

# The Right to Life in International Human Rights Law

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## KEY TAKEAWAYS

U.N. bodies should demonstrate greater respect for the internationally recognized right to life consistent with the natural law basis of human rights.

U.N. Member-States should highlight instances in which U.N. bodies are acting *ultra vires* by attempting to unilaterally amend binding international human rights law.

U.N. Member-States must push back against the abuse of prestige by rogue treaty-monitoring bodies, which advance abortion and undermine the credibility of human rights.

## Introduction

No one committed to human rights denies what Article 3 of the Universal Declaration of Human Rights<sup>1</sup> (UDHR) asserts: “Everyone has a right to life.” Rather, what is disputed today is the question of who is included under the term “everyone.” More than any other right, then, debates over the right to life implicate the basic scope of human rights protections, or, in the language of contemporary moral philosophy, the fundamental moral status of humanity and its individual members.

Core to these debates are three moral–legal categories: (1) the inherent dignity of members of the human family (referenced by the first and fifth preambular paragraphs of the UDHR, as well as by Articles 1 and 23<sup>2</sup>); (2) equal rights consequent on the equal dignity of human beings (also referenced by the first and fifth

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preambular paragraphs, as well as by Articles 1 and 7<sup>3</sup>); and (3) personhood (referenced by the fifth preambular paragraph, as well as by Articles 3 and 6).

Personhood and human dignity both indicate a unique kind of heightened moral status that requires human rights protections, while basic equality indicates that those with this status possess it equally and so are owed human rights protections equally, too. “Everyone” equally shares in personhood and human dignity and equally possesses human rights. This essay will return to the mutually reinforcing importance of these core categories for understanding who counts as “everyone” later on.

## Natural Law

The immediate impetus behind the UDHR’s promulgation in 1948 was the injustices carried out before and during World War II, particularly those perpetrated by the National Socialist government of Germany. But far from originating with the UDHR’s drafters, the idea of what is meant by “human rights” hails from a long tradition of natural law reflection on justice.

Here it is important to be aware of the distinction between an idea or proposition and how its essence may be expressed in various formulations. While neither ancient Roman jurists nor Thomas Aquinas (A.D.1225–1274) possessed the precise idiom of “human rights,” they clearly understood and accepted its logically prior corollary: that justice requires giving to another what is his right (*ius suum*, with *ius* the root word for justice).<sup>4</sup> So though a genuine development in the idiom of human rights occurred through Gratian’s seminal work of canon law (the *Decretum*, completed c. 1140) and the early commentaries it generated (up to c. 1200)—wherein a more subjectivized idea of *ius* as a power (*potestas*) or faculty (*facultas*) or liberty (*libertas*) of the individual was developed<sup>5</sup>—this new idiom was but a particular articulation of ideas on justice endorsed by Aquinas and others before him in the natural law tradition.<sup>6</sup>

What counts as right (and thus *a* right) within this tradition is settled by appeal to the natural law, i.e., the standard of the reasonable that is naturally inherent in human reflection on justice and morality. The Roman lawyer Ulpian (A.D. 170–223),<sup>7</sup> Aquinas,<sup>8</sup> and the early canon lawyers<sup>9</sup> saw more clearly than their ancient Greek predecessors in the natural law tradition that everyone is by nature equal and thus due their natural right in virtue of their human nature (hence why natural law ethicists are equally comfortable with the terms “natural” and “human,” used as descriptions of fundamental rights).

Emerging out of the broad medieval natural law tradition, Francisco de Vitoria, Bartolome de Las Casas, and Francisco Suarez argued on behalf

of the natural rights of native American Indians in the face of colonial exploitation in the 16th and 17th centuries.<sup>10</sup> From this same moral and juridical lineage, Hugo Grotius appropriated the idea and idiom of natural rights and, in doing so, acted as the bridge over which natural rights were carried from the medieval canonists and post-Reformation second scholastics to modern protestant political theorists. The natural rights theories of Grotius, Samuel Pufendorf, Jean Jacques Burlamaqui, Christian Wolff, Emer de Vattel, and John Locke<sup>11</sup> were, in turn, formative of the American Declaration of Independence of 1776, which, after mentioning the “Laws of Nature and Nature’s God,” declares: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”

The philosophy of natural rights was to the fore in that other important 18th-century precursor to the UDHR, the 1789 French Declaration of the Rights of Man and the Citizen.<sup>12</sup> The key drafter of the American Declaration, Thomas Jefferson, had a role in the drafting of the French Declaration, as it was he who advised the Marquis de Lafayette on the creation of the first model for the eventual 1789 Declaration.<sup>13</sup> The final text of the French Declaration, influenced in part also by the Virginia Bill of Rights of 1776, invoked the “natural, inalienable, and sacred rights of man” and, “under the auspices of the Supreme Being” (Preamble), enumerated the “natural and imprescriptible rights of man” as “liberty, property, security, and resistance to oppression” (Article 2).<sup>14</sup>

## Universal Declaration of Human Rights

The drafters of the UDHR knew from where they were getting their ideas. One of the most influential framers of what was to become the preamble to the UDHR, René Cassin, looked to the preamble of the 1789 French Declaration for inspiration.<sup>15</sup> Two of the most important template documents employed by the Canadian jurist John Humphrey in the composition of the very first draft of the UDHR, the “Pan American” declaration and a study sponsored by the American Law Institute, both drew heavily from the constitutional natural rights tradition.<sup>16</sup> And when the UDHR was adopted in Autumn 1948, its drafters’ speeches made repeated reference to the 1776 and 1789 Declarations.<sup>17</sup>

The overarching thrust of the natural law/natural rights tradition up to 1948 insisted upon human rights as rooted in human nature itself, so it is entirely fitting that the UDHR begins with the statement, “recognition of

the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” and goes on to reference “human beings” in the context of human rights protection, both in its second preambular paragraph and its very first article. The sufficient condition of being human for qualifying for human rights protection is what makes the insistence upon *equal* rights credible: Since no one shares more or less in human nature than any other human being, no one has a greater or lesser claim on human rights protection.

The UDHR’s invocation of dignity further illuminates the necessary and sufficient connection between human nature and possession of human rights. The very first draft preamble circulated was authored by John Humphrey and contained an alienable, extrinsic understanding of human dignity, “That there can be no human freedom or dignity unless war and the threat of war are abolished.”<sup>18</sup> The second preamble circulated was authored by René Cassin and contained a much more intrinsic understanding of human dignity: “[H]uman freedom and dignity cannot be respected as long as war and the threat of war are not abolished.” The preambular statement that was eventually accepted was authored by Charles Malik, a Thomist philosopher and the leading philosophical influence on the UDHR’s drafting,<sup>19</sup> and contained the phrases “inherent dignity” and “inalienable rights.”<sup>20</sup>

Malik later explained the significance of these terms:

[T]he doctrine of natural law is woven at least into the intent of the Declaration. Thus it is not an accident that the very first substantive word in the text is the word “recognition”: “Whereas recognition of the inherent dignity and of the equal and inalienable rights, etc.” Now you can “recognize” only what must have been already there, and what is already there cannot, in the present context, be anything but what nature has placed there. Furthermore, dignity is qualified as being “inherent” to man, and his rights as being “inalienable,” and it is difficult to find in the English language better qualifications to exhibit the doctrine of the law of nature than these two.<sup>21</sup>

During debates over Article 1, Eleanor Roosevelt (chairperson of the drafting commission) pointed out that dignity was included to emphasize that every human being is worthy of respect.<sup>22</sup> Her remark was directed against the contention that dignity was not a right and therefore ought not to be part of any article of the UDHR. Roosevelt’s point was that human dignity explains why we have rights in the first place. Her position would later be attested to by both the International Covenant on Civil and Political

Rights and the International Covenant on Economic, Social and Cultural Rights which, in their second preambular paragraphs, affirm that human dignity founds human rights.<sup>23</sup>

The intrinsic (“inherent”) account of dignity contained in the UDHR’s preamble coheres perfectly with the UDHR’s belonging to the natural rights tradition. Inherent dignity means that the categorical moral worth of individual human beings is intrinsic to (or rooted within) their nature as human beings. Hence, this dignity is properly *human* dignity. As such, the UDHR sets itself against all extrinsic accounts of dignity whereby an individual’s basic worth is contingent upon some property non-essential to his or her nature, such as those proffered by Thomas Hobbes,<sup>24</sup> David Hume,<sup>25</sup> and Friederich Nietzsche.<sup>26</sup>

Instead, the UDHR aligns itself firmly in favor of easily the most influential account of dignity at the time of its drafting—the natural law account which was exemplified by, *inter alia*, Pope Leo XIII’s encyclical *Rerum Novarum* (1891), Pope Pius XI’s encyclical *Quadragesimo Anno* (1931), the preamble to the 1937 Irish Constitution (an overtly natural law constitution and the first ever to invoke individual dignity), Pope Pius XII’s 1942 Christmas Address,<sup>27</sup> and the American Jewish Committee’s draft “Declaration of Human Rights” (1944).<sup>28</sup>

The logically interdependent moral realities of human dignity and (equal) natural human rights cohere with the import of Article 6’s invocation of personhood, “Everyone has the right to recognition everywhere as a person before the law.” Personhood here is clearly understood in an inclusive sense: No one is to be excluded from being recognized as a person. In light of the positive references to “all human beings” (Article 1) and “all members of the human family” (first preambular paragraph), “everyone” in Article 6 ought to be interpreted as every human being. Johannes Morsink is correct to describe this as “stripped down” personhood,<sup>29</sup> a conception of personhood stripped down to what Anna Grear terms the “embodied vulnerability of the human sub-stratum.”<sup>30</sup>

There was considerable debate as to whether the reference to juridical personhood in Article 6 should be retained, with the U.K. and U.S. delegations particularly reluctant to keep it (for jurisprudential, and, possibly, in the case of the latter, domestic political reasons). However, the majority of delegates present were impressed by the arguments of Cassin and others who pointed out that personhood had been used as a legal tool for denying the fundamental rights of human beings, such as Jews and African Americans. The article was necessary according to Cassin because “persons existed who had no legal personality.”<sup>31</sup> Recognizing personhood as

inclusive of all individuals who share in a common rational nature, like human nature, is a feature of the natural law tradition.<sup>32</sup>

The contrary view is that of an exclusive account of personhood that divorces personhood from human nature and makes of it an exclusive, elite status higher than the status of simply being human.<sup>33</sup> But the exclusive account was alien to human rights thinking at the time of the UDHR's drafting; the dominant view was the inclusive understanding, as present within the U.S. Catholic Bishops' draft "A Declaration of Rights" (1946), the American Jewish Committee's draft "Declaration of Human Rights" (1944), and the American Declaration of the Rights and Duties of Man (1948).<sup>34</sup>

The incorporation of an inclusive account of personhood in the UDHR is perfectly appropriate because inclusive personhood perfectly coheres with intrinsic dignity. Common employment of the categories "dignity and personhood" in contemporary moral philosophy indicates that they are interchangeable, which is how they operate in the UDHR, too. There, they both signify the unique, fundamental moral worth of the individual *qua* human being.<sup>35</sup> And this is precisely how contemporary natural law scholars understand the interrelationship between these two categories:

Although there are different types of dignity, in each case the word refers to a property or properties—different ones in different circumstances—that cause one to *excel*, and thus elicit or merit respect from others. Our focus will be on the dignity of a person or personal dignity. The dignity of a *person* is that whereby a person excels other beings, especially other animals, and merits respect or consideration from other persons...what distinguishes human beings from other animals, what makes human beings *persons* rather than *things*, is their rational nature.<sup>36</sup>

It was this last point that Malik intended to make by his insistence on including the clause "endowed with reason and conscience" in Article 1.<sup>37</sup> Not only are the affirmations of inclusive personhood and inherent dignity by the UDHR consistent, they help make credible the claim that all members of the human family have *equal* human rights.

## The Right to Life of Unborn Children

The UDHR's reliance on the mutually illuminating and mutually dependent categories of equal human (natural) rights, inherent human dignity, and inclusive personhood means that it endorses human rights as belonging to human beings by virtue of their human nature. This itself entails that

the deep logic (as well as *prima facie* meaning) of the UDHR requires recognizing that members of the human family living *in utero* possess human rights, and thus the right to life.

The right to life is centrally the right against being intentionally killed. It has dual application: horizontal (against the activities of other persons) and vertical (against activities of the state). The moral norm underpinning the right to life is exceptionless (“absolute”) in the sense that once it is specified adequately (i.e., no *intentional*<sup>38</sup> killing), the right does not permit of further qualification, limitation, or “balancing.”<sup>39</sup>

The right to life most certainly excludes all utilitarian attempts to justify the intended killing of innocents on the basis that such killings supposedly effect an overall net good when compared to the effects of the choice not to perpetrate them. The utilitarian view sees one course of action as more moral than another when it more fully instantiates (the most plausible version of) the principle of “the greatest good for the greatest number.” Utilitarianism permits what, in reality, is immoral and contrary to respect for human rights partly because it fails to acknowledge human dignity.

As a uniquely supreme kind of worth, human dignity is priceless and incommensurable—there is no metric according to which it can be measured, calculated, and compared, even as regards other of its instantiations in human persons.<sup>40</sup> So it is rationally senseless to claim that furthering the interests of a majority can morally “outweigh” a violation of human dignity brought about through the intentional killing of an innocent or innocents.<sup>41</sup>

And yet many legal and other scholars argue that abortion, the intentional killing of an unborn human being, is a human right. What is more, they appeal to the UDHR in so arguing. Their line of reasoning centers of the inclusion of the term “born” in Article 1 and is typified by the claim of Christina Zampas and Jaime M. Gher that “the term ‘born’ was intentionally used to exclude the [fetus] or any other antenatal application of human rights.”<sup>42</sup> Zampas and Gher argue that a proposal was made to delete the term “born” precisely on the basis that it seemed to exclude the unborn from human rights recognition, and that this proposal was rejected.

Similarly, Rhonda Copelon, Zampas, Elizabeth Brusie, and Jacqueline deVore argue that a remark by the French delegate during drafting to the effect that the right to freedom and equality is “inherent from the moment of birth” was directed against a proposed amendment to delete the term “born,” an amendment motivated by a concern to include unborn human beings within the ambit of human rights protection.<sup>43</sup> Therefore, they conclude, the term “born” in Article 1 counts against human rights protections for the unborn.

In fact, the converse is the case. Johannes Morsink demonstrates in his study into the origins of the UDHR that debates over the retention or rejection of the term “born” did *not* center on the question of abortion or the moral status of fetal life, but on whether human rights are inherent within human nature or, instead, are attributed to human beings from some source extrinsic to their very existence, such as society or law.<sup>44</sup> The contention by the French delegate that the right to freedom and equality is “inherent from the moment of birth” was directed against not a pro-life proposal but the Soviet position, whereby equality of rights before the law is “determined not by the fact of birth, but by the social structure of the state.”<sup>45</sup>

The insertion of the term “born” in the first place was at the behest of a joint French and Philippine proposal.<sup>46</sup> It echoed Jean-Jacques Rousseau’s *The Social Contract*<sup>47</sup> and Article 1 of the 1789 French Declaration of the Rights of Man and the Citizen, which Rousseau helped inspire (“Men are born and remain free and equal in rights”), which themselves echoed the Ulpian’s proposition included near the beginning of Justinian’s *Digest* of the 6th century, “by natural law all were born free.”<sup>48</sup> Rousseau’s moral opposition to abortion<sup>49</sup> indicates that he had no difficulty employing “born” as a signifier without implying that the value of “humanity” has no pre-natal application. Neither did the *Digest*, which affirms the civil rights of unborn children.<sup>50</sup> And neither did René Cassin of France, the co-proposer of the amendment that included the term “born,”<sup>51</sup> nor the Chilean delegate, Hernán Santa Cruz, who spoke in favor of the philosophy underpinning the term.<sup>52</sup> Both delegates stated their moral support for the human rights status of unborn human beings during the course of the UDHR’s drafting.<sup>53</sup>

So while it is true that by dint of a philosophical misunderstanding, a few delegates (those of Mexico and Venezuela) objected to the term “born” on the grounds that it could imply disregard for the unborn child,<sup>54</sup> these objections were extraneous to the real import of what “born” signified. What it signified then—as now—is that human rights and human dignity inhere (are intrinsic to) human nature as per the moral relevance of that nature. Dignity and rights cannot inhere in human nature if they are contingent upon the materialization of developed or immediately exercisable (as distinct from latent or root) capacities proper to paradigmatic (healthy, mature, non-disabled) members of the human family. As such the intended meaning of the disputed qualifier counts *in favor* of unborn human rights.

Further support for this contention is that no delegate argued in favor of retaining the term “born” on the basis that it meant that only actual physically born human beings could claim human rights. The argument in favor of retaining the term was based exclusively on support for the view

that both equal dignity and human rights are inherent in all human beings. (As Article 2 puts it: “Everyone...without distinction of any kind.”) Malik, typically, was acutely aware of the true significance of this debate: “[T]he word ‘born’ means that our freedom, dignity and rights are natural to our being and are not the generous grant of some external power.”<sup>55</sup>

Does the UDHR, then, affirm the rights of all human beings, including unborn human beings? The matter does not, to my mind, permit a univocal, unqualified judgment. Proposals were, in fact, made to explicitly include the unborn within the terms of Article 3 (which at the time was draft Article 4), which enumerates the right to life. One such proposal was made by the Chilean delegate and stated, “unborn children, incurables, the feeble[-] minded [sic] and the insane have the right to life.”<sup>56</sup> This suggestion would be discussed alongside a recommendation by Malik, “Everyone has the right to life and physical integrity from the moment of conception regardless of his or her physical or mental condition. Everyone has the right to liberty and personal safety.”<sup>57</sup> Both proposals were rejected.

Two reasons were advanced against their adoption: the need for concision within the UDHR<sup>58</sup> and the fact that not all countries prohibited abortion in all circumstances.<sup>59</sup> No delegate argued that unborn children were not entitled to human rights protection *per se*. For instance, Cassin took a stand against Malik’s proposal on the basis that it was not acceptable to every member, while also expressing his agreement with the proposal’s substance.<sup>60</sup> Malik is also reported as requesting:

[T]hat reference should be made in the summary record of the meeting to the statements made by the representatives of China, the Union of Soviet Socialist Republics, and the United Kingdom in connection with [the then] article 4.... [W]hile the delegations of those three countries wished to omit the phrase “from the moment of conception” in the interests of brevity, they considered that idea to be implied in the general terms of article 4.<sup>61</sup>

In response to Malik’s request, the Chinese delegate stressed that the wording of the draft Article not only implied but actually contained the idea expressed by Malik’s amendment;<sup>62</sup> the United Kingdom delegate stated that Article 4 could be understood to contain such an idea but did not necessarily do so.<sup>63</sup> The proposals to include “from the moment of conception” and “regardless of his or her physical or mental condition” were each voted on separately and were each defeated six votes to two.<sup>64</sup>

The proposal to explicitly protect unborn children was rejected for the sake of succinctness and generality, and because its inclusion may have

proved an obstacle to some states signing the UDHR. No argument was made against the proposal to the effect that the unborn child does not possess human rights as such, and no argument was made to the effect that there is a human right to abortion. (Indeed, no attempt was ever made during the drafting of the UDHR to include even a heavily limited right to abortion.) Thus, out of the two distinct positions put forward on the issue, one explicitly argued that the unborn child possessed human rights, while the other position, which was officially endorsed, was an admixture of stylistic and sovereignty concerns. Out of the six votes against the proposal, two were clearly motivated by stylistic concerns (the votes of the United States and China), and three were primarily motivated by sovereignty concerns (the votes of the United Kingdom, the Union of Soviet Socialist Republics, and France). The *travaux préparatoires* shed no light on the intention behind the Australian vote. If it was motivated by a desire for concision, an approach urged by the Chairperson just prior to the vote,<sup>65</sup> then an evenly split intention between stylistic and sovereignty concerns would have formed the successful vote. At worst, therefore, the vote against the proposal was intended to make it easier for certain states to sign on to the UDHR. There was no principled, morally substantive opposition to unborn human rights or support for abortion rights.

Perhaps the best summation of the UDHR on the matter, when all relevant preambular paragraphs, articles, and debates are taken into consideration, including the most philosophically and historically attentive interpretation of the core terms inherent in each, is:

- Yes, the UDHR offers substantive moral support for the recognition of the human rights of unborn human beings as members of the human family;
- No, the UDHR does not explicitly include unborn children under its right to life; and
- No, the UDHR neither affirms a human right to abortion nor offers substantive moral support for a human right to abortion.

The UDHR's relationship to the human rights status of the unborn child is in some ways similar to the relationship between the original U.S. Constitution (inclusive of the Bill of Rights) and the human rights status of African Americans. Presupposing the overtly natural rights philosophy of the Declaration of Independence, the Constitution enumerated various

natural rights and gave its endorsement to the fundamental, natural equality of all human beings.<sup>66</sup> Yet this endorsement was importantly deficient since the Constitution's protection of African Americans' natural rights was insufficiently explicit given the threatening cultural context facing them, and was even undermined by provisions like Article IV, section 2, clause 3.<sup>67</sup> Similarly as regards the Declaration itself, the decision to omit Jefferson's words against the King waging "cruel war against human nature itself" through royal support for the slave trade injured the humane tenor of the document (and was a decision made at the behest of southern opposition, and thus—as with the UDHR drafting decision to omit explicit reference of the unborn under the right to life—motivated by sovereignty and consensus concerns).

So despite these founding documents' natural rights underpinnings, they were ill-equipped to remove the legal possibility of a future Supreme Court decision like *Dredd Scott v. Sanford*, which harnessed cultural prejudices to reject the fundamental equality of African Americans and their natural right not to be held in slavery as the possession of another. The *Dredd Scott* majority construed the Constitution against the grain of its moral and philosophical underpinnings and held that colored people are "a subordinate and inferior class of beings"<sup>68</sup> who "had no rights or privileges but such as those who held the power and the Government might choose to grant them."<sup>69</sup>

And yet the inherent natural rights logic of both the Constitution and the Declaration of Independence was irrepressible. The dissent in *Dred Scott* spoke to it: "A slave is not mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence,"<sup>70</sup> and "slavery, being contrary to natural right, is created only by municipal law."<sup>71</sup> Dissent was assented to during Congressional debates over the Thirteenth and Fourteenth Amendments, wherein appeal to the natural, inalienable, equal rights of human beings was ubiquitous.<sup>72</sup>

Since then, there have been legally endorsed setbacks on the road to the proper recognition of the human dignity of all regardless of such accidental characteristics as skin color, not least *Plessy v. Ferguson*,<sup>73</sup> but when they have been overcome, it has been through (as Martin Luther King Jr. famously put it) living out the true meaning of the creed: "We hold these truths to be self-evident, that all men are created equal."

In a similar way the UDHR's affirmation of inherent human dignity, equal human rights, and inclusive personhood is oriented firmly toward a more explicit recognition of the human rights status of the unborn. Like the Reconstruction Amendments and the Civil Rights Act, a day may come when this more explicit recognition fully materializes in human rights law, even

if the materialization must occur against the grain of the views of bodies tasked with operating faithfully according to the meaning of the UDHR.

## Subsequent International Human Rights Law

Subsequent international human rights law has in fact provided more explicit—if still not fully explicit—recognition of the unborn child’s human rights. Article 6(5) of the 1966 International Covenant on Civil and Political Rights protects the right to life of unborn children whose mothers have been sentenced to death. (“Sentence of death...shall not be carried out on pregnant women.”) The *travaux* show the provision was added out of consideration for “the interests of the unborn child.”<sup>74</sup>

This section proceeds from and is intelligible in light of Article 6(1), “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” As with the UDHR drafting, an unsuccessful attempt was made to explicitly include reference to the unborn under Article 6(1). A proposed amendment to insert the clause “from the moment of conception” into the right-to-life article was defeated by 31 votes to 20 (with 17 abstentions).<sup>75</sup> But the *travaux* make it clear that the vote was not lost due to a direct rejection of the idea that unborn children possess human rights or due to any notion that there is such a thing as a human right to abortion. Rather, delegates were concerned with the lack of legal clarity arising from the invocation of conception as a legal marker and, to a seemingly lesser extent, with the need to respect state sovereignty in light of the incompatibility of the amendment with extant abortion legislation in various jurisdictions.

The 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) did not discuss the right to life of unborn children in the context of the abortion controversy. It did, however, recognize that the unborn child requires human rights protection in the child-centric Article 12(2)(a). In the context of ensuring that “everyone” enjoys the highest standard of physical and mental health, the ICESCR holds that “steps to be taken by the State Parties to the present Convention...shall include...the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child.”

The 1959 United Nations Declaration on the Rights of the Child had, by this stage, already indicated that “child” includes the child “before as well as after birth.” And the inclusion of this statement in the third preambular paragraph of the 1989 U.N. Convention on the Rights of the Child (UNCRC) forms what remains the most explicit affirmation of the human rights status

of the unborn child by international human rights “hard” law: “[T]he child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”

Though appearing to be an entirely unambiguous affirmation of the human rights status of the unborn child, the significance of the UNCRC’s preambular statement is qualified by the placement in the *travaux* “on behalf of the entire Working Group” the following statement, “[I]n adopting this preambular paragraph, the Working Group does not intend to prejudice the interpretation of article 1 or any other provision of the Convention by State parties.”<sup>76</sup> This interpretative statement itself would be the subject of a legal opinion from the U.N.’s Legal Counsel, an opinion furnished after the Working Group had completed its work and that cast significant doubt on the legal effect of the interpretative statement.<sup>77</sup>

A point the opinion intimates is that in international law hermeneutics (as per Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, or VCLT),<sup>78</sup> the ordinary meaning of the preamble ranks higher than appeal to supplementary means of interpretation such as the *travaux*. Despite an element of ambiguity over its precise significance in international human rights law, then, the UNCRC’s preamble remains a more explicit and more general affirmation of the unborn child’s human rights than hitherto achieved. It is also part of a trend that is both clear and clearly faithful to the moral–philosophical foundations of the UDHR.

In the 1990s, another trend began pertaining to the status of the unborn in intentional human rights law. Of itself, this particular trend did not amount to a development of international human rights law but rather involved a radical shift in how United Nations bodies interpreted this law. So seemingly from nowhere and without offering anything like a reasoned justification the Human Rights Committee (HRC), a body established pursuant to Article 28 of the International Covenant on Civil and Political Rights (ICCPR), began declaring that compliance with the ICCPR requires the decriminalization of abortion in cases of “rape, incest, serious risks to the health of the mother, [and] fatal fetal abnormality.”<sup>79</sup>

The HRC now also expresses concern at the “discriminatory impact” of abortion laws that criminalize most abortions within a jurisdiction and thus prevent women of lesser economic means (who cannot afford to travel) from procuring an abortion.<sup>80</sup> The body routinely challenges states with restrictive abortion laws and does so primarily by appeal to Articles 3,<sup>81</sup> 6,<sup>82</sup> and 7<sup>83</sup> of the ICCPR.

In its recent General Comment (No. 36) on Article 6, the HRC construes that article to effectively contain a near-unlimited right to abortion.<sup>84</sup> No

effort is made by the HRC to offer anything like a *ratio decidendi* for rejecting the applicability of human rights to unborn children and for incorporating a right to abortion into the text of the ICCPR. The manifold “concluding observations” and “general comments” simply assert the existence of a right to abortion under that instrument.

Despite presentations, suggestions, and posturings to the contrary, the HRC’s “concluding observations” and “general comments” do *not* form part of binding international human rights law. The same goes for all U.N. treaty-monitoring bodies. This is something that even scholars very sympathetic to the activities of treaty-monitoring bodies accept.<sup>85</sup> The HRC is not a judicial-type body and does not have the legal power to develop, delete, or add to the ICCPR’s provisions, as is clear from the text of the ICCPR itself.

Article 40(1) provides for states party to the Covenant “to submit reports [to the HRC] on measures they have adopted which give effect to the rights recognized herein [i.e., in the ICCPR itself],” while Article 40(4) requires the HRC to transmit reports and general comments to the state parties. Since this is the extent of the HRC’s powers under the ICCPR, it acts *ultra vires* when it seeks to alter, add to, or diminish the rights recognized by the ICCPR or to otherwise amend that instrument.

The problematic nature of the HRC’s approach to the human rights of the unborn child is mirrored in most other U.N. treaty-monitoring bodies. The Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee),<sup>86</sup> established pursuant to Article 17 of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), is perhaps the most insistent on a human right to abortion. The CEDAW Committee regularly appeals to Article 12(1) of CEDAW to support abortion rights. (“States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.”)

Yet, like the ICCPR, the CEDAW makes no provision for abortion as a human right, either in Article 12(1) or elsewhere. This is ascertainable from a good faith reading of its actual textual provisions and confirmed by its *travaux* (which indicate that abortion was not understood as a human right component of “family planning” or any other CEDAW provision).<sup>87</sup> Constitutional scholars of almost every generation and nationality are familiar with a glaring disjunction between the underlying philosophy of a foundational legal text and an aspect of its current official interpretation. So it is with the current incompatibility between, on the one hand, the underlying moral philosophy of the UDHR—reflected in its explicit text—and the

instruments promulgated pursuant to it, and, on the other, the free-floating interpretations of these human rights documents asserted by U.N. treaty-monitoring bodies, which somehow infer a right to abortion.

## Disintegration of the Human Rights Philosophy

In the minds of many human rights scholars today, debates over the human rights status of unborn children are rather peripheral to the future of human rights. At most, they tend to assume that the status of the unborn matters really only insofar as it impacts upon the discrete matter of the right to abortion. (What matters for a clear majority of scholars is that the status of the unborn is resolved in such a way as to leave the right to abortion intact.) Very few think that the credibility of human rights *as a whole* stands or falls on the status of unborn children, and so very few are in the least bit troubled by how U.N. treaty-monitoring bodies implicitly—yet really—disparage the human rights status of unborn children.

But the basic credibility of human rights as a whole is at stake in these debates. This is not a circular claim; its veracity can be apprehended by appreciating diverse-yet-intertwined insights from a variety of philosophical sub-disciplines, something most human rights scholars and members of treaty-monitoring bodies are not readily in a position to do. These insights have enormous implications for human rights, though, and it is imperative to consider them.

Honest and scientifically informed thinkers in favor of abortion rights know that the unborn entity is a human being.<sup>88</sup> Usually, too, they subscribe to at least some vestigial respect for the idea that it is intrinsically wrong to kill innocent persons. The obvious solution to the dilemma is to deny that unborn human beings are moral persons (or, what is essentially the same thing, possess equal human dignity). For the denial to be minimally plausible, of course, it must appeal to a criterion of moral personhood (or of possessing human dignity) the unborn fail to satisfy. The standard of personhood that quickly became the dominant, consensus position was that of having the immediately exercisable (as distinct from latent or root) capacity for self-consciousness.<sup>89</sup>

It was a position alien to the thought of the most influential fathers of the natural rights tradition when they considered personhood in the context of justice and rights.<sup>90</sup> These philosophers assumed that to possess human nature was to be a person. Theirs was an intrinsic, inclusive account of personhood. The revisionist account, on the other hand, posited personhood as contingent upon the experiencing of an advanced developmental stage

wherein a relevant root capacity develops into a corresponding, immediately exercisable capacity. The root capacity that makes possible an immediately exercisable capacity is itself intrinsic to human nature and, thus, the immediately exercisable capacity is contingent upon an intrinsic feature of human nature. But the immediately exercisable capacity considered in isolation is, strictly speaking, non-essential to human nature and thus in that way extrinsic to it.

As extrinsic to human nature, the revisionist account of personhood excludes various human beings. This, of course, was the point. But even philosophers in favor of abortion quickly came to realize that it was not just unborn human beings who were excluded by this revisionist standard. Michael Tooley illustrated clearly in his seminal 1983 work, *Abortion and Infanticide*, published just 20 or so years after the legislative push for abortion rights fully kicked into gear, that newborn human beings were similarly “non-persons” according to the revisionist standard of personhood.<sup>91</sup> It was a simple matter of logical consistency.

Peter Singer’s work helped popularize the argument Tooley was making, and today it is widely accepted among bioethicists that infanticide, in effect, the intentional killing of newborns, is substantially equivalent to the killing of children pre-birth in the sense that none of the beings killed are persons (only persons have a proper right to life).<sup>92</sup> The practical implications of this concession have been much less acute than the practical implications of the social consensus concerning abortion, though largely because the latter removes almost<sup>93</sup> all practical relevance from the former.

At the other ends of life’s spectrum, that same revisionist standard of personhood has engendered a broad bioethical consensus in favor of the allegedly sub-personal nature of human beings who are alive but lacking any significant level of consciousness as a result of acquired, severe cerebral impairment (as occurs in cases of injury resulting in a so-called persistent vegetative state, or PVS).<sup>94</sup> Law in certain influential jurisdictions has followed suit and permits the “letting die” (in reality: deliberate killing via act or omission) of such profoundly impaired human beings since it is supposedly in their “best interests” to die.<sup>95</sup> (This rationale for legalized killing is tantamount to holding that a human being’s life in a PVS-like condition is sub-personal and that therefore they themselves are not fully a person and do not possess equal human dignity.)

It did not take long for the rejection of inclusive personhood that predicated these sorts of decisions to trickle down into decisions to euthanize incompetent, non-PVS patients (e.g., those with severe dementia or in a coma) without their explicit request. And so non-voluntary euthanasia is

often unofficially tolerated to the point of quasi-formal policy in jurisdictions like Belgium and the Netherlands.<sup>96</sup> All this is relatively well-known in moral philosophy and medical law.

What is much less well-known publicly is that a small number of serious philosophers have in the past 15 years or so applied the revisionist account of personhood to cases of adults with profound intellectual disabilities. Inevitably, the results have been troubling. The possession by an individual of a profound intellectual disability often entails his lacking a sufficiently robust ability for self-consciousness to satisfy the revisionist criterion for personhood.<sup>97</sup> The implication, not always unstated, is that these persons do not possess a right to life.

It is noteworthy that some of the most vehement opposition to this development comes from secular feminist ethicists. How do they argue against the de-personalizing of the profoundly intellectually disabled? Often by appealing to the unique worth of both human nature and natural, biological relationships between dependent human beings.<sup>98</sup>

Although it is abundantly clear to most serious scholars working on the interrelationship between bioethics and moral status that the revisionist account of personhood renders many more categories of human beings non-persons beyond unborn children, human rights and other legal scholars who embrace the revisionist account for the purposes of abortion advocacy seem largely uninformed of this implication—or at least very rarely advert to it publicly. The wider implications of their account of personhood should trouble them massively, and yet they remain seemingly unperturbed.

The matter is even more problematic than that of human rights abandoning some of the most vulnerable categories of human beings and leaving them outside the scope of human rights protection. A further entailment of the revisionist account of personhood is only beginning to appear on the radar of moral philosophers. It can be appreciated by combining the aforementioned insights from the fields of bioethics and moral status with important insights from the field of value theory.

The divorce of personhood from human nature turns out to unravel human rights in its entirety. How? To begin with, a credible account of revisionist personhood cannot rely on magic. In other words, it cannot suppose that in the order of human development a human at point  $p$  is simply a non-person and at the very next developmental point,  $p + 1$ , is fully a person. Cognitive science rejects the idea that the immediately exercisable ability for self-consciousness is like a switch that is completely off and then suddenly, as if by magic, turned fully on.

Rather, the consensus and commonsense view is that the ability to experience self-consciousness develops gradually (and can be lost gradually, too, as in the case of dementia). Thus, from the very outset, the revisionist account of personhood was open to the possibility that a human being increases in personal value up to the point he or she becomes a full person. On this basis, bioethical references to “quasi” or “partial” or “potential” persons are very common, and usually indicate a moral worth on the personhood scale somewhere between null and full. The alleged increase in moral worth is not ad hoc: It tracks the human being’s increasing though incomplete appropriation of the ability to do what counts as the criterion for personhood. No longer is there any need to appeal to implausible magic moments or magic points, leaving the plausibility of the revisionist account intact.

Or so it seemed. The reason why the solution appeared to work so well is that up to the point of achieving self-consciousness there was a graduated, proportionate, and isomorphic parallel between the human being’s growth in and toward the relevant criterion and his moral worth. No arbitrary, ad hoc, abrupt change in moral status occurred.<sup>99</sup> But if the revisionist account of personhood was to be credible it had to be *fully* consistent. And that entails a very serious problem. For it is generally accepted by philosophers (and by cognitive scientists) that degrees of self-consciousness are found beyond a minimally substantive point that acts as a plausible anchor for revisionist personhood.<sup>100</sup> Indeed, it is likely more accurate to speak of different levels and depths of self-consciousness than of linear degrees, making the idea of an invariant, fixed point of self-consciousness corresponding to the personhood-conferring metric even less plausible.<sup>101</sup>

Hence, we are left with this picture by the revisionist account of personhood when informed by the dominant view of self-consciousness: There is a “point” at which a non-intellectually disabled developing human being achieves a level of the capacity for self-consciousness high enough to suffice for counting as a person, and, beyond this, there are human persons with higher levels of this capacity. If the revisionist account of personhood is to maintain internal consistency in light of this picture and is to avoid the arbitrary and ad hoc positing of a magic point at which an increase in moral status no longer tracks (in effect, is proportionate with) an increase in the capacity for self-consciousness, then it follows that it will not only need to accept the existence of quasi or partial persons, but of various degrees of “supra” persons too.

This is precisely the conclusion drawn over the past 10 or so years by respected philosophers like Jeff McMahan,<sup>102</sup> Richard Arneson,<sup>103</sup> and Christopher Knapp.<sup>104</sup> They are not particularly comfortable with the

conclusion, since they are proponents of the revisionist account, but they are clearheaded and honest enough to follow their personhood argument where it leads.

It is obvious that the idea of a gradated series of supra persons over and above normal persons destroys outright the idea of fundamental human equality. (The destruction is thoroughgoing, because there will be many supra persons with lesser moral worth than other supra persons on this account.) As the earlier treatment of the UDHR indicated, fundamental equality of human rights and human rights subjects are essential features of the basic meaning of human rights. So the revisionist account of personhood is incompatible with human rights even on the assumption that it can be just to exclude some more marginalized classes of human beings from human rights protection.

Now it might appear open to a proponent of the revisionist account to save it in one of two ways. He or she could simply abandon the idea of gradated personhood altogether, thus saving the account from serious internal inconsistency and from the elitism entailed by it. But that move introduces massive arbitrariness into the position: At every pre-magic level of the relevant capacity being reached, even at the level only ever-so-slightly below the magic level, the human being has no personal worth, while for every increase in the relevant capacity post-magic point it makes absolutely no difference at all to the worth of the human being. The obvious arbitrariness of this approach is recognized by almost all proponents of personhood revisionism, and so few, if any, of them today endorse it.

A more promising savings clause is this: Bite the bullet and insist on thoroughgoing internal consistency, yet deny that the differences in moral status above the “normal” personhood line are significant enough to require practical (as distinct from theoretical) abandonment of fundamental human rights equality. This move, too, however, is unsuccessful. If being situated a little below the personhood-conferring line makes one a partial person, and if it is the case that there is no principled difficulty with killing partial persons compared with killing persons, then it follows that relatively small differences in moral worth on this revisionist account can, in fact, entail drastic differences in what counts as permissible and impermissible treatment.

We now arrive at the deep, human rights–disintegrating flaw of the whole revisionist approach. This is something that even its most clearheaded proponents do not see clearly.<sup>105</sup> In proposing that there is any gradation at all within personhood, even only a gradation *below* a magic line (in effect, only in terms of partial personhood), revisionist proponents commit themselves

to viewing personhood as a non-fundamental type of moral worth, one that shares a common metric by which it can be calculated and weighed, and therefore is commensurable with other of its instantiations; non-unique in any of its instantiations; non-fundamental (in effect, not an end in itself); and violable (since an entity participating to some extent in personhood can have his or her core interests intentionally harmed through being killed).

With these concessions made, one is thereby committed to seeing personhood in utilitarian, not natural rights, terms. As per the earlier treatment of the right to life, utilitarian ethics guides action by appeal to a greater good of some sort being produced by one choice over its alternative(s). To make sense of the idea of measuring moral-type goods against one another, there must be a common metric by which to measure them. Natural law ethics rightfully denies there is. The most fundamental morally relevant goods do not share a plausible common metric—what is the common denominator shared by life and friendship and artistic creativity, for example?

Because the most fundamental goods are personal goods, it stands to reason that there is no reductive common metric that can weigh the worth of persons against one another. Each individual person possesses a unique, incommensurable worth; the worth of persons is priceless, and as such their dignity is inviolable. This view of the human dignity proper to persons explains why each of us has a right to life against being intentionally killed, no matter how many other innocent, brilliant, or politically influential persons stand to benefit from the cessation of our existence. Utilitarianism, unwilling to recognize the incommensurable, fundamental, inviolable worth of any moral-type good, even persons themselves, stands unable to justify human rights.<sup>106</sup>

So for utilitarianism *no one* is a person in the true human rights sense; *no one* possesses inviolable, priceless human dignity. And any position that concedes that personhood has a measure and a price, so that some are more persons than others who are only “quasi” or “partial” persons, and concedes that these others can have their most basic interests deliberately destroyed on the condition that persons overall benefit (“greater good”), is a position that is implicitly utilitarian<sup>107</sup> and cannot credibly affirm what is affirmed by Article 3 of the UDHR: “Everyone has a right to life.”

Do not think this is a question of mere ethical theory. One of the factors behind the inclusion of that right in the UDHR was repugnance at the National Socialist euthanasia law targeting, in particular, the intellectually disabled<sup>108</sup>—a law justified on utilitarian grounds and with many legal, social, and scholarly precursors within enlightened, progressive Western democracies at that time.<sup>109</sup>

The revisionist account of personhood is fatal for the whole of human rights. Divorcing human nature from personhood and positing the attainment of some heightened, immediately exercisable capacity as the criterion for personhood will cash out in one of two ways. If it avoids directly entailing degrees of personhood, it will be utterly arbitrary and thus discrediting of human rights itself, and leave a variety of innocent, vulnerable human beings—born and unborn—without *any* human rights protection whatsoever. Or, if the divorce is managed in a way whereby it is non-arbitrary and internally consistent, it will end up rejecting the twin truths that all persons are fundamentally equal in moral worth and possess rights that protect them from having their interests deliberately harmed via utilitarian-type calculations. No man is an island, John Donne said, and the bell tolls for us all.

## Paths Forward

There is an important role for academic-educational initiatives to explore the deep meaning of human rights. Too few leaders and thinkers are aware of the intellectual threat posed to human rights from within jurisdictions that historically championed them. It is remarkable, for instance, how under-discussed the concessions of McMahan, Arneson, and Knapp are in current debates and literature, given the tightness of their arguments and the stunning and devastating reach of those arguments' implications. Maybe those who expect to see a monster under the bed tend not to look.

Much more scholarly work needs to be done in this area and in human rights legal and moral theory more generally. This is very much a practical recommendation since the UDHR itself was based on a tradition of thought as much as on a tradition of law and practice.

An urgent and under-appreciated human rights issue is the rogue deliverances of human rights treaty bodies. It is imperative that adherents to authentic human rights *formally* and *openly* push back against treaty-monitoring bodies' undermining of human rights protections. Currently, treaty-monitoring bodies face little, if any, principled state opposition. The effect of this omission is to create the impression in the public, political, and, increasingly, judicial mind that such bodies are fair and even legally authoritative interpreters of human rights law. The falsity of this impression serves to weaken the meaning, standing, and integrity of actual international human rights law as found in human rights treaties.

Further, there is the real possibility that if states continue to remain passive toward or acquiesce in the faulty pronouncements of treaty-monitoring bodies, then those pronouncements could attain the status of customary

human rights law and/or such passivity/acquiescence may count as “subsequent practice” for the purposes of interpreting the meaning of human rights treaty law as per Article 31(3)(b) of the Vienna Convention on the Law of Treaties. Of note as regards the issue of “subsequent practice” is that the International Law Commission has recently affirmed that treaty bodies’ pronouncements can contribute toward “subsequent practice” if endorsed (or perhaps even non-opposed) by the relevant state.<sup>110</sup> So while currently it is very widely accepted, including by the International Law Association<sup>111</sup> and even revisionist human rights scholars,<sup>112</sup> that the conclusions and findings of treaty-monitoring bodies are not legally binding and do not form part of human rights law, this could very well change in the future—and change quite quickly at that.

## Recommendations

What can be done? I will briefly outline four possibilities and offer a judgment on each. (No doubt there are more avenues to explore, and others should dedicate time to considering what these might be.)

1. **Make efforts to alter the consensus philosophical composition of these bodies in a way that makes them more faithful to the human rights philosophy.** States do have power to elect the members of these bodies. To the best of my knowledge, there has hitherto been little coordinated effort among states to promote the election of authentic defenders of human rights to various treaty-monitoring bodies—so there is much room for improvement in this regard. Realistically, though, in the short term, it will be a difficult task to coordinate the election of a sufficient number of authentic human rights defenders to a particular body so as to shift that body’s majority view on important matters like the right to life. More immediately realizable, and probably more efficient, options are available.
2. **Engage with treaty-monitoring bodies when they are in the process of formulating a new General Comment.** This approach is one already taken by adherents to authentic human rights. This happened recently during drafting by the HRC of its General Comment 36 (on the right to life). Pro-life academics, nongovernmental organizations (NGOs), and states made submissions urging the HRC to reject the idea that the right to life somehow entails a right to abortion.<sup>113</sup> Their efforts were well-intentioned but ultimately doomed to failure.

The current consensus philosophical position of the HRC, which is antithetical to authentic human rights, meant that deliberations over General Comment 36 were virtually certain to end up rejecting the right to life of unborn children and endorsing a right to abortion.<sup>114</sup> Unless approach (1) is successfully pursued—at least in part—approach (2) will be unrealizable.

- 3. Use pro-life-inclined governments' formal responses to U.N. treaty-monitoring bodies' "periodic reviews" to advance criticisms of said bodies' questions** (which are often ideologically loaded against the meaning of the relevant treaty itself) and "jurisprudence." This is a more immediately realizable approach, does not involve a huge amount of coordination, and will have a positive impact.

Current practice is generally for states to acquiesce in the supposed integrity of the review process by neither challenging the basis of the questions put to them nor pre-emptively responding to the likely "findings" of the body against them. At most, states that avoid amending domestic law in line with a U.N. body's expectations will cite their dualist legal system or some other intricacy of their domestic law. But often the questions and deliverances of the treaty-monitoring body will presuppose the existence of a "right" not part (either explicitly or implicitly) of the treaty of which the body is a function.

States, therefore, can and should use their official responses to formally criticize and reject faulty interpretations of human rights treaties by U.N. bodies and highlight instances where such bodies are acting *ultra vires* by attempting to unilaterally amend binding international human rights law (the content of which is formed by textual provisions read in light of supplementary means of treaty interpretation, as per the VCLT). State parties can do this in both the "State Parties Reports," the initial step of the review process, and then in their response to the U.N. bodies' "Lists of Issues" (a response titled "Replies to LOIs").<sup>115</sup>

U.N. bodies' "Concluding Observations," the final step of the review process, would thereby be forced to take notice of criticisms directed towards the U.N. body's assertions—and to formally engage with those criticisms in a way they do not currently have to when NGOs criticize U.N. interpretations of human rights during the oral presentation part of the periodic review process.

Potentially, this could: (1) force U.N. bodies (or at least certain of its members) to critically reflect on their own operations, competence, and fidelity to human rights law; (2) encourage other states to question the deliverances of U.N. bodies on human rights grounds; (3) dampen judicial enthusiasm for citing the work of treaty-monitoring bodies; (4) lessen the aura of uncontroversial authoritativeness of treaty-monitoring bodies in the public and official mind; and (5) motivate and provide official data for scholarly reflection on the trajectory of human rights law, theory, and practice.

More importantly, though, this measure would place a substantial (and possibly insurmountable) obstacle in the path of treaty bodies' pronouncements forming either customary human rights law or contributing towards "subsequent practice" as per Article 31(3)(b) of the VCLT.

The effectiveness of the implementation of this recommendation would be greatly enhanced if formal state objections to a treaty body's interpretation of human rights law were legally well grounded, in effect, if the objections cohered with the legal hermeneutics endorsed by Articles 31 and 32 of the VCLT (see discussion, *infra*). Usually only a small number of civil servants/department officials have direct responsibility for the drafting of official responses to U.N. bodies, so it should not be difficult to coordinate the practical implementation of this recommendation.

- 4. In line with and supplementing the previous recommendation, states should also submit interpretative declarations to the human rights treaties they have ratified (or even just signed) outlining that they interpret these treaties in accordance with Articles 31 and 32 of the VCLT.** Normally interpretative declarations (which are distinct from reservations) are communicated by states upon signing, ratifying, or acceding to a treaty, but international law does not stipulate that their communication is restricted to those official acts. In fact, the International Law Commission accepts the legitimacy of the "late formulation" of interpretative declarations,<sup>116</sup> as does the U.N.<sup>117</sup> and the Council of Europe.<sup>118</sup>

The VCLT itself is uncontroversially authoritative in international law. It has been ratified by 114 states and is regarded as a codification

of existing customary law. So it is difficult to imagine how an international actor could object to an interpretative declaration that affirms a particular state interprets a treaty it is party to in accordance with the VCLT.

The VCLT's attractiveness is in its reasonableness. Article 31(1) states that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Article 32 deals with supplementary means of interpretation in cases in which the meaning of a treaty provision is ambiguous. In particular, it mentions having recourse to the *travaux* as a supplementary means of treaty interpretation.

Of course, a good faith reading of the express terms of a human rights treaty in light of its object and purpose and supplemented by an awareness of its *travaux* cannot sustain the claim that there is an international human right to abortion. Hence it is no surprise that treaty-monitoring bodies that affirm such a right adopt nothing like a VCLT interpretative methodology (or any principled hermeneutic methodology at all—they simply trade in sheer assertion).

Entering an interpretative declaration indicating commitment to the VCLT would affirm the actual meaning of the treaty as well as legally and politically disarm the influence of treaty-monitoring bodies when they interpret that treaty in a free-wheeling manner expressive of their own philosophical convictions. All the effects outlined above in relation to point three apply here, too. The more states that can be encouraged to implement points three and four, the more treaty-monitoring bodies will lose political credibility—and the less they will develop customary legal authority or indirect positive legal authority from being considered as contributing towards "subsequent practice."

## Conclusion

Here, I suggest two possible basic outlines for what the relevant interpretative declaration may look like, one more general and the other more targeted:

1. "The government of x declares that only interpretations of the present treaty which accord with Articles 31 and 32 of the Vienna Convention

on the Law of Treaties, which *x* has ratified, shall be considered by *x* for the purpose of amending domestic law.”

2. As above with (1) with the addition of the following: “The government of *x* does not accept the authority of a third-party body to unilaterally alter treaty provisions agreed to by *x* upon ratification of the present treaty, either by deletion, addition, or amendment of treaty provisions. The present treaty makes no provision for such an authority.”

What is needed is for one or a number of states to take the first step and to formally and substantially push back against the abuse of prestige by rogue treaty-monitoring bodies, an abuse that is greatly damaging the credibility and practical effect of genuine human rights. Doing so is practical; not doing so will make adherence to genuine human rights increasingly impractical.<sup>119</sup>

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## Endnotes

1. United Nations, "Universal Declaration on Human Rights," December 10, 1948, <https://www.un.org/en/universal-declaration-human-rights/index.html> (accessed January 16, 2020).
2. A derivative sense of dignity is alluded to by Article 22.
3. Articles 10, 16, 21, 23, and 26 spell out some of the implications of equality before the law.
4. John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998), pp. 132–138.
5. Brian Tierney has shown that it is inaccurate to hold that the subjective concept of right began as late as Gerson (against Richard Tuck) or Ockham (against Michel Villey). Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150–1625* (Atlanta, GA: Scholars Press, 1997), pp. 54–77.
6. These others include Socrates, Plato, Aristotle, and Ulpian, as Hersch Lauterpacht—a giant in the field of post-war international law—shows in his 1945 work on the nascent International Bill of the Rights of Man. Lauterpacht insists that the theory of natural law has "always been the main inspiration, if not the conscious instrument, of the doctrine of the rights of man," and there never was any substantive shift from natural law to natural rights but that that process "is coeval with political and philosophical thought dating back to antiquity and the Middle Ages." Hersch Lauterpacht, *An International Bill of the Rights of Man* (Oxford: Oxford University Press, 2013), pp. 4 and 23.
7. "By natural law all were born free." Alan Watson ed., *The Digest of Justinian*, Vol. 1 (Philadelphia: University of Pennsylvania Press, 1985), p. 2.
8. See Finnis, *Aquinas*, pp. 136–137.
9. From the outset the canon law conception of natural rights was not based specifically on Christian revelation but on "an understanding of human nature itself as rational, self-aware, and morally responsible." Tierney, *The Idea of Natural Rights*, p. 76.
10. On Vitoria, and especially Suarez, as contributing to Grotius' understanding of natural rights and international law, see Antonio García y García, "The Spanish School of the Sixteenth and Seventeenth Centuries: A Precursor of the Theory of Human Rights," *Ratio Juris*, Vol. 10, No.1 (1997), pp. 25–35.
11. Locke was significantly indebted to the Anglican theologian Richard Hooker. For a synopsis of the philosophical influences on 18th-century American revolutionary and natural rights talk, see James H. Hutson, "The Emergence of the Modern Concept of a Right in America: The Contribution of Michel Villey," *American Journal of Jurisprudence*, Vol. 39, No. 1 (1994), pp. 185–224 and 213–220.
12. National Assembly of France, "Declaration of the Rights of Man and of the Citizen," August 26, 1789, [https://constitution.org/fr/fr\\_drm.htm](https://constitution.org/fr/fr_drm.htm) (accessed January 16, 2020).
13. Lynn Hunt, *The French Revolution and Human Rights: A Brief Documentary History* (Boston: Bedford Books of St. Martin's Press, 1996), pp. 13–15 and 71–73.
14. French revolutionary politics, which merged into the First Republic, were anything but respectful of freedom of religion and freedom of association, however.
15. Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001), pp. 66–67.
16. *Ibid.*, p. 57.
17. Johannes Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (Philadelphia: University of Pennsylvania Press, 2009), pp. 18–19.
18. For the draft texts of the UDHR, see Glendon, *A World Made New*, pp. 271–314.
19. More than any other figure, Malik insisted upon raising matters of philosophical importance during the drafting process, as is evident in his (ultimately successful) insistence on including the clause "endowed with reason and conscience" (referring to "human beings") in the foundational Article 1. See United Nations, "Commission On Human Rights: Third Session; Summary Record of the Fifteenth Meeting," Doc. E/CN.4/SR.50, May 27, 1948, pp. 12–13, <https://undocs.org/E/CN.4/SR.50> (accessed January 15, 2020), and Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999), pp. 296–299. For a brief summary of scholarly views on the significance of Malik for the drafting of the UDHR, see Glenn Mitoma, "Charles H. Malik and Human Rights: Notes on a Biography," *Biography*, Vol. 33, No. 1 (2010), p. 222.
20. The Cassin draft of the preamble did not contain the terms "inherent" and "inalienable," whereas the next version, authored by Malik, did. Glendon, *A World Made New*, pp. 117–118.
21. Habib Malik, ed., *The Challenge of Human Rights: Charles Malik and the Universal Declaration* (Oxford: Charles Malik Foundation, 2000), pp. 161–162.
22. Glendon, *A World Made New*, p. 146.
23. See United Nations Office of the High Commissioner, "International Covenant on Civil and Political Rights," March 23, 1976, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> (accessed January 17, 2020), and United Nations Office of the High Commissioner, "International Covenant on Economic, Social, and Cultural Rights," January 3, 1976, <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> (accessed January 17, 2020).

24. Thomas Hobbes, *Leviathan: with Selected Variants from the Latin Edition of 1668*, Edwin Curley, ed., (Indianapolis/Cambridge: Hackett Publishing, 1994), pp. 50–57.
25. David Hume, “Of the Dignity or Meanness of Human Nature,” in Stephen Copley and Andrew Edgar, eds., *David Hume: Selected Essays* (Oxford: Oxford University Press, 1998), pp. 43–49.
26. Friedrich Nietzsche, *On the Genealogy of Morality*, Keith Ansell-Pearson, ed. (Cambridge: Cambridge University Press, 2006), pp. 172–173.
27. On this address, Moyn writes, “The appeal to reaffirm faith in the dignity of the human person, and in the rights that follow from that dignity, reached unprecedented heights of public visibility.... Undoubtedly, the pope’s first peace point was the supreme, influential, and most publicly prominent invocation of human dignity during World War II proper and likely in the whole history of political discourse to that date.” Samuel Moyn, *Christian Human Rights* (Philadelphia: University of Pennsylvania Press, 2015), pp. 2–3.
28. It is often supposed that the articulation of human dignity originated with Immanuel Kant, but it can, in fact, be traced back to Cicero’s *De Officiis* (44) and is also found in Boethius’ *De Consolatione Philosophiae* (524). See, generally, Mette Lebeck, *On the Problem of Human Dignity: A Hermeneutical and Phenomenological Investigation* (Würzburg: Königshausen & Neumann, 2009), chs. 1 and 2.
29. Johannes Morsink, “Women’s Rights in the Universal Declaration,” *Human Rights Quarterly*, Vol. 13, No. 2 (1991), p. 230.
30. Anna Grear, “Challenging Corporate ‘Humanity’: Legal Disembodiment, Embodiment and Human Rights,” *Human Rights Law Review*, Vol. 7, No. 3 (2007), p. 517.
31. Morsink, *The Universal Declaration of Human Rights*, p. 44. John Humphrey was responsible for originally making reference to juridical personality in the UDHR. John P. Humphrey, *Human Rights and the United Nations: A Great Adventure* (New York: Transnational Publishers, 1984), p. 40.
32. In *Contra Eutychem et Nestorium (Against Eutyches and Nestorius*, c. 512) Boethius responds to the eponymous thinkers who completely conflated personhood with nature by offering a definition of a person as a *naturae rationabilis individua substantia*—an individual substance of a rational nature. Hugh Fraser Stewart, Edward Kennard Rand, and Stanley Jim Tester, eds., *Boethius* (Cambridge: Harvard University Press, 1962), p. 85. Alongside endorsing this Boethian definition of personhood, Aquinas refers to a person as a subject (*hypostasis*) “distinct by reason of dignity.” Thomas Aquinas, *Summa Theologiae* I, q. 29, a. 3, ad. 2.
33. Contemporary versions of an exclusivist account of personhood are all, in one way or another, indebted to John Locke’s view of the person as outlined in his *Essay Concerning Human Understanding*: “a thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing, in different times and places; which it does only by that consciousness which is inseparable from thinking, and, as it seems to me, essential to it.” John Locke, *An Essay Concerning Human Understanding*, Peter H. Nidditch, ed. (Oxford: Oxford University Press, 1979), p. 79. It is noteworthy that Locke had no use for his own epistemology-oriented view of personhood when it came to treating of natural rights. For him, natural rights arose from and protected human nature.
34. See Klaus Dicke, “The Founding Function of Human Dignity in the Universal Declaration of Human Rights,” in David Kretzmer and Eckart Klein, eds., *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002), p. 113.
35. “‘Human dignity’ probably became part of current usage at the same time and for the same reasons as the expression ‘human person,’ i.e., to designate the fundamental value or importance of the human individual as such. The 1948 *Universal Declaration of Human Rights* testifies to the currency of both terms, and within the human rights tradition flowing from the *Universal Declaration*, the term is constantly used to express the basic intuition from which human rights proceed.” Lebeck, *On the Problem of Human Dignity*, 27 (emphasis in original).
36. Patrick Lee and Robert P. George, “The Nature and Basis of Human Dignity,” *Ratio Juris*, Vol. 21, No. 2 (2008), p. 174 (emphasis in original).
37. See note 16, *supra*.
38. Much hinges on the meaning of what it is to intend an effect as either a means or an end. (Killing consequent upon a choice to use proportionate force to defend oneself need not involve an intent to end life; such killing may in fact be a side-effect.) The foundational work in this regard is Elizabeth Anscombe, *Intention* (Cambridge: Harvard University Press, 1957). Anscombe wrote her monograph in part as a response to defenders of President Truman’s choice to kill—as a means to an end—innocent Japanese civilians during World War II. An excellent exposition of intention (and foresight) is Michael Bratman, *Intention, Plans, and Practical Reason* (Cambridge: Harvard University Press, 1987).
39. John Finnis, *Natural Law and Natural Rights*, 2nd ed. (Oxford: Oxford University Press, 2011), pp. 223–226.
40. So it can be misleading to speak of “equal” dignity. Better to speak in terms of, for example, every human being possessing an incomparable, inherent dignity. For a very helpful analysis of this and related issues, see Sherif Girgis, “Equality and Moral Worth in Natural-Law Ethics and Beyond,” *American Journal of Jurisprudence*, Vol. 59, No. 2 (2014), pp. 143–162.
41. See, generally, Germain Grisez, “Against Consequentialism,” *American Journal of Jurisprudence*, Vol. 23, No. 1 (1978), pp. 21–72. Some versions of “rule utilitarianism” (as distinct from “act utilitarianism”) attempt to make compatible adherence to utilitarianism with respect for human rights. But rule utilitarianism relies in the first instance on act-utilitarian calculations and so it is as incompatible with a sound understanding of human dignity as act utilitarianism. A consistent rule utilitarian must always be prepared to suspend respect for human rights if foreseen consequences dictate—a conditional intention which is antithetical to genuine respect for human rights.
42. Christina Zampas and Jaime M. Gher, “Abortion as a Human Right: International and Regional Standards,” *Human Rights Law Review*, Vol. 8, No. 2 (2008), p. 263.

43. Rhonda Copelon, Christina Zampas, Elizabeth Brusie, and Jacqueline deVore, "Human Rights Begin at Birth: International Law and the Claim of Fetal Rights," *Reproductive Health Matters*, Vol. 13, No. 26 (2005), pp. 121-122. For the actual statement from the French delegate see United Nations, "Ninety-Ninth Meeting: Draft International Declaration of Human Rights," Doc. A/C.3/SR.99, p.116, <https://undocs.org/A/C.3/SR.99> (accessed January 17, 2020).
44. Morsink, *The Universal Declaration of Human Rights*, pp. 290-293. See also Morsink, *Inherent Human Rights*, p. 29.
45. United Nations, "Ninety-Eighth Meeting: Draft International Declaration of Human Rights," Doc. A/C.3/SR.98, p. 110, <https://undocs.org/A/C.3/SR.98> (accessed January 17, 2020).
46. Morsink, *The Universal Declaration of Human Rights*, p. 291.
47. Jean-Jacques Rousseau, *The Social Contract*, in *Rousseau: The Social Contract and Other Later Political Writings*, Victor Gourevitch, ed. (Cambridge: Cambridge University Press, 1997), p. 41 ("Man is born free, and everywhere he is in chains.").
48. Watson, ed., *The Digest of Justinian*, p. 2.
49. In the *Discourse on the Origin and Foundations of Inequality Among Men*, Rousseau displays a heavily negative view of abortion. Jean-Jacques Rousseau, "Discourse on The Origin and Basis of Inequality Among Men," in *Jean-Jacques Rousseau: The Basic Political Writings*, Donald A. Cress, ed. (Indianapolis: Hackett Publishing Company, 2011), p. 66. He then goes on to write:

How many are the shameful ways to prevent the birth of men or to fool nature: either by those brutal and depraved tastes that insult its most charming work, tastes that neither savages nor animals ever knew, and that have arisen in civilized countries only as a result of a corrupt imagination; or by those secret abortions, worthy fruits of debauchery and vicious honor; or by the exposure or the murder of a multitude of infants, victims of the misery of their parents or of the barbarous shame of their mothers; or, finally, by mutilation of those unfortunates. What would happen if I were to undertake to show the human species attacked in its very source, and even in the most holy of all bonds, where one no longer dares to listen to nature until one has taken into account one's financial interests, and where, with civil disorder confounding virtues and vices, continence becomes a criminal precaution, and the refusal to give life to one's fellow man an act of humanity? But without tearing away the veil that covers so many horrors, let us content ourselves with pointing out the evil, for which others must supply the remedy.
- ibid., pp. 102-103.
50. For example, Watson, ed., *The Digest of Justinian*, pp. 15-17, 57, 137, 175, and 198.
51. United Nations, "Summary Record of the 9th Meeting," Doc. E/CN.4/AC.2/SR.9, pp. 21-22, <https://digitallibrary.un.org/record/629485?ln=en> (accessed January 20, 2020).
52. United Nations, "Ninety-Ninth Meeting: Draft International Declaration of Human Rights," p. 120.
53. See United Nations, "Summary Record of the 35th Meeting on Human Rights, Drafting Committee on an International Bill of Rights, 2nd Session," Doc. E/CN.4/AC.1/SR.35, May 17, 1948, <http://hr-travaux.law.virginia.edu/document/iccpr/ecn4ac1sr35/nid-1686> (accessed January 17, 2020) p. 4, and United Nations, "Summary Record of the 2nd Meeting, Commission on Human Rights, Drafting Committee, 1st Session," Doc. E/CN.4/AC.1/SR.2, June 11, 1947, p. 10, <https://hr-travaux.law.virginia.edu/document/iccpr/ecn4ac1sr2/nid-181> (accessed January 17, 2020).
54. United Nations, "Ninety-Eighth Meeting: Draft International Declaration of Human Rights," p. 111, and United Nations, "Ninety-Ninth Meeting: Draft International Declaration of Human Rights," p. 121.
55. Malik, ed., *The Challenge of Human Rights*, p. 162.
56. United Nations, "Summary Record of the 35th Meeting on Human Rights, Drafting Committee on an International Bill of Rights, 2nd Session," p. 3. The remainder of the proposal read, "Everyone has the right to enjoy conditions of life compatible with human dignity and the normal development of his or her personality. Persons incapable of satisfying their own needs have the right to maintenance and support."
57. Ibid., p. 4.
58. Ibid. (Eleanor Roosevelt on behalf of the United States).
59. Ibid., p. 5 (Alexei Pavlov on behalf of the USSR). During an earlier, briefer discussion of the topic, Bodil Begtrup of the Commission on the Status of Women argued that the explicit inclusion of the unborn under the right to life could not be reconciled with extant domestic legislation providing for the right to abortion in "certain cases." U.N. Doc. E/CN.4/AC.2/SR.3, p. 8, <https://digitallibrary.un.org/record/629389?ln=en> (accessed January 20, 2020). A few days later, during drafting of what was to become the International Covenant on Civil and Political Rights, Begtrup indicated that the primary case she had in mind was provision for abortion in order to save the mother's life. United Nations, "Summary Record of the 35th Meeting on Human Rights, Drafting Committee on an International Bill of Rights, 2nd Session," p. 13.
60. Ibid., p. 4.
61. Ibid., p. 5.
62. Ibid.
63. Ibid.
64. Ibid., p. 6.

65. *Ibid.*
66. Both those who supported *and opposed* the inclusion of the Bill of Rights appealed to natural rights to justify their stance. See Benjamin Fletcher Wright, *American Interpretations of Natural Law: A Study in the History of Political Thought* (Harvard: Harvard University Press, 1931), pp. 139–140.
67. “No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”
68. *Dred Scott v Sandford*, 60 U.S. 393 (1857) at 404–405.
69. *Ibid.*, at 405.
70. *Ibid.*, at 550 (McLean, J.).
71. *Ibid.*, at 624 (Curtis, J.).
72. For example, “I am in favour of the adoption of this amendment because it will secure to the oppressed slave his natural and God-given rights. I believe that the black man has certain inalienable rights, which are as sacred in the sight of heaven as those of any other race. I believe he has a right to live, and to live in a state of freedom.” *Congressional Globe*, June 15, 1864, p. 2990 (statement of Rep. Ingersoll): “It is not within the limits of human laws to legislate away the soul of man; we cannot deprive him, by any process of legislation, constitutional or otherwise, of his free agency, we cannot legislate away his liberty...[in relation to ‘the four hundred specimens of humanity’ owned by an anti-Amendment member] who, by the laws of nature and of God, have the same right to own him that he has to own them.” *Congressional Globe*, January 11, 1865, p. 221 (statement of Rep. Broomall).
73. *Plessy v Ferguson*, 163 U.S. 537 (1896).
74. William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd ed. (Cambridge: Cambridge University Press, 2002), p. 134.
75. For a more comprehensive treatment of this and other drafting debates pertaining to the status of the unborn in international human rights treaty law, see Thomas Finegan, “International Human Rights Law and the ‘Unborn’: Texts and *Travaux Préparatoires*,” *Tulane Journal of International and Comparative Law*, Vol. 25, No. 2 (2016), pp. 89–126.
76. United Nations, Office of the High Commissioner for Human Rights, *Legislative History of the Convention on The Rights of The Child*, Vol. I (2007), p. 296, <https://www.ohchr.org/Documents/Publications/LegislativeHistorycrc1en.pdf> (accessed January 17, 2020).
77. For the text of the opinion, see Sharon Detrick, *United Nations Convention on the Rights of the Child: A Guide to the “Travaux Préparatoires”* (Dordrecht: Martinus Nijhoff Publishers, 1992), p. 113. The U.N. Legal Counsel who wrote the opinion, Karl August Fleischhauer, served as judge on the International Court of Justice from 1994 to 2003.
78. United Nations, “Vienna Convention on the Law of Treaties,” drafted May 23, 1969, entered into force January 27, 1980, [https://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf) (accessed January 17, 2020).
79. United Nations Human Rights Committee, “Concluding Observations on the Fourth Periodic Report of Ireland,” U.N. Doc. CCPR/C/IRL/CO/4, August 19, 2014, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsieXFSudRZs%2FX1ZaMqUUOS9ylqPEMRvxx26PpQFtwrk%2BhtvbJlfrkLE%2BCPVCm6lW%2BYjfrz7jxiC9GMVvGkvu2UluUfSqikQb9KMVoAoKkgSG> (accessed January 17, 2020).
80. *Ibid.* The HRC’s advocacy in favor of a right to abortion began in its 1996 document, “Concluding Observations of the Human Rights Committee, Peru,” United Nations Human Rights Committee, “Concluding Observations of the Human Rights Committee, Peru,” U.N. Doc. CCPR/C/79/Add.72, November 18, 1996, <http://hrlibrary.umn.edu/hrcommittee/peru1996.html> (accessed January 17, 2020). There the HRC called for the decriminalization of abortion in the case of rape and posited that clandestine abortions effected by the general criminalization of abortion are the main cause of maternal mortality in the country.
81. “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”
82. “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”
83. “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”
84. United Nations Human Rights Committee, “General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life,” CCPR/C/GC/36, October 30, 2018, para. 8, [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1\\_Global/CCPR\\_C\\_GC\\_36\\_8785\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf) (accessed January 17, 2020).
85. For example, Michael O’Flaherty and John Fisher, “Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles,” *Human Rights Law Review*, Vol. 8, No. 2 (2008), p. 215 (“These Concluding Observations have a non-binding and flexible nature.”); Manfred Nowak, “The Need for a World Court of Human Rights,” *Human Rights Law Review*, Vol. 7, No. 1 (2007), p. 252 (describing as “non-binding” the decisions and concluding observations and recommendations of the treaty-monitoring bodies); and Zampas and Gher, “Abortion as a Human Right: International and Regional Standards,” p. 253 (“Committees are not judicial bodies and their Concluding Observations are not legally binding”).
86. The CEDAW Committee has analogous powers to the HRC: It issues non-binding “suggestions and general recommendations” (Article 21[1]) based on “the provisions of the present Convention” (Article 18 [1]).

87. See Lars Adam Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of all Forms of Discrimination Against Women* (Dordrecht: Martinus Nijhoff Publishers, 1993), p. 144. In 2005 Amnesty International subscribed to this good faith interpretation of the CEDAW by describing as a “myth” the claim that the CEDAW supports abortion through its invocation of family planning: “CEDAW does not address the matter of abortion...[and] [m]any countries in which abortion is illegal...have ratified the Convention.” Amnesty International, “A Fact Sheet on CEDAW: Treaty For The Rights of Women,” August 25, 2005, [https://www.amnestyusa.org/files/pdfs/cedaw\\_fact\\_sheet.pdf](https://www.amnestyusa.org/files/pdfs/cedaw_fact_sheet.pdf) (accessed November 18, 2019). There is probably no real need to have recourse to supplementary interpretative materials on this point because the ordinary meaning of “family planning” does not involve abortion, as even the contemporary Oxford, Cambridge, and Merriam-Webster dictionaries indicate (never mind editions in circulation in 1979 when the CEDAW was adopted).
88. See, for example, T. W. Sadler, *Langman’s Medical Embryology*, 11th ed. (Philadelphia: Wolters Kluwer, 2010), pp. 3–4, 13, and 39; William J. Larsen and Gary C. Schoenwolf, *Larsen’s Human Embryology*, 4th ed. (Philadelphia: Elsevier Health, 2009), pp. 2, 4, 7, and 15; and Keith L. Moore and T. V. N. Persaud, *The Developing Human: Clinically Oriented Embryology*, 8th ed. (Philadelphia: W.B. Saunders Company, 2007), p. 2.
89. Sometimes the standard is described as the (immediately exercisable) capacity for rationality, agency, or some combination of these and similar capacities (for example, the capacity for future planning). These various capacities are inextricably linked and in many respects coterminous with self-consciousness, and so it matters little for present purposes which is referred to.
90. See note 29, *supra*, on John Locke. Elsewhere, I analyze views on the unborn child by the most important philosophical and juristic “founding forefathers” of the American Revolution. Thomas Finegan, “Human Rights Law and Constitutional Biolaw: A Coherentist Investigation into Dignity, Personhood and Rights,” doctoral thesis, 2014.
91. Michael Tooley, *Abortion and Infanticide* (Oxford: Clarendon Press, 1983). Important precursors to Tooley’s revisionist account are Joseph Fletcher, “Indicators of Humanhood: A Tentative Profile of Man,” *The Hastings Center Report*, Vol. 2, No. 5 (1972), pp. 1–4; Joseph F. Fletcher, “Four Indicators of Humanhood: The Enquiry Matures,” *The Hastings Center Report*, Vol. 4, No. 6 (1974), pp. 4–7; and Daniel Dennett, “Conditions of Personhood,” in Amelie Oksenberg Rorty, ed., *The Identities of Persons* (California: University of California Press, 1976), pp. 175–196.
92. A representative collection of views on the matter is contained in the same volume as the following article which began it: Alberto Giubilini and Francesca Minerva, “After-Birth Abortion: Why Should the Baby Live?” *Journal of Medical Ethics*, Vol. 39, No. 5 (2013), pp. 261–263.
93. In jurisdictions with liberal abortion regimes, children who survive abortions to be born alive legally can be—and sometimes are—deliberately neglected by medical staff in order to bring about their deaths. See, e.g., European Centre for Law and Justice, “Late Term Abortions and Neonatal Infanticide in Europe,” Petition to the Parliamentary Assembly of the Council of Europe, June 2015, pp. 6–9, [https://www.academia.edu/13078907/Late\\_Term\\_Abortion\\_and\\_Neonatal\\_Infanticide\\_in\\_Europe](https://www.academia.edu/13078907/Late_Term_Abortion_and_Neonatal_Infanticide_in_Europe) (accessed October 30, 2019).
94. An important work as part of this emerging consensus is John Harris, *The Value of Life: An Introduction to Medical Ethics* (London: Routledge and Kegan Paul, 1985).
95. A landmark case is *Airedale National Health Service Trust v. Bland* A.C. 789 (1993). For analysis of the case see John Keown, *Euthanasia, Ethics and Public Policy: An Argument Against Legalisation* (Cambridge: Cambridge University Press, 2002), ch. 19.
96. An example of judicial recognition of the very troubling statistics on non-voluntary euthanasia in these jurisdictions is *Fleming v. Ireland* I.E.H.C. 2, (2013), paras. 94–104.
97. See, for example, Jeff McMahan, “Our Fellow Creatures,” *The Journal of Ethics*, Vol. 9, Nos. 3–4 (2005), pp. 353–380, and Peter Singer, “Speciesism and Moral Status,” *Metaphilosophy*, Vol. 40, Nos. 3–4 (2009), pp. 567–581.
98. The leading voice in this area is Eva Feder Kittay. See, for example, Eva Feder Kittay, “At the Margins of Moral Personhood,” *Ethics*, Vol. 116, No. 1 (2005), pp. 100–131, and Licia Carlson and Eva Feder Kittay, “Introduction: Rethinking Philosophical Presumptions in Light of Cognitive Disability,” *Metaphilosophy*, Vol. 40, Nos. 3–4 (2009), pp. 307–330 and 322–335.
99. Another advantage of the position was that it gave ground to consider certain sub-personal humans as more than mere moral “nothings” and yet not so important as to be persons with a right to life burdensome on reproductive autonomy.
100. For example, Philippe Rochat, “Five Levels of Self-Awareness as They Unfold Early in Life,” *Consciousness and Cognition*, Vol. 12, No. 4 (2003), pp. 717–731, and Laura J. Bach and Anthony S. David, “Self-Awareness after Acquired and Traumatic Brain Injury,” *Neuropsychological Rehabilitation*, Vol. 16, No. 4 (2006), pp. 397–414.
101. Tim Bayne et al., “Are There Levels of Consciousness?” *Trends in Cognitive Sciences*, Vol. 20, No. 6 (2016), pp. 405–413.
102. Jeff McMahan, “Challenges to Human Equality,” *The Journal of Ethics*, Vol. 12, No. 1 (2008), pp. 81–104.
103. Richard Arneson, “Basic Equality: Neither Acceptable nor Rejectable,” in U. Steinhoff, ed., *Do All Persons Have Equal Moral Worth?* (Oxford: Oxford University Press, 2015), pp. 30–52.
104. Christopher Knapp, “Equality and Proportionality,” *Canadian Journal of Philosophy*, Vol. 37, No. 2 (2007), pp. 179–202.
105. Jeff McMahan comes closest. McMahan, “Challenges to Human Equality,” p. 101.
106. For some brief remarks on the incompatibility between rule utilitarianism and human rights, see note 37, *supra*.
107. For more on this point see Thomas Finegan, “Intermediate Moral Respect and Proportionality Reasoning,” *Bioethics*, Vol. 30, No. 8 (2016), pp. 579–587.

108. Morsink, *The Universal Declaration of Human Rights*, pp. 39–40.
109. One need only consider *Buck v. Bell*, 274 U.S. 200 (1927), a ruling written by one of the most respected legal scholars of the era, Oliver W. Holmes.
110. International Law Commission, *Draft Conclusion on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, 2018, conc. 13, [https://legal.un.org/ilc/texts/instruments/english/commentaries/1\\_11\\_2018.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/1_11_2018.pdf) (accessed January 17, 2020). See also International Law Association, Berlin Conference, Committee on International Human Rights Law and Practice, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies*, 2004, para. 21.
111. “It seems to be well accepted that the findings of the treaty bodies do not themselves constitute binding interpretations of the treaties.... Governments have tended to stress that, while the views, concluding observations and comments, and general comments and recommendations of the treaty bodies are to be accorded considerable importance as the pronouncement of body [sic] expert in the issues covered by the treaty, they are not in themselves formally binding interpretations of the treaty.” International Law Association, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies*, paras. 15–16.
112. See note 85, *supra*.
113. See United National Human Rights Committee, “General Comments No. 36 on Article 6 of the International Covenant on Civil and Political Rights: Right to Life,” <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx> (accessed January 10, 2020).
114. This is *not* to suggest that states should not formally oppose unjust General Comments. They should, for reasons relating to the development of customary international law and the relevance of “subsequent practice” for treaty interpretation. “[T]he general comments and general recommendations of the treaty bodies are circulated to all States parties following their adoption, generally in the form of the annual report of the committee concerned to the General Assembly or to the Economic and Social Council. States have the opportunity to express their views on the correctness of the interpretations at that stage, as well as in their reports under the treaty and in their discussions with the committees during the consideration of those reports...one could argue that the acquiescence of States parties in those statements could be seen as establishing the agreement of the parties on the interpretation of those provisions.” International Law Association, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies*, para. 23.
115. See, for example, United Nations Human Rights Committee, “Monitoring Civil and Political Rights,” <https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx> (accessed October 30, 2019).
116. International Law Commission, *Guide to Practice to Reservations to Treaties: 2011*, para. 2.4.4, [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/1\\_8\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_8_2011.pdf) (accessed January 17, 2020).
117. For example, see declarations entered to the ICCPR post accession, United Nations, “Chapter IV: Human Rights,” December 16, 1966, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en) (accessed January 10, 2020).
118. See Council of Europe, “Reservations and Declarations for Treaty No. 005: Convention for the Protection of Human Rights and Fundamental Freedoms,” [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p\\_auth=4ZONITZB](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=4ZONITZB) (accessed January 10, 2020).
119. Pushing back against treaty-monitoring bodies is compatible with the maintenance of a treaty-monitoring system. There is even a case to be made that it could strengthen that system. Forcing treaty-monitoring bodies to root their findings in the VCLT would, naturally, reduce the competence creep and proliferation of findings of those bodies—but it would also improve their overall legal credibility and *modus operandi*, likely reduce the number of treaty reservations that do not conflict with a treaty’s object and purpose, and make it more difficult for states to excuse or dismiss negative findings against them.