akin to nature is unlikely to be universally compelling. Faced with this difficulty, many fall back on the legal consensus. As stated above, natural scholars tend to see human rights law to be in direct continuation with the human rights concept. From there, conflating transcendental human rights with human rights law is a step that some natural scholars are ready to take. This explains why a good number of them are happy to rely on the concrete manifestation of human rights in international law in order to dismiss the need to find a metaphysical basis for human rights. However, logically, in the natural school's perspective, a legal consensus can only ever be the *proof* of the existence of human rights, not a foundation of human rights. Presumably, natural scholars would still believe in human rights even in the absence of the so-called consensus that has developed since World War II. Indeed, occasionally, a natural scholar rejects the present form of human rights law as wrong. Not surprisingly, there are natural scholars who specifically refuse to rely on consensus to found human rights. The search for an ontological basis for human rights occupies some key natural scholars.

The protest scholars encounter the same problem as the natural scholars when it comes to identifying the ground on which they base their belief in human rights. Naturally suspicious of human rights law, they cannot adopt the route followed by some natural scholars of relying on the legal consensus.

Instead, they rely on the less specific idea of the historical development of a tradition. Belgian philosopher and protest scholar Guy Haarscher speaks of “*dressage*,” a French word that connotes the training of animals and thus, may provocatively suggest an internalization by the individual of a logic that is not entirely instinctive.<sup>5</sup> The typical emphasis of this school on a learned tradition explains why protest scholars are generally very interested in human rights education. While a long established tradition may perhaps seem to offer more permanence than the mere legal consensus of a particular historical moment, those who deny the existence of human rights still criticize it. It is ultimately as dissatisfying for protest scholars as it is for natural scholars to shun completely a metaphysical foundation on which to base human rights. Not surprisingly, some protest scholars seek to ground human rights on a more metaphysical basis than a social discourse.<sup>6</sup>

The foundation of human rights concerns the natural and protest schools only. It simply does not interest the discourse school that believes that human rights exist only because they are talked about. Discourse scholars look at discussions of the foundation of human rights with disdain and as fundamentally flawed. As for deliberative scholars, who see human rights as emerging from agreement, the foundation of human rights is not an interesting issue. This does not detract them from being highly concerned with the issue of how to find, found, or reach agreement (where the emphasis shifts, expectedly given their general orientation, to process). They are more interested in justification than foundation.<sup>7</sup>

### C. On the Realization of Human Rights

Natural scholars conceive of human rights as entitlements: entitlements to specific objects that every individual should have respected. For them, human beings *have* human rights, and human rights are typically realized through individual enjoyment. A possession paradox arises, as noted by the natural scholar Jack Donnelly: “Where human rights are effectively protected, [the individual] continue[s] to *have* human rights, but there is no need or occasion to *use* them.”<sup>8</sup> Mr. Donnelly rephrases this idea: “[H]aving’ a right is of most value precisely when one does not ‘have’ (the object of) the right

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5. GUY HAARSCHER, *PHILOSOPHIE DES DROITS DE L’HOMME* 124,130 (4th ed. 1993). On the identification of Haarscher as a protest scholar, see DEMBOUR, *supra* note 3, at 236–38, 243–48.
  6. Costas Douzinas is a prime example. See COSTAS DOUZINAS, *THE END OF HUMAN RIGHTS: CRITICAL LEGAL THOUGHT AT THE TURN OF THE CENTURY* (2000).
  7. See, e.g., JAMES W. NICKEL, *MAKING SENSE OF HUMAN RIGHTS* (2d ed. 2007).
  8. JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 14 (1st ed. 1989). See main text below for excerpts from Donnelly’s work illustrating why he can be classified as a natural scholar.



. . . . [ , leading to a situation of] 'having' (possessing) and 'not having' (not enjoying) a right at the same time."<sup>9</sup> For the purpose of classification, the important point is that most natural scholars stress that the individual *has* human rights by virtue of being a human being.

Protest scholars would also accept that human beings have human rights. Though, instead of thinking of human rights as entitlements to particular objects that each individual, as it were, is selfishly at liberty to claim for herself, they think of the concept of human rights as a call to ensure that the rights of others be respected. In other words, when my rights are secured, I must ensure that the rights of my neighbor are secured as well as the rights of the neighbor of my neighbor and so on. In their perspective, the problem that arises out of the possession or enjoyment of human rights is that once individuals enjoy human rights, they often only use them for their own benefit. The loss of the sense of obligation to fight for the human rights of others is a betrayal of the human rights concept. For the protest school, human rights are realized through a perpetual fight for their realization. They conceive of human rights not so much as tangible but as a utopia or a project always in the making (and reversible).

*Having* human rights does not enter the logic of the deliberative school. For deliberative scholars, human rights serve to guide action. As such, human rights are not and cannot be a matter of possession. They lay down the parameters of deliberation, the outcome of which is not presumed in advance. In the perspective of this school, human rights do not directly dictate how things should be substantively, therefore granting little sense to the idea that human rights can be possessed. What marks the realization of human rights is liberal, democratic, and fair processes that enable good political governance. Human rights are realized not through possession but through a particular mode of political action.

It makes no sense for discourse scholars to think about the realization of human rights, as they do not believe in human rights to begin with. Discourse scholars instead repeatedly point to the shortcomings of the human rights discourse that does not deliver what it promises, namely, equality between human beings. Discourse scholars are not surprised by the repeated failures of the human rights discourse to achieve its declared goals. Many of them intimate that a more solid project of emancipation is needed. Some simply refrain from making grand pronouncements on ethical issues and seek, from a resolutely empirical approach, to observe and describe the contradictory features of human rights discourse.

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9. JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 9 (2d ed. 2003).

#### D. On the Universality of Human Rights

For natural scholars, human rights derive from nature; their universality is therefore a given. Faced with the fact that human rights have taken different forms over time, they concede that human rights can, in practice, receive particular articulations. These are legitimate as long as they remain true to the principle of human rights, which, by contrast, is unique. The notion of “overlapping consensus” encapsulates this idea.

For protest scholars, the ubiquity of injustice points to the universal relevance of human rights. Less inclined than natural scholars to look at human rights as entitlements to specific objects, the different articulations of human rights over time is not a logical problem for their school of thought. Indeed, as the world evolves, so do the forms of suffering, potentially requiring new formulations of human rights.

For deliberative scholars, the universality of human rights is at best a project: it is certainly not a given. In their perspective, human rights will only become universal through the global adoption of the liberal values they express. Whether this will happen or not remains to be seen. While deliberative scholars would welcome the universalization of human rights principles, not all concern themselves deeply with what is happening in societies that they regard as geographically, politically, and culturally very different from their own.

Discourse scholars are extremely irritated by the claims of scholars in the other three schools about the universality of human rights. They find the natural school’s perspective intellectually untenable in view of the diversity of moral forms in human society over time and space. They denounce its imperialism. Discourse scholars are also wary of the deliberative school and feel that the school’s repeated invocation of consensus dangerously obscures power relations. They tend to be more sympathetic to the position of the protest school, which shares their commitment to denouncing injustice.

#### E. On Their Overall Faith/Position Toward Human Rights

Natural scholars *believe* in human rights. Historically, they also are the ones who set up the parameters within which human rights came to be both conceived and debated, at least intellectually. They have traditionally represented the human rights orthodoxy.

Protest scholars also *believe* in the concept of human rights, though they deplore the fact that human rights have been institutionally hijacked. Thus, they call for a return to true human rights. Furthermore, they stress that human rights constitute an extremely demanding ethic (one can never do enough in the perpetual fight for the realization of human rights). They

could be said to be to human rights what Liberation theologians are to Catholicism, and in that sense, they are dissidents from the orthodoxy.

In keeping with the religion analogy, deliberative scholars would represent secularity in human rights thought. This label does not make any presumption about their lack or possession of religious faith. Rather, in this context, a secular label with respect to human rights (and human rights only) points to the fact that deliberative scholars do not *believe* in human rights, even though they are entirely committed to the idea of trying to enact and perhaps to spread the values they associate with human rights. In a somewhat ironic twist of language, they increasingly represent the current human rights orthodoxy.

Finally, discourse scholars are human rights nihilists. Philosophically, nihilism does not entail the rejection of all moral principles. Instead, following Nietzsche, it can signal the call for new values to be created through the re-interpretation of old values that have lost their original sense. Having to live with the supremacy of the language of human rights in contemporary political discourse, to the extent that discourse scholars accept this language, they call for its re-evaluation.

#### IV. THE SCHOOLS IN THE PRACTICE OF ACADEMIC WRITINGS

##### A. Identifying Clues

Table 1 lays out the propositions presented above in a systematic form. It can serve as a reference when attempting to place arguments made about human rights in one of the four sections of the human rights conceptual field. For example, the conflation of human rights with human rights law, whether expressed or implicit, can generally be considered a powerful clue for an affiliation with the natural school. However, this clue is not devoid of possible ambiguities: deliberative scholars tend to equate (rather than conflate) human rights law with human rights, making it potentially difficult to interpret a positive reference to human rights law. To complicate matters further, some identifying clues can be missing or expressed in a very different way than what is generally the case in that school. For example, Mark Goodale, a recognizable natural scholar, specifically rejects current human rights law as being unfaithful to the true human rights.<sup>10</sup> Moreover, the appearance of

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10. See MARK GOODALE, *SURRENDERING TO UTOPIA: AN ANTHROPOLOGY OF HUMAN RIGHTS* 37 (2009). “[The ethnography of human rights] calls into question many of the basic assumptions of postwar human rights theory and practice. Moreover, to the extent that the international human rights system is a reflection of these assumptions, then it too must be reconsidered.” *id.* See *infra* section IV(B) for excerpts from Goodale’s work illustrating why he can be classified as a natural scholar.

Table 1.  
Systematic Comparison of the Schools

<i>Schools of thought</i>	Natural school (HR old orthodoxy)	Deliberative school (HR secularism/ new orthodoxy)	Protest school (HR dissidence)	Discourse school (HR nihilism)
<i>Human rights (HR)</i>				
<b>Are conceived, in short, as</b>	A given	Agreed upon	Fought for	Talked about
<b>Consist in</b>	Entitlements (probably negative at their core)	Principles	Claims/Aspirations	Whatever you put into them
<b>Are for</b>	Every single human being	Running the polity fairly	First and foremost those who suffer	Should be, but are not, for those who suffer
<b>Can be embodied in law?</b>	Definitely—this is the aim	Yes—law is their typical if not only mode of existence	Should be, but law too often betrays the HR idea	HR law exists but does not embody anything grand
<b>See HR law since 1948 as definite progress</b>	Yes*	Yes	No	No
<b>Are based on</b>	Nature/God/ Universe/Reason [with legal consensus acting as a fallback for many]	A consensus as to how the polity should be run [with reason in the background]	A tradition of social struggles [but with a yearning for the transcendental]	Language
<b>Are realizable?</b>	Yes, through individual enjoyment (and good substantive laws)	Yes, through political organization (and good procedural laws)	No, they require a perpetual struggle (and implementing laws risk being an abject deformation of their ideal)	No, unsurprisingly, they are a failure
<b>Are universal?</b>	Yes, definitely, they are part of the structure of the universe (even if they get translated in practice in slightly different forms)	Potentially, if the consensus broadens	At source, yes, if only because suffering is universal	No, their supposed universality is a pretence

\* Though exceptionally a natural scholar will reject the present form of human rights law as not embodying human rights.

a key word can be misleading. For example, the fact that Jürgen Habermas is famous for his discourse theory on law and democracy does not make him a discourse scholar. As we shall see in subsection B, Habermas is best classified as a deliberative scholar. Affiliation with a particular school, to be securely assessed, must always be confirmed on a number of issues. Even then, it is possible for an argument to straddle different schools.

## B. Naming Some Scholars

This section places a variety of human rights scholars in each school. In each individual case, short passages from one single text are quoted without a further explanation as to why they can be attached to the school to which they are attached (as the above text and table should enable the reader to work this through alone). The selected passages reflect the personal views of their author—they do not represent general statements and their direct purpose is not to rehearse or engage with the ideas of others. While the quotations are often truncating the original text, they hopefully do not distort the views of their authors. It should nonetheless be borne in mind that their aim is not to capture the main point of the publication from which they are extracted. Inevitably, the exercise also fails to do justice to the authors' arguments, which are invariably more sophisticated than the sample of words presented here indicates.

### 1. *In the Natural School*

Alan Gewirth, philosopher, in *The Community of Rights*:

[A] right is an individual's interest that ought to be respected and protected; and this "ought" involves, on the one side, that the interest in question is something that is due or owed to the subject or right-holder as her personal property, as what she is personally entitled to have and control for her own sake; and, on the other side, that other persons, as respondents, have a mandatory duty at least not to infringe this property.<sup>11</sup>

Are there any human rights? Or, more generally, since human rights are a species of moral rights, are there any moral rights at all? Or, to put it still more generally, do humans have any rights? . . . [W]here does one look to ascertain the existence of moral rights or human rights?<sup>12</sup>

[What I call the *Principle of Generic Consistency* (PGC)] is the principle of human rights. . . . The argument for the PGC has . . . dialectically established that the human rights have as their objects the necessary conditions of action and successful action in general and that all humans equally have these rights.<sup>13</sup>

11. ALAN GEWIRTH, *THE COMMUNITY OF RIGHTS* 9 (1996).

12. *Id.* at 10.

13. *Id.* at 19.

Jack Donnelly, political scientist, in *Universal Human Rights in Theory and Practice*:

If human rights are the rights one has simply because one is a human being, as they usually are thought to be, then they are held “universally,” by all human beings.<sup>14</sup>

[H]uman rights claims rest on a prior moral (and international legal) entitlement.<sup>15</sup>

The source of human rights is man’s moral nature.<sup>16</sup>

Human rights are at once a utopian ideal and a realistic practice for implementing that ideal.<sup>17</sup>

Michael Perry, lawyer, in *The Idea of Human Rights: Four Inquiries*:

The idea of human rights—the idea that has emerged in international law in the period since the Second World War—is complex.<sup>18</sup>

The idea of human rights that informs . . . international human rights documents . . . is . . . the idea that *there is something about each and every human being, simply as a human being, such that certain choices should be made and certain other choices rejected; in particular, certain things ought not to be done to any human being and certain other things ought to be done for every human being.*<sup>19</sup>

[T]he force of a claim about what ought not to be done to or about what ought to be done for human beings does not depend on whether the claim is expressed in the language of rights. Even though the language of moral rights is . . . useful, it is not essential.<sup>20</sup>

Mark Goodale, anthropologist, in *Surrendering to Utopia: An Anthropology of Human Rights*:

[A]t mid-twentieth century anthropology had established itself as the preeminent source of scientific expertise on many empirical facets of culture and society, . . . [but] it was at precisely this moment . . . [that anthropology] was blocked from contributing in any meaningful way to the development of understanding about what was—and still is—the most important putative cross-cultural fact: that human beings are essentially the same and that this essential sameness entails a specific normative framework.<sup>21</sup>

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14. DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* (2d ed.), *supra* note 9, at 1.

15. *Id.* at 12.

16. *Id.* at 14.

17. *Id.* at 15.

18. MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* 11 (1998).

19. *Id.* at 13.

20. *Id.* at 55–56.

21. GOODALE, *supra* note 10, at 18.

[M]ost people intuit . . . that this essential sameness suggests an entire moral and perhaps legal framework, one that is expressed in what is for many people around the world an unintelligible normative language (rights), yet one that either does, or ought to, supersede all of those political, religious, or other structures that work to oppress, restrict, or diminish.<sup>22</sup>

## 2. *In the Deliberative School*

Jürgen Habermas, philosopher, in *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*:

The philosopher *tells* citizens which rights they *should* acknowledge mutually if they are legitimately to regulate their living together by means of positive law. . . . [A] change of perspective [is] necessary if citizens are to be capable of applying the discourse principle *for themselves*. . . . After this change in perspective, we can no longer ground equal communicative and participatory rights from *our vantage point*. The citizens themselves become those who deliberate and, acting as a constitutional assembly, decide how they must fashion the rights that give the discourse principle legal shape as a principle of democracy. . . . [Political rights] are meant to guarantee that all formally and procedurally correct outcomes enjoy a presumption of legitimacy. . . . The scope of citizens' public autonomy is not restricted by natural or moral rights just waiting to be put into effect. . . . Nothing is given prior to the citizen's practice of self-determination other than the discourse principle, which is built into the conditions of communicative association in general, and the legal medium as such.<sup>23</sup>

Michael Ignatieff, political commentator, in *Human Rights as Politics and Idolatry*:

[T]here *is* nothing sacred about human beings, nothing entitled to worship or ultimate respect. All that can be said about human rights is that they are necessary to protect individuals from violence and abuse, and if it is asked why, the only possible answer is historical.<sup>24</sup>

We need to stop thinking of human rights as trumps and begin thinking of them as a language that creates the basis for deliberation. . . . [R]ights are not the universal credo of a global society, not a secular religion, but something much more limited and yet just as valuable: the shared vocabulary from which our arguments can begin, and the bare human minimum from which differing ideas of human flourishing can take root.<sup>25</sup>

The fundamental moral commitment entailed by rights is not to respect, and certainly not to worship. It is to deliberation.<sup>26</sup>

22. *Id.* at 57.

23. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 126–28 (1996).

24. MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* 83 (2001).

25. *Id.* at 95.

26. *Id.* at 84.

Tom Campbell, lawyer, in *Rights: A Critical Introduction*:

My view is that what rights people have is a matter of social fact, . . . [though I] accept that moral judgment is involved in answering the next question: what rights ought to exist?<sup>27</sup>

[R]ights as we know them are contingent historical phenomena with inherited meanings and contents, rather than cultural and historical universals, although this is what we may strive to make them for the future.<sup>28</sup>

[R]ights do not exist until they are routinely secured. . . . [The question to be answered is] how we can best turn manifesto rights which express demands or proposals as to what rights ought to exist into rights that actually do exist.<sup>29</sup>

Sally Merry, anthropologist, in *Human Rights and Gender Violence: Translating International Law into Local Justice*:

Human rights are part of a distinctive modernist vision of the good and just society that emphasizes autonomy, choice, equality, secularism, and protection of the body.<sup>30</sup>

Over time, a gradual expansion of norms creates institutional structures, leading ultimately to a norms cascade as the ideas of human rights become widespread and internalized.<sup>31</sup>

Instead of viewing human rights as a form of global law that imposes rules, it is better imagined as a cultural practice, as a means of producing new cultural understandings and actions. The human rights legal system produces culture by developing general principles that define problems and articulate normative visions of a just society in a variety of documents ranging from lawlike ratified treaties to nonbinding declarations of the General Assembly.<sup>32</sup>

[Human rights law] is a fragmentary and largely persuasive mechanism very much in the making.<sup>33</sup>

### 3. In the Protest School

Jacques Derrida, philosopher, in *On Cosmopolitanism and Forgiveness*:

Where have we received the image of cosmopolitanism from? *And what is happening* to it? . . . [H]ow can we . . . dream of a novel status . . . for the "cities of refuge", through a *renewal* of international law?<sup>34</sup>

27. TOM CAMPBELL, *RIGHTS: A CRITICAL INTRODUCTION*, at xii (2006).

28. *Id.* at xvii.

29. *Id.* at 206.

30. SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* 220 (2006).

31. *Id.* at 221.

32. *Id.* at 228–29.

33. *Id.* at 227.

34. JACQUES DERRIDA, *ON COSMOPOLITANISM AND FORGIVENESS* 3 (Mark Dooley trans., 2001).



There is still a considerable gap separating the great and generous principles of the right to asylum inherited from the Enlightenment thinkers and from the French Revolution and, on the other hand, the historical reality . . . of these principles.<sup>35</sup>

It is a question of knowing how to transform and improve the law, and of knowing if this improvement is possible within an historical space which takes place *between* the Law of an unconditional hospitality, offered *a priori* to every other, to all newcomers, *whoever they may be*, and *the* conditional laws of a right to hospitality without which *The* unconditional Law of hospitality would be in danger of remaining a pious and irresponsible desire, without form and without potency, and [in danger] of . . . being perverted at any moment.<sup>36</sup>

Neil Stammers, political/social theorist, in *Human Rights and Social Movements*:

This book explores the analytical significance of the historical link between human rights and social movements, arguing that ordinary people—working together in social movements—have always been a key originating source of human rights.<sup>37</sup>

[T]he historical emergence and development of human rights needs to be understood and analysed in the context of social movement struggles against extant relations and structures of power.<sup>38</sup>

[O]nce institutionalised[,] human rights come to stand in a much more ambiguous relation to power. While they can still be used to challenge power, their origins and meanings as “struggle concepts” can get lost or be switched in ways that result in human rights becoming a tool of power, not a challenge to it.<sup>39</sup>

Upendra Baxi, lawyer, in *The Future of Human Rights*:

I take it as axiomatic that the historic mission of “contemporary” human rights is to give voice to human suffering, to make it visible, and to ameliorate it.<sup>40</sup>

Whether or not a world bursting forth with human rights norms and standards is a better world than one bereft of human rights languages still remains an open question.<sup>41</sup>

[T]he originary authors of human rights are people in struggle and communities of resistance.<sup>42</sup>

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35. *Id.* at 11.

36. *Id.* at 22–23.

37. NEIL STAMMERS, *HUMAN RIGHTS AND SOCIAL MOVEMENTS* 1 (2009).

38. *Id.* at 2.

39. *Id.* at 3.

40. UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* 6 (2d ed. 2006).

41. *Id.* at 2.

42. *Id.* at xiv.

What makes contemporary human rights movements *precious* is the fact that they . . . deny all *cosmological*, as well as *terrestrial, justifications* for the imposition of unjustified human suffering.<sup>43</sup>

June C. Nash, anthropologist, in *Mayan Visions: The Quest for Autonomy in an Age of Globalization*:

When grassroots movements converge, . . . the particular merges with the universal as the claims of poor market vendors to keep their posts in the old market merge with the plea to end the war raised by other speakers at [the protest I described above]. Frequently these “lesser voices” are lost as a movement gains power, but their claims are the elemental challenges for justice that ignite social movements.<sup>44</sup>

A hidden benefit of global integration is the opening up of local protests against growing inequalities to a worldwide audience. This depends on a conscientious press whose reports are made available to a wide audience. It also depends upon data collection agencies inspired by human rights concerns. The conjuncture of these two conditions made the Chiapas uprising available to a wide reading public throughout the world. The press and human rights NGOs provided both a mirror for the indigenous people to perceive how the world was responding to their protest and a catalyst to world opinion.<sup>45</sup>

#### 4. In the Discourse School

Alasdair MacIntyre, philosopher, in *After Virtue: A Study in Moral Theory*:

[Rights is one of three concepts which occupy a] key place . . . in the distinctively modern moral scheme . . . . By “rights” I do not mean those rights conferred by positive law or custom on specified classes of person; I mean those rights which are alleged to belong to human beings as such and which are cited as a reason for holding that people ought not to be interfered with in their pursuit of life, liberty and happiness. . . . [T]he truth is plain: there are no such rights, and belief in them is one with belief in witches and in unicorns.<sup>46</sup>

The best reason for asserting so bluntly that there are no such rights is indeed of precisely the same type as the best reason which we possess for asserting that there are no witches and the best reason which we possess for asserting that there are no unicorns: every attempt to give good reasons for believing that there *are* such rights has failed.<sup>47</sup>

Wendy Brown, political theorist, in an article entitled “The Most We Can Hope For . . .’: Human Rights and the Politics of Fatalism”:

43. *Id.* at xxiii.

44. JUNE C. NASH, *MAYAN VISIONS: THE QUEST FOR AUTONOMY IN AN AGE OF GLOBALIZATION* 213 (2001).

45. *Id.* at 253.

46. ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 68–69 (3d ed. 2007).

47. *Id.* at 69.

What are the implications of human rights assuming center stage as an international justice project, or as *the* progressive international justice project?<sup>48</sup>

[W]e must take account of that which rights discourse does not avow about itself. It [the rights discourse] is a politics and it organizes political space, often with the aim of monopolizing it. It also stands as a critique of dissonant political projects, converges neatly with the requisites of liberal imperialism and global free trade, and legitimates both as well. If the global problem today is defined as terrible human suffering consequent to limited individual rights against abusive state powers, then human rights may be the best tactic against this problem. But if it is diagnosed as the relatively unchecked globalization of capital, postcolonial political deformations, and superpower imperialism combining to disenfranchise peoples in many parts of the first, second, and third worlds . . . , other kinds of political projects . . . may offer a more appropriate and far-reaching remedy for injustice defined as suffering *and* as systematic disenfranchisement from collaborative self-governance.<sup>49</sup>

Makau Mutua, lawyer, in *Human Rights: A Political and Cultural Critique*:

I wrote this book . . . [because] I wanted to explain why I believe that the human rights corpus should be treated as an experimental paradigm, a work in progress, and not a final inflexible truth. It is important that the human rights movement be fully exposed so that its underbelly can be critically examined. I know that many in the human rights movement mistakenly claim to have seen a glimpse of eternity, and think of the human rights corpus as a summit of human civilization, a sort of an end to human history. This view is so self-righteous and lacking in humility that it of necessity must invite probing critiques from scholars of all stripes.<sup>50</sup>

Shannon Speed, anthropologist, in *Rights in Rebellion: Indigenous Struggle and Human Rights in Chiapas*:

The widespread utilization of human rights as a discourse of resistance reflects the hegemonic position of both Western legal institutions and the liberal ideology of the global market that sustains them. . . . Theoretically, we can learn more by looking at the various reappropriations of the discourse of human rights, and the ways that they emerge in particular interactions: the way the tool is held by particular social actors in particular contexts. Politically, we can even embrace the discourse to support the people we work with when it is necessary, based on our own historically and politically contingent interpretations and understandings.<sup>51</sup>

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48. Wendy Brown, "The Most We Can Hope For. . .": *Human Rights and the Politics of Fatalism*, 103 S. ATL. Q. 451, 453 (2004).

49. *Id.* at 461–62.

50. MAKAU MUTUA, *HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE*, at ix–x (2002).

51. SHANNON SPEED, *RIGHTS IN REBELLION: INDIGENOUS STRUGGLE AND HUMAN RIGHTS IN CHIAPAS* 181 (2008).

## V. FINAL OBSERVATIONS

### A. Avoiding Boxing Academic Disciplines in Particular Corners

The model presented in this contribution does not assume that one discipline is tied to a particular conception of human rights. As the above examples demonstrate, two scholars who are trained in the same discipline do not have to share the same conception of human rights.<sup>52</sup> In light of the oversimplified external renditions of disciplines current in human rights scholarship (of the type: anthropologists asserting that “lawyers believe that . . .” or vice-versa), the fact that the model allows every academic discipline to be found anywhere in the human rights conceptual field should be welcomed. While the exercise of naming particular representatives of each school has only been done here with respect to philosophy, political theory, law, and anthropology, the process could no doubt be repeated with respect to further disciplines such as sociology, international relations, cultural studies, psychology, history, as well as theoretical perspectives, such as feminism.

### B. The Respective Prevalence of the Schools

An empirical investigation of the actual prevalence of the schools remains to be conducted. Nonetheless, this article will venture to offer some preliminary suggestions as to the respective influence of each school. As hinted above, the natural school has long represented, in the Western world at least, the prevalent “common sense” or human rights orthodoxy that defines human rights as the rights that everybody has by virtue of being a human being. However, in academic circles, a new orthodoxy, represented by the deliberative school, seems to be replacing this old orthodoxy. The protest school seems to host the most human rights activists (and thus perhaps also activist-scholars). The discourse school of thought, with its lack of faith in human rights, is probably the least prevalent school, especially among human rights academics who most likely choose their field of research partly out of a commitment to furthering the concept of human rights: discourse scholars do not even share the non-transcendental commitment to human rights that characterizes the deliberative school of thought.

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52. For some additional linking of particular scholars to each of the four schools, see *DEMBOUR supra* note 3, at 232–71.

Interestingly, some empirical qualitative work, which is admittedly limited, suggests that a variety of positions are found among non-scholars in a way that echoes the model presented in this article.<sup>53</sup>

### C. The Attractions of Each and Every School

For the sake of conceptual clarity, the model has been presented here in a clear-cut manner. However, it should be stressed that both multiple and ambiguous affiliations are possible.<sup>54</sup> Each school of thought presents persuasive arguments—all have something of interest to offer. Not surprisingly then, many scholars, including the author and some of the scholars quoted above, waver in their orientations.

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53. Paul Stenner, *Identifying Patterns Amongst Lay Constructions of Human Rights: A Psychological Approach*, Paper given at the workshop “Towards a Sociology of Human Rights: Theoretical and Empirical Contributions” at the International Institute for the Sociology of Law, Oñati, Spain (24–25 May 2007) (on file with author). Stenner notes that the lay positions on human rights he identifies by recourse through Q methodology overlap to a large extent with the four schools identified in this contribution. *Id.*
54. For some concrete examples, see DEMBOUR, *supra* note 3, at 258–61.