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BOOK REVIEW

WATCHING THE OPERA IN SILENCE: DISGUST, AUTONOMY, AND THE SEARCH FOR UNIVERSAL HUMAN RIGHTS

*Richard Delgado**

Inventing Human Rights: A History. By Lynn Hunt. New York, London: W.W. Norton & Company. 2007. Pp. 214+appendix. \$14.95.

INTRODUCTION

Are human rights expanding over time? Christopher Stone, Peter Singer, and many others hold that they are and that this is a good thing. In a famous article and book, Stone points out that in early times, human beings recognized rights only for members of their immediate family or clan.¹ Gradually, our circle of concern expanded to include members of other clans, then foreigners, women, Jews, and members of other races. Stone writes that we will eventually come to endow natural objects, such as rocks, trees, fish, and rivers, with rights, so that one day the entire natural environment will receive protection in its own right, not merely because this will benefit humanity.²

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1. See Christopher D. Stone, *Toward Legal Rights for Natural Objects: Should Trees Have Standing?*, 45 S. CAL. L. REV. 450, 450 (1972); CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING?* 3 (1974). See generally CHRISTOPHER D. STONE, *EARTH AND OTHER ETHICS: THE CASE FOR MORAL PLURALISM* (1987).

2. Stone, *supra* note 1, at 450-57.

In a similar fashion, moral philosopher Peter Singer posits an expanding circle of sympathies that will one day extend to nonhuman creatures, entailing vegetarianism and changes in the way we relate to household pets and laboratory animals.³ Aristotle,⁴ Immanuel Kant,⁵ John Rawls,⁶ and many others have also urged that we broaden the scope of those to whom we owe respect and equal treatment.

But what propels this gradually widening arc? Lynn Hunt, professor of history at UCLA, believes that the answer has to do with new kinds of reading.⁷ With the advent of the epistolary novel around 1750, readers learned that persons of different classes and groups had feelings, hopes, dreams, and life plans very much like their own.⁸ These new sympathies culminated in milestones such as the French Declaration of the Rights of Man and Citizen,⁹ the Declaration of Independence,¹⁰ and the United Nation's Universal Declaration of Human Rights.¹¹ Over time, new forms of reading—and viewing and listening—contributed to empathy, the ability to see oneself in others.¹² This process, however, is incomplete. We have yet to see certain outcast groups—notably criminals, ideological opponents, and wartime enemies—as like us.¹³ According to Hunt, however, we will one day “go the limit” and recognize universal human rights for all.¹⁴

3. *E.g.*, PETER SINGER, *THE EXPANDING CIRCLE: ETHICS AND SOCIOBIOLOGY* 169-70 (1981) (advocating for the development of an ethical system based on the interrelatedness of all sentient creatures); *see also* PETER SINGER, *ANIMAL LIBERATION* 27-86, 163-89 (1977) (discussing vegetarianism and changing relationships with animals).

4. ARISTOTLE, *THE NICHOMACHEAN ETHICS*, §§ VIII-IX (J. L. Ackrill & J. O. Urmson eds., Sir David Ross trans., Oxford Univ. Press 1980) (describing a number of virtues, specifically those relating to relationships).

5. *See* IMMANUEL KANT, *METAPHYSICS OF MORALS* § 47, at 216-17 (Mary J. Gregor ed. & trans., Cambridge Univ. Press 1996) (positing a principle of universalizability in human ethics).

6. *See* JOHN RAWLS, *A THEORY OF JUSTICE* 11-12 (1971) (proposing that we should act as though behind a “veil of ignorance”).

7. *See* LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* 34-69 (2007).

8. Hunt discusses empathy, fellow feeling, and similar emotions by which we identify with the fate of others. *Id.* at 32-33, 35, 40-42, 48, 50.

9. Even earlier, in 1215, the Magna Carta formalized certain rights, namely those of the barons against the English king. *Id.* at 21, 114.

10. Hunt discusses this milestone and its role in expanding discourse about rights. *Id.* at 21, 25, 64, 115-16, 126-27.

11. Hunt analyzes this document and its influence on universal human rights. *Id.* at 17, 19, 203-08; app. 223-29.

12. Hunt discusses the impact of new forms of text, particularly fiction and portraiture. *Id.* at 33-34, 39, 64-65.

13. Hunt describes current limits of empathy. *See id.* at 18, 28, 209-14.

14. Hunt discusses the inexorable advance of human rights and their expansion over time. *See id.*

Hunt's book is inspiring, edifying, and full of rich historical and literary detail. It treats moral advance as inexorable and explains what forces propel it.¹⁵ It provides a powerful argument in favor of literature, especially fiction. It also connects morality with knowledge in a relationship that many have merely posited without showing the precise connection.¹⁶

This essay first outlines Hunt's argument for universal human rights and then poses a question she leaves open: Why have human rights advanced further in Europe than in the United States? Part II illustrates this disparity on a number of fronts, including the death penalty, abolition of slavery, rights of women, and environmental protection. Part III posits an explanation for this disparity.

My thesis is that reading does indeed build empathy as Hunt proposes. But early American fiction celebrated a different set of heroes from those who emerged in European fiction. These American heroes included settlers who tamed a wild land, Indian fighters, plantation owners who managed teams of slaves, and soldiers who fought the British and French in the name of independence and Manifest Destiny. American fiction, then, created empathy, but of a different kind from that of a Dickens novel, which taught identification with factory workers or the poor. Captivity narratives and short stories such as *The Red Badge of Courage*¹⁷ helped set the young nation on the headlong, expansionist path that it pursues, to some extent, even today.

Part IV leaves the realm of discourse and shows how material forces also shaped the development of rights consciousness in the new nation. I show that empathy proved an advantage—and so advanced rapidly—but only in mercantile centers such as New England, where understanding what another person wanted facilitated useful exchanges. In the South and West this advantage did not set in nearly so strongly. Thus, both its literature and its way of doing business converged to make the United States a place of limited rights and sympathies even when the rest of the world was rapidly expanding them. The review's conclusion offers some thoughts for reformers interested in encouraging the movement toward universal human rights.

at 18-21, 213-14.

15. In brief, moral advance is virtually unstoppable because it turns on the increased knowledge of our fellow human beings and their condition. The forces propelling it are knowledge and reading or other forms of vicarious experience.

16. *See id.* It shows, in short, how to get an "ought" (a normative statement) from an "is" (a descriptive statement). *See* G.E. MOORE, PRINCIPIA ETHICA ¶ 10, at 61-62 (Thomas Baldwin ed., Cambridge Univ. Press 1993) (1903) (labeling this difficulty the "naturalistic fallacy").

17. STEPHEN CRANE, THE RED BADGE OF COURAGE (1895).

I. INVENTING HUMAN RIGHTS

Human rights, according to Lynn Hunt, are an unusual form of moral currency. Trumping wealth, social status, friendship, and other particularities, they inhere in all persons simply on account of our common humanity.¹⁸

They are, however, a relatively recent phenomenon. Although the British issued a Bill of Rights in 1689 and a Magna Carta even before that, rights did not acquire anything like their current broad scope until a century later.¹⁹ Even then, slaves, criminals, the propertyless, women, religious minorities, and other large groups were excluded.²⁰ Only with certain modern documents, such as the Declaration of Human Rights in 1948, did society declare, at least as an aspiration, that rights are inalienable and universal.²¹

Hunt's book describes the expansion of human rights thus far, and what humanity must still do to complete the story. Central to her account is the role of feeling and emotion. A person becomes aware that a human right is at issue when he or she feels horrified by its violation.²² This emotion, sometimes called empathy or fellow feeling, is closely tied to notions of bodily integrity. Thus, part of Hunt's study concerns changing ideas about the human body.²³ Notions of hygiene, modesty, and personal delicacy thus occupy central places in her book. As recently as the late Middle Ages, for example, Madame Duchatelet regularly undressed in front of her male servants, whom she did not consider fully human.²⁴ Empathy—the perception that others are like oneself—required a shift in attitude toward the autonomy and wellbeing of others.²⁵

The forces propelling these advances were complex and included new convictions about the sanctity of the human body, as well as an aversion to mutilation and torture.²⁶ They also included the development of bodily delicacy and the advent of disgust toward such things as spitting or sneezing

18. HUNT, *supra* note 7, at 15-16.

19. *Id.* at 15-18, 21, 77-78.

20. *Id.* at 18, 28.

21. *Id.* at 17-18, 20-23.

22. *Id.* at 26.

23. *Id.* at 27-30.

24. *Id.* at 38.

25. *Id.* at 27-32.

26. Torture, of course, re-emerged in national consciousness with revelations of events at Abu Ghraib and the military prison in Guantanamo, Cuba. *See, e.g., id.* at 28 (discussing how changing notions of the sanctity of the human body led to an aversion to torture), 208; *see infra* notes 116-18 and accompanying text.

in public without covering one's mouth.²⁷ Ultimately, Enlightenment notions of the body as a temple of the human spirit culminated in the movement for the abolition of slavery, torture, and other forms of cruelty.²⁸

Hunt's introductory section explains that she will consider the historical interaction of texts and developing notions of human autonomy and empathy. As Hunt puts it: "Reading accounts of torture or epistolary novels translated into brain changes and came back out as new concepts about the organization of social and political life."²⁹ For Hunt, "new kinds of reading (and viewing and listening) created new individual experiences (empathy), which in turn made possible new social and political concepts (human rights)."³⁰ Her focus is on "individual minds," by which she means ordinary people, not only the great thinkers and writers of the time.³¹ It is also on the means by which human rights achieved three interlocking prerequisites—naturalness, equality (i.e., the same for everyone), and universality.³²

A succeeding chapter, the heart of the book, explains Hunt's thesis about the role of literature in advancing human rights. If a right is something that causes an emotion in us—outrage—when we experience its violation, what enables ordinary people to develop the type of identification with other people that is the foundation for human rights? Chapter 1, "Torrents of Emotion: Reading Novels and Imagining Equality," focuses on three epistolary novels: Samuel Richardson's *Pamela* (1740) and *Clarissa* (1747-48), and Jean-Jacques Rousseau's *Julie* (1761).³³

The typical epistolary novel proceeds in the form of a series of letters, an approach that offers a heightened sense of identification with the protagonists who seem like real people, not fictional characters.³⁴ Rousseau's *Julie*, for example, is in love with her tutor but marries an older soldier, Womar, who had saved her father's life. Ultimately, by the time of her death, which occurs after she saves her young son from drowning, she learns to love her tutor platonically, as a friend.³⁵ Hunt writes that Rousseau's readers identified

27. *Id.* at 82, 111-12.

28. *Id.* at 81-82.

29. *Id.* at 33-34.

30. *Id.* at 33-34.

31. *Id.* at 34.

32. *Id.* at 20-22.

33. *Id.* at 35-69.

34. *Id.* at 40-42.

35. *Id.* at 35-36.

intensely with Julie. Many wrote to Rousseau, noting that they had devoured the book, or cried, even howled at Julie's death.³⁶

While the book revolved around love and passion, not human rights, Hunt posits that Julie "opened up its readers to a new form of empathy" by allowing them to experience vicarious emotions across lines of class, sex, and nation.³⁷ It also elevated ordinary people, like the protagonists and servants, to the status of heroes.³⁸ These three great novels created a "sense of equality and empathy through passionate involvement in the narrative."³⁹ While strict proof is impossible, Hunt notes that the books appeared immediately preceding the appearance of the concept of "the rights of man" and seem bound up with it.⁴⁰

In the course of discussing these novels, Hunt expands on her thoughts about empathy. She believes that this touchstone emotion is biologically predisposed (although some of us have more of it than others) but also shaped by particular cultures.⁴¹ Development of empathy also requires social interaction.⁴² Readers of eighteenth-century novels received an introduction to people outside their particular class or social circle. This allowed them to relate to people who did not seem, at first glance, "like them," giving new context to the idea of equality.⁴³ Although novel-reading was not the only event that helped expand human sympathies, it was a key one.⁴⁴

Hunt's discussion of the other two novels is somewhat briefer. In Richardson's *Pamela*, the main character writes to her mother of how her employer attempted to seduce her. The epistolary form—an intense, personal letter to a close friend—allowed the author to spend as much time as he wished on a character's inner thoughts and emotions, which is not always possible in other narratives, such as plays. *Pamela* grew to be immensely popular in England and France.⁴⁵

36. *Id.* at 36-37.

37. *Id.* at 38.

38. *Id.* at 38-39.

39. *Id.* at 39.

40. *Id.* at 39, 56.

41. *Id.* at 39-40.

42. *Id.*

43. *Id.* at 40.

44. On the role of empathy in the law, see, for example, Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Susan Bandes, *Empathy, Narrative and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996); Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61 (1996). On the role of passions generally in the law, see *THE PASSIONS OF THE LAW* (Susan Bandes ed., 1999). *Id.* at 40-41, 43-48.

45. HUNT, *supra* note 7, at 42-47.

Richardson's *Clarissa* came in seven volumes, each running several hundred pages in length. The heroine runs away with Lovelace to escape the cloddish suitor proposed by her family. Although Lovelace betrays Clarissa by drugging and raping her, he then repents and proposes marriage. Clarissa dies brokenhearted, her sense of self violated. In letters to Richardson, readers poured out their grief and distress for "the dear girl" or "the divine Clarissa."⁴⁶

These three novels did not find universal favor. Some clerics accused them of undermining morality and the principles of social order.⁴⁷ They warned that reading them could encourage readers to act on their emotions and passions, "sow[ing] discontent in the minds . . . of servants and young girls."⁴⁸ Serious supporters included Thomas Jefferson, who recommended them to a friend for their ability to imprint "both the principles and practice of virtue."⁴⁹

Hunt explains that she focused on novels with "female heroines . . . because their quest for autonomy could never fully succeed."⁵⁰ Readers learned that women, who at that time still lacked legal and social rights, aspired to autonomy, just as men did.⁵¹ An examination of the path of divorce law illustrates her point. England, in contrast to other Protestant countries, made it nearly impossible to get a divorce between 1700 and 1857. After the French revolutionaries instituted divorce, dissolution rates grew to about 1800 a year.⁵² After gaining independence, the colonies also liberalized the practice, although a little later.⁵³ As Hunt explains, "Learning to empathize opened the path to human rights, but it did not ensure that everyone would be able to take that path right away."⁵⁴

Another important chapter, "Bone of Their Bone: Abolishing Torture," focuses on the abolition of harsh punishments, particularly in France.⁵⁵ Hunt begins with an account of the death by torture of Jean Calas, a 64-year-old French Protestant accused of murdering his son to prevent him from converting to Catholicism.⁵⁶ Calas's torture proceeded in two steps. In the first, his accusers bound his wrists tightly to a bar behind him in an effort to

46. *Id.* at 46-48.

47. *Id.* at 50-54.

48. *Id.* at 52.

49. *Id.* at 57.

50. *Id.* at 59.

51. *Id.* at 59-60.

52. *Id.* at 63.

53. *Id.* at 63-64.

54. *Id.* at 68.

55. *Id.* at 70-112.

56. *Id.* at 70.

force him to name his accomplices. When he refused, they stretched him with cranks and pulleys that drew his arms up while weights held his feet in place. After he still refused to name his confederates, his interrogators tied him to a bench while forcing water from pitchers down his throat.⁵⁷ Calas died proclaiming his innocence.⁵⁸

Voltaire brought attention to Calas's mistreatment in a pamphlet and book in which he used the phrase, "human rights."⁵⁹ Voltaire's outrage focused, however, not so much on torture itself but on the religious bigotry motivating the judges and police.⁶⁰ Nevertheless, his work started a social re-evaluation of torture, and by the late 1700s several nations, including Sweden, Prussia, Austria, and Bohemia, had abolished it.⁶¹ Enlightenment works, such as Beccaria's *Essays on Crimes and Punishment* (1764), rejected judicial torture and even the death penalty.⁶² The public spectacles that accompanied executions came to seem tawdry.⁶³

Hunt notes that at first, even the educated elite did not see a connection between cruel punishment and the new language of rights. This came only with new concerns for the human body; Hunt notes that "[b]odies gained a more positive value as they became more separate, more self-possessed, and more individualized over the course of the eighteenth century, while violations of them increasingly aroused negative reactions."⁶⁴

These changes in public attitudes accompanied new consensuses on behaviors that were no longer appropriate in public, including urination, defecation, disdain for eating from common bowls, and sharing beds with someone other than one's partner.⁶⁵ For Hunt, these changes signaled "the advent of the self-enclosed individual, whose boundaries" required respect in social interaction.⁶⁶ Self-possession and autonomy brought increasing self-discipline, including the use of handkerchiefs for coughing and sneezing, and

57. Contemporary readers will, of course, recall the controversy over waterboarding as a technique of enemy interrogation. See, e.g., Sara A. Carter, *Hayden Aims for 'a More Cohesive CIA,'* WASH. TIMES, Apr. 6, 2008, at A1.

58. HUNT, *supra* note 7, at 72.

59. *Id.*

60. *Id.* at 73-74.

61. *Id.* at 75-76.

62. *Id.* at 80-81, 103-08.

63. *Id.* at 93-95.

64. *Id.* at 81-82.

65. *Id.* at 82.

66. *Id.* at 82-83.

listening to music or the opera in silence.⁶⁷ An increased interest in portraits, even by ordinary individuals, also accompanied these changes.⁶⁸

Official, state-imposed torture came to an end when “the traditional framework of pain and personhood fell apart, to be replaced, bit by bit, by a new framework, in which individuals owned their bodies, had rights to their separateness and to bodily inviolability, and recognized in other people the same passions, sentiments, and sympathies in themselves.”⁶⁹

Subsequent chapters⁷⁰ trace the expansion of human rights through various formal proclamations, charters, and bills and show how, once they gained a toehold, human rights would cascade—gather momentum and sweep in new groups, such as Jews, women, the propertyless, and countries, in a manner previously unthinkable.⁷¹ In particular, Hunt believes that “the French revolution, more than any other event, revealed that human rights possessed an inner logic.”⁷² Granting rights to one minority group, Protestants, for example, would place the issue of the rights of Jews on the table but not, for instance, those of women or blacks.⁷³ But the “bulldozer force of the revolutionary logic of rights”⁷⁴ soon turned, in France at least, to the issue of free blacks and slaves.⁷⁵ By 1793, the French colonies were in upheaval. Slave revolts in Saint Domingue forced the deputies to comply with their demands in order to hold onto the colony.⁷⁶ An ex-slave, Toussaint L’Ouverture, invoked the language of rights.⁷⁷ Without the original declaration of rights in the mother country, Hunt writes, France’s total abolition of slavery in 1794 would not have come about.⁷⁸

Hunt closes with a discussion of women’s rights,⁷⁹ beginning with early advocacy by Mary Wollstonecraft, *Vindication of the Rights of Woman* (1792). Hunt then proceeds through reforms in inheritance and divorce laws.⁸⁰

67. *Id.* at 30, 82, 111.

68. *Id.* at 30, 85-92.

69. *See id.* at 112, 135-45.

70. *See id.* at 113-45, 146-75 (“They Have Set a Great Example: Declaring Rights”; “There Will Be No End To It: The Consequences of Declaring”).

71. *Id.* at 116, 122, 125, 132, 139-43.

72. *Id.* at 150.

73. *Id.* at 150-60, 165-75.

74. *Id.* at 160.

75. *Id.* at 160-67.

76. *Id.* at 164-67.

77. *Id.* at 166.

78. *Id.* at 166-67.

79. *Id.* at 167-75.

80. *Id.* at 168.

Hunt's final chapter, "The Soft Power of Humanity: Why Human Rights Failed, Only to Succeed,"⁸¹ traces the zigzag path of human rights. Here, Hunt argues that human rights are at times stymied by forces like nationalism or biology. Nationalism, Hunt argues, reserves rights for just one people (Germans for example).⁸² Biology can at times draw pseudo-classifications among levels of humanity.⁸³

Although Hunt does mention that early socialists distrusted rights as egoistic,⁸⁴ she might also have mentioned the recent debate between critical legal studies and critical race theory. Critical legal studies took a dim view of rights, while critical race theory found them to be a source of inspiration and a rallying point for resistance.⁸⁵

Hunt's final pages discuss the world wars, noting that the crimes of the Nazis made inclusion of human rights in the United Nations charter seem imperative. She concedes that many such instruments lack enforcement mechanisms⁸⁶ and that torture continues to be carried out (not least of all by the United States).⁸⁷ She concedes, as well, that "modern forms of communication have expanded the means of empathizing with others, [but] they have not been able to ensure that humans will act on the basis of that fellow feeling."⁸⁸ The argument over who—and what—deserves rights (the disabled? homosexuals? animals?) continues. For Hunt, however, no structure is better suited to examine such questions than international courts, governmental bodies, and conventions. Moreover, "rights are best defended in the end by feelings, convictions, and actions of multitudes of individuals who demand responses that accord with their inner sense of outrage."⁸⁹

II. RIGHTS IN THE UNITED STATES

Hunt takes us on a tour that is at one and the same time informative and encouraging. Rights are expanding; human attitudes to bodily integrity and

81. *Id.* at 176-214.

82. *Id.* at 181-86.

83. *Id.* at 186-94.

84. *Id.* at 197-201.

85. See Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987) (discussing disagreement between critical legal studies scholars and scholars of critical race theory over the role of rights and rights discourse in protecting outsider groups).

86. HUNT, *supra* note 7, at 204.

87. *Id.* at 208.

88. *Id.* at 209-10.

89. *Id.* at 213.

autonomy are strengthening; and every so often, humanity incorporates new worldwide consensus in the form of a document, consolidating a century or more of gains.

Yet, Hunt's book can easily leave her American readers (this one, at least) with a nagging feeling: The United States seems to lag behind the rest of the world with respect to practically every advance she describes. Although the United States has at times acted generously (*e.g.*, the Marshall Plan⁹⁰ and the recent bailout of the Argentine economy⁹¹), and Europe has at times acted abominably,⁹² we have more often brought up the rear with respect to human rights (*e.g.*, the slaughtering of the Indians and the enslavement of Africans⁹³). Although it is easy to rationalize that all colonial nations were guilty of similar barbarities, in many cases we practiced them more wholeheartedly and gave them up later than other nations.⁹⁴

We were not among the first dozen nations to abolish slavery,⁹⁵ and both Canada and Australia have made formal amends to their indigenous populations exceeding what the United States has done.⁹⁶ At the same time, we have resisted signing treaties banning genocide,⁹⁷ protecting women's rights,⁹⁸ and safeguarding against global warming.⁹⁹ The United States,

90. See generally Barbara C. George et al., *The 1998 OECD Convention: An Impetus for Worldwide Changes in Attitudes Toward Corruption in Business Transactions*, 37 AM. BUS. L.J. 485, 488 (2000).

91. See generally Jessica W. Miller, Comment, *Solving the Latin American Sovereign Debt Crisis*, 22 U. PA. J. INT'L ECON. L. 677, 691 (2001).

92. Nazism and the Holocaust come to mind, as well as England's role in the slave trade. See, *e.g.*, ALEXANDER TESIS, *DESTRUCTIVE MESSAGES* (2002).

93. See generally JUAN PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 96-284 (2d ed. 2007).

94. Hunt notes that the United States lagged in affording rights to women. HUNT, *supra* note 7, at 172. See also *infra* notes 95-130 and accompanying text.

95. See DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 13-43 (5th ed. 2004) (chronicling the repeal). France was one of the earliest to abolish the practice in one of its colonies in 1791, LAURENT DUBOIS, *AVENGERS OF THE NEW WORLD: THE STORY OF THE HAITIAN REVOLUTION* (2005). See HUNT, *supra* note 7, at 166-67 (French abolition in 1794). See generally *id.* at 119-20 (brief discussion of scholarly influence on slavery); STEVEN M. WISE, *THOUGH THE HEAVENS MAY FALL: THE LANDMARK TRIAL THAT LED TO THE END OF HUMAN SLAVERY* (2006) (discussing the histories of the abolitionist movement in different countries, namely, England and the United States).

96. See PEREA ET AL., *supra* note 93, at 262-84 ("Comparative Approaches," which covers reparations to indigenous populations).

97. See generally Dana Z. Falstrom, *Thought Versus Action*, 58 ME. L. REV. 337, 363 n.139 (2006) (citing Evelyn Iritani, *U.S. Gives Cold Shoulder to Treaties*, L.A. TIMES, Mar. 13, 2005, at A22).

98. On the U.S. reluctance to join the worldwide movement for women's rights, see Jeffery Huffines, *United States Ratification of Human Rights Treaties*, 3 ILSA J. INT'L & COMP. L. 641 (1997).

99. See, *e.g.*, Constant Brand, *U.S. Rejects EU-Asia Emissions Reduction*, AP PRESS, May 29, 2007, available at http://www.breitbart.com/article.php?id=D8PE57FG2&show_article=1 (discussing American slowness to act against global warming, including the Kyoto protocol).

apparently alone in the world, reserves the right to engage in pre-emptive war without consulting allies or securing the permission of the United Nations.¹⁰⁰

Even in areas not covered by treaty but by common law, the United States has often adopted a less encompassing version than that which prevailed in other common-law jurisdictions. For example, American law generally recognized no duty to retreat.¹⁰¹ That is to say, a homeowner or other person who believed himself or herself under murderous attack could simply fire away, without first issuing a warning or backing up.¹⁰²

The United States continued to execute the mentally retarded until 2002¹⁰³ and juveniles until 2005,¹⁰⁴ well after most nations banned both practices. Indeed, most advanced nations have rejected capital punishment entirely, whereas we seem a long way from doing so.¹⁰⁵ We incarcerate such a large percentage of our population that we lead the developed world in this respect, as even the U.S.-based Amnesty International has noted.¹⁰⁶

The United States maintained—and enforced—dozens of laws against interracial marriage until 1967, when *Loving v. Virginia* finally struck them down.¹⁰⁷ Although history shows that Britons displayed mixed feelings about miscegenation, with some vigorously condemning it, no laws ever expressly

100. See, e.g., Jedediah Purdy, *The Lesser Evil*, 104 MICH. L. REV. 1501, 1517-18 (2006) (book review of: MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* (2004)) (discussing the United States' position on pre-emptive war); see also HUNT, *supra* note 7, at 201-03 (reporting that the United States initially opposed the sweeping rights language of the U.N. Charter).

101. On the duty to retreat, see Joseph Beale, *Duty to Retreat from Murderous Assault*, 16 HARV. L. REV. 567 (1902); W. PAGE KEATON ET AL., PROSSER & KEATON ON TORTS 127-28 (5th ed. 1984) [hereinafter PROSSER & KEATON].

102. PROSSER & KEATON, *supra* note 101, at 127-28.

103. *Atkins v. Virginia*, 536 U.S. 304 (2002); see generally Eileen P. Ryan & Sarah B. Berson, *Mental Capacity and the Death Penalty*, 25 ST. LOUIS PUB. L. REV. 351 (2006).

104. *Roper v. Simmons*, 543 U.S. 551 (2002); see generally Enrico Pagnanelli, *Children as Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of Roper v. Simmons*, 44 AM. CRIM. L. REV. 125 (2007).

105. Great Britain's last recorded execution took place in 1964, the same year the country abolished the death penalty for the crime of murder. Parliament removed the death penalty from the country's statute books in 1997 and abolished it entirely in 1998. See *French Cabinet Backs Ending Death Penalty*, N.Y. TIMES, Aug. 27, 1981, at A5 (reporting that France was the last West European country to abolish the death penalty in 1981). Thirty-eight U.S. states continue to execute criminals following the Supreme Court's reinstatement of the death penalty in 1976. The United Nations Human Rights Commission voted in favor of a worldwide moratorium on executions in 1991. *U.N. Panel Votes for Ban on Death Penalty*, N.Y. TIMES, Apr. 29, 1999, at A4.

106. See generally Daniel Lazare, *Stars and Bars*, THE NATION, Aug. 27, 2007, at 9; Adam Liptak, *Inmate Count In U.S. Dwarfs Other Nations'*, N.Y. TIMES, Apr. 23, 2008, at A1.

107. 388 U.S. 1 (1967).

prohibited the practice.¹⁰⁸ Furthermore, in the Civil Partnership Act (2005), Great Britain gave registered same-sex couples rights similar to marriage.¹⁰⁹ Conversely, only a handful of U.S. states have provided the same right to same-sex couples.¹¹⁰

The United States, as most readers know, is the only industrialized nation in the world without some form of universal health insurance.¹¹¹

The United States was slow to forbid child labor. Although a number of states enacted protective legislation between 1880 and 1910, federal statutes only began to appear in the 1910s.¹¹² Britain, by contrast, put in place Factory Acts to decrease child labor abuse in mills in 1833, 1844, and 1874.¹¹³

A comparison of women's reproductive rights,¹¹⁴ punishment of sodomy and homosexuality,¹¹⁵ torture,¹¹⁶ detention of enemy combatants,¹¹⁷ and

108. See generally Roxann Wheeler, *The Complexion of Desire: Racial Ideology and Mid-Eighteenth-Century British Novels*, 32 EIGHTEENTH CENTURY STUD. 309, 314 (1998).

109. On England's Civil Partnership Act (2005), see http://www.opsi.gov.uk/acts/acts2004/ukpga_20040033_en_1. See also Suzanne Daley, *France Gives Legal Status to Unmarried Couples*, N.Y. TIMES, Oct. 14, 1999, at A3.

110. At the time of writing, only a handful of U.S. states (Massachusetts, Connecticut, Vermont, New Jersey, California, and New Hampshire) provided anything similar. See Marriage and Relationship Recognition, <http://www.hrc.org/issues/marriage.asp> (last visited Oct. 27, 2008).

111. See generally Paul Krugman, Op-Ed., *Health Care Horror Stories*, N.Y. TIMES, Apr. 11, 2008, at A23.

112. See generally WALTER I. TRATTNER, *CRUSADE FOR THE CHILDREN* 45-163 (1970); Allen R. Sanderson, *Child-Labor Legislation and the Labor Force Participation of Children*, 34 J. ECON. HIST. 297 (1974).

113. See generally Clark Nardinelli, *Child Labor and the Factory Acts*, 40 J. ECON. HIST. 739, 741 (1980).

114. See Abby F. Janoff, *Rights of the Pregnant Child vs. Rights of the Unborn Under the Conventions on the Rights of the Child*, 22 B.U. INT'L L.J. 163, 175-88 (2004) (noting that many commonwealth countries provided abortion "virtually on request" long before the United States did).

115. See, e.g., The Sexual Offences Act, 1967, c. 60 (U.K.) (decriminalizing private sexual acts between consenting adults over the age of twenty-one); see also Committee on the Offences of Homosexual Affairs and Prostitution, 1957, Wolfenden Report (U.K.) (proposing legalization of homosexuality and sodomy). In the United States, the Supreme Court did not rule that state laws criminalizing homosexual activity were unconstitutional until it decided *Lawrence v. Texas*, 539 U.S. 558 (2003).

116. See, e.g., Tom Wright, *U.S. Defends Rights Record Before U.N. Panel in Geneva*, N.Y. TIMES, May 6, 2006, at A1 (reporting that over two dozen U.N. officials called American officials before a U.N. panel to explain the country's treatment of prisoners in Iraq, Afghanistan, and Guantanamo Bay); see also HUNT, *supra* note 7, at 208 (noting the same); Paul Shiner, *A Deliberate Torture Policy*, THE GUARDIAN, June 14, 2007 (reporting that the House of Lords voted to ban torture of prisoners while in British custody).

117. On the U.S. position (vis-à-vis that of other nations) regarding detention and the Geneva Accords, see Jack Goldsmith, *The Laws in Wartime*, SLATE, Apr. 2, 2008, <http://www.slate.com/id/2187870/>; Dan Froomkin, *Call it the Abu Ghraib Memo*, WASHINGTONPOST.COM, Apr. 2, 2008, <http://www.washingtonpost.com/wp-dyn/content/blog/2008/04/02/BL2008040202171.html>.

extraordinary rendition¹¹⁸ also shows differences, rarely in the United States' favor.

Animal rights and protection receive much more attention in England and other European countries than in the United States.¹¹⁹ Many American states adopted open-range laws that allowed farm animals to roam freely.¹²⁰ For example, a vegetable farmer wishing to protect her crop was required to build a fence, as animal owners were under no duty to fence them in.¹²¹ By the same token, British common law diverged from the U.S. version regarding capture of animals.¹²² In England, the Crown exercised authority over wild animals and their habitat. Extensive laws limited hunting, fishing, and trapping. The colonies, and especially the United States, instead applied the rule of capture, under which all these activities were unregulated sources of income, food, and clothing. To both American citizens and the judiciary, the wilderness and its vast animal life were not cherished resources to be protected but instead an "enemy to be conquered and tamed."¹²³ The capture rule entailed, as well, relaxation of prohibitions against trespass and the right of landowners to exclude hunters.¹²⁴ English law, by contrast, deemed the right of the landowner superior to that of the hunter.

One thinks, as well, of doctrines such as employment at will (under which workers can be fired for any reason), which received its fullest expression in the United States,¹²⁵ and limitations on the rule of no-duty-of-rescue, which

118. On extraordinary rendition and its standing under international law, see Congressional Press Release, Apr. 2, 2008; Biden: Justice Dep't Memo Shocks the Conscience.

119. Great Britain, for example, prohibits ownership of primates as pets, forbids cockfighting, and prohibits "puppy mills." See Dep't for Env. Food & Rural Affairs, UK (DEFRA), available at <http://www.defra.gov.uk/animalh/welfare/domestic/index.htm> (discussing the ban on puppy mills). See also Daniel Foggo & Matthew Campbell, *British Fans Flock to French Cockfights*, THE SUNDAY TIMES (London), Jan. 22, 2006, available at <http://www.timesonline.co.uk/tol/news/uk/article717208.ece> (discussing the British ban on cockfighting).

120. See generally Michael C. Blumm & Lucas Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673 (2005); John Dvorske et al., *Animals Running at Large, Open Range Doctrine*, 3B C.J.S. § 266 (2007). See also Paul Meller, *Ban on Animal Tests for Cosmetics*, N.Y. TIMES, Jan. 17, 2003, at A8 (discussing the European Parliament's 2003 law forbidding the practice of cosmetic testing on animals).

121. Dvorske et al., *supra* note 120.

122. See generally Blumm & Ritchie, *supra* note 120, at 686-90 (discussing British and American rules regarding hunting).

123. *Id.*

124. *Id.*

125. See *Adair v. United States*, 208 U.S. 161 (1907) (declaring unconstitutional a statute that prohibited the discharge of a worker because of union membership); see also Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976) (discussing the history of employment at will in the United States and advocating legislation to limit the ability of an

did not.¹²⁶ And when doctrines such as unconscionability,¹²⁷ contracts of adhesion,¹²⁸ and the duty to bargain in good faith¹²⁹ finally entered U.S. law, they did so via European expatriate law professors like Friedrich Kessler.¹³⁰

The resourceful reader will undoubtedly be able to think of many other respects in which U.S. law exhibits a rough-hewn, individualistic quality compared to that of the rest of the world. Although this country has occasionally been in the forefront of humanitarian relief and, even more rarely, led the way in establishing human rights law, it has generally lagged behind the record of the most advanced nations. Why might this be so?

III. THE UNSTEADY MARCH OF HUMAN RIGHTS: EXPLAINING THE RECORD

If U.S. progress in recognizing human rights has been uneven, what explains its halting pace? Undoubtedly, many forces contributed, but I focus on two: the new country's literature and its way of doing business. Early American fiction, more than the European kind, glorified war, Indian killing, and settlement.¹³¹ In turn, the empathy that American readers developed focused on warriors, settlers, Indian killers, and plantation owners who managed large numbers of slaves—not on homeless people, Dickensian factory workers, or the slaves themselves.¹³² Novels and short fiction can develop empathy, as Hunt points out, but that empathy may be for the exploiting class just as easily as for the exploited.¹³³ The former type of empathy was in evidence in the United States to a much greater degree than it was in England or France, possibly because the United States began as a resource-rich society interested in extraction.

Material forces also played a role. Consider, for example, the function of empathy in a society's economy. That faculty conferred an advantage on its possessor since one could figure out what another person might be feeling and

employer to dismiss employees unjustly); Clyde W. Summers, *Employment at Will in the United States*, 3 U. PA. J. LAB. & EMP. L. 65 (2000) (arguing against the doctrine, which allows even unjust dismissals).

126. See generally Damien Schiff, *Samaritans—Good, Bad and Ugly: A Comparative Analysis*, 11 ROGER WILLIAMS U. L. REV. 77 (2005).

127. See generally Friedrich Kessler, *Contracts of Adhesion: Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

128. *Id.*

129. See Friedrich Kessler & Edith Fine, *Culpa in Contrahendo: Bargaining in Good Faith and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964).

130. See Kessler, *supra* note 127; Kessler & Fine, *supra* note 129.

131. See, *infra* Part III.A. and accompanying notes.

132. See *id.*

133. HUNT, *supra* note 7, at 38-69.

act accordingly.¹³⁴ But this advantage only accrued, at least strongly, in a mercantile society such as England, whose economy was based on trade. A merchant, for example, could quickly grasp what his or her clients, customers, and employees wanted, and offer something in return. Everyone profited from this kind of knowledge.¹³⁵ This was true, of course, in the Northeastern cities of the United States, such as Boston, Philadelphia, and New York. But in the agrarian South, a plantation owner did not need to use empathy in understanding his slaves. He could use coercion instead.¹³⁶ The same was true in the West and on the frontier. Settlers needed little empathy to understand the Indians or appreciate old-growth forests. The challenge facing them was to kill or relocate the former and cut down the latter as quickly as possible to make way for farms.¹³⁷ American fiction therefore unsurprisingly increased identification with conquerors, warriors, Indian fighters, tree fellers, and the Southern way of life. Not all American fiction took this form, of course, but enough so that readers who were attuned to it could readily find reinforcement for their own brand of selective empathy.

A. Underdogs and Overlords in American Fiction

As has been seen, American fiction has often treated overlords and conquerors sympathetically. At the same time, writers and moviemakers have often drawn Indians, blacks, Mexicans, and the working class in disparaging terms. When Great Britain went to war, its enemies were generally white nations, such as France or Germany. When the United States went to war, the enemy was often Native American or Mexican, at least in the early years. British cartoons and novels would often paint the French in unflattering terms—as effete, snail-eating people, for example—but not as uncouth savages or tricky, shoot-you-in-the-back Mexicans.¹³⁸

Some of the young nation's most prominent fiction exemplified this dichotomy. D.W. Griffith's film *The Birth of a Nation*,¹³⁹ based on the novel

134. See *infra* Part III.B. and accompanying notes.

135. See *id.*

136. See *id.*

137. See *id.*

138. See, e.g., Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Cure Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1260-75, 1277-88 (1992) (describing types of racial depiction and stereotyping and the difficulty of countering them under reigning First Amendment law).

139. THE BIRTH OF A NATION (David W. Griffith Corp. 1915). See Russell Merritt, *D. W. Griffith's The Birth of a Nation: Going after Little Sister*, in CLOSE VIEWINGS: AN ANTHOLOGY OF NEW FILM

*The Clansman*¹⁴⁰ by Thomas Dixon and perhaps the most famous in Hollywood history, depicted the Southern way of life in rhapsodic terms. The Civil War emerged as a tragedy for that region; newly freed blacks were portrayed as rapacious beasts with designs on white women.¹⁴¹ The movie played to packed houses for years, shaping the attitudes of millions of the new immigrants who were flocking to the United States at this time.¹⁴² A few years later, *Gone With the Wind* presented a similarly romanticized portrait of Southern life, with loyal black servants who knew their places and white plantation owners who struggled valiantly to hold on in the face of change.¹⁴³

Even abolitionist writing, such as Harriet Beecher Stowe's *Uncle Tom's Cabin*,¹⁴⁴ portrayed gentle, long-suffering black philosophers such as Uncle Tom, not angry revolutionaries like Toussaint-L'Ouverture or Paul Robeson, who despised inequality and opposed racism.¹⁴⁵ Cowboy and Indian tales portrayed the cowboy as a noble, modest, self-effacing protector of white womanhood, while the Indians came across as bloodthirsty savages bent on mayhem and destruction.¹⁴⁶ Most novels and short stories about war glorified it; the few that questioned it, such as *Red Badge of Courage*,¹⁴⁷ nevertheless found it bittersweet.

CRITICISM 215 (1990), for a discussion of the film and its influence.

140. THOMAS DIXON, *THE CLANSMAN* (1905). See ANTHONY SLIDE, *AMERICAN RACIST: THE LIFE AND FILMS OF THOMAS DIXON* (2004).

141. See, e.g., CATHERINE SILK & JOHN SILK, *RACISM AND ANTI-RACISM IN AMERICAN POPULAR CULTURE* 126-27 (1990) (discussing the impact of scenes of black men (white actors in blackface) chasing a white woman over a cliff to her death).

142. Delgado & Stefancic, *supra* note 138, at 1265; see also SILK & SILK, *supra* note 141 (discussing the movie's impact on society).

143. *GONE WITH THE WIND* (Metro-Goldwyn-Mayer 1939). Based on the novel by Margaret Mitchell (1936) by the same title, the movie depicts events in Georgia during and just after the Civil War.

144. HARRIET BEECHER STOWE, *UNCLE TOM'S CABIN* (Wordsworth Editions Ltd. 1995) (1852).

145. See WILLIAM L. VAN DEBURG, *SLAVERY AND RACE IN AMERICAN POPULAR CULTURE* 35-36 (1984) (positing that Uncle Tom's long-suffering character was itself a stereotype and ultimately harmful to the cause of black freedom and equality).

146. See, e.g., Susan Faludi, *America's Guardian Myths*, N.Y. TIMES, Sept. 7, 2007, at A29; JON TUSKA, *THE FILMING OF THE WEST* (1976); JOHN E. O'CONNOR, *HOLLYWOOD'S INDIAN: STEREOTYPES OF NATIVE AMERICANS IN FILM* (1980); ROY H. PEARCE, *SAVAGISM AND CIVILIZATION: A STUDY OF THE INDIAN AND THE AMERICAN MIND* (rev. ed. 1965).

147. See CRANE, *supra* note 17, at 32, 90-91.

Entire genres of writing, such as Indian captivity tales,¹⁴⁸ titillated Anglo readers, especially females, with descriptions of virtuous young white women carried away by bronze, loincloth-wearing savages and raised in captivity. In reality, very few cases of Indian kidnapping ever occurred; many more Indian children were forcibly removed from their families and sent to Indian boarding schools, where Anglo authorities cut off their long hair, punished them for speaking Indian languages, and taught them to hate their culture and dress and act white.¹⁴⁹

James Fenimore Cooper, perhaps the most sympathetic of the Anglo storytellers about Indians, nevertheless depicted them as radically unlike white men and women.¹⁵⁰ Frontier narratives, including stories about Daniel Boone, David Crockett, and Zenas Leonard, played to large audiences hungry for tales of heroic trappers and Indian fighters overcoming all odds and fighting off bears, sinkholes, interior icebergs, and other unlikely dangers on the way to survival in the Wild West.¹⁵¹ Even Steven Crane, who on occasion wrote admiringly of the Indians, wrote disparagingly of Mexicans.¹⁵²

During much of the formative period of American literature, narratives were rife with stereotypes of noble whites and ignoble Indians, blacks, and Latinos.¹⁵³ Filmmaker Marlon Riggs' award-winning one-hour documentary,

148. *E.g.*, MARY ROWLANDSON, *THE SOVEREIGNTY AND GOODNESS OF GOD, TOGETHER WITH THE FAITHFULNESS OF HIS PROMISES: DISPLAYED: BEING A NARRATIVE OF THE CAPTIVITY AND RESTORATION OF MRS. MARY ROWLANDSON AND RELATED DOCUMENTS* (1682); COTTON MATHER, *HUMILIATIONS FOLLOWED WITH DELIVERANCE* (1697); RICHARD SLOTKIN, *REGENERATION THROUGH VIOLENCE: THE MYTHOLOGY OF THE AMERICAN FRONTIER 1600-1860* (1973); FRANCES ROE KESSLER, *THE INDIAN CAPTIVITY NARRATIVE: A WOMAN'S VIEW* (1990); Faludi, *supra* note 146.

149. *E.g.*, PEREA ET AL., *supra* note 93, at 741-45, 928, 1020-24 (on government boarding schools and their treatment of Indian schoolchildren).

150. *E.g.*, JAMES FENIMORE COOPER, *LAST OF THE MOHICANS* (1826) (describing the feats and travails of the noble warrior Uncas); Delgado & Stefancic, *supra* note 138, at 1268 (describing mythical Indians in Cooper's writing).

151. *See, e.g.*, SLOTKIN, *supra* note 148; TIMOTHY FLINT, *BIOGRAPHICAL MEMOIR OF DANIEL BOONE* (1833); ZENAS LEONARD, *NARRATIVE OF THE ADVENTURES OF ZENAS LEONARD* (1839); Stephanie LeManager, *Trading Stories: Washington Irving and the Global West*, in 15 *AM. LIT. HIST.* 683 (2003); NELSON LEE, *THREE YEARS AMONG THE COMANCHES: THE NARRATIVE OF NELSON LEE, THE TEXAS RANGER 25-26* (2001); DAN DEQUILLE (William Wright), *THE BIG BONANZA 79-84* (1969); Faludi, *supra* note 146.

152. *See, e.g.*, Stephen Crane, *A Man and Some Others*, 47 *CENTURY MAG.* 601 (1897) (recounting the tale of a Mexican brute who kills "Bill," a heroic Anglo cowboy who refused the Mexican's demand to leave his land, or else).

153. *See* Delgado & Stefancic, *supra* note 138, at 1261-70, 1273-75 (discussing three centuries of depictions of these groups in popular culture); JAMES FENIMORE COOPER, *THE SPY: A TALE OF THE NEUTRAL GROUND 54-55* (AMS Press, Inc. 2002) (1852) (recounting a disparaging depiction of a black slave); Joel Chandler Harris, *Free Joe and the Rest of the World*, 29 *CENTURY MAG.* 117-24 (1884) (same).

Ethnic Notions,¹⁵⁴ depicted a parade of Sambos, mammies, coons, uncles, and devious—or hapless—African Americans in cartoons, household curios, and art. As with other groups—Latinos, Asian Americans, Indians—the images changed from era to era as white society needed reassurance, reason for outright oppression, or a rationale for segregation.¹⁵⁵

American fiction, then, especially the popular sort, promoted solidarity and identification with the dominant group and emotional distance from minorities, Indians, and the poor. In this respect, fiction played a quite different role from the one Lynn Hunt traces in early English and Continental writing.¹⁵⁶ To the extent that empathy, stemming from reading novels and short stories and watching film, is an important ingredient in the expansion of human rights, it is easy to see how France and England would leave the United States behind.

B. Material Forces: the New Nation's Ways of Doing Business

Not only did the country's literature promote empathy for those on the top, in contrast to the kind of literature that was developing in England and France, but material and structural forces also pushed in the same direction. The geographically large, wide-open continent rewarded selfishness and independence (a "pioneer spirit").¹⁵⁷ And, a little later, a written Constitution slowed the pace of progress, since social change could not occur without

154. *Ethnic Notions* (PBS 1986).

155. *Id.* (Directed by Marlon Riggs, this prize winning documentary narrates over 300 years of popular depiction of black people.); see Delgado & Stefancic, *supra* note 138 (outlining a "functional theory" of racial stereotyping). Not all American fiction treated minorities in such cavalier fashion. Sinclair Lewis, Theodore Dreiser, Pietro Di Donato, John Steinbeck, and the abolitionists were conspicuous exceptions.

156. HUNT, *supra* note 7, at 34-69.

157. See, e.g., *Shane* (Paramount Pictures 1953). Even after the pioneer era ended, the sheer size of the United States makes it difficult for citizens to empathize and sympathize with each other. For example, people in England and France find it more convenient and inexpensive to visit other countries than do the citizens of the United States. Travel, of course, may lead to heightened understanding of one's own culture, as well as that of other regions. This would have been especially true before the advent of air travel, but it holds true to some extent even today—less than ten percent of the U.S. population traveled abroad during a recent year. U.S. DEP'T OF COMMERCE, INT'L TRADE ADMIN., OFFICE OF TRAVEL & TOURISM INDUS. & BUREAU OF ECON. ANALYSIS (2004); U.S. CENSUS BUREAU, CENSUS 2000 (2000). Also, American workers typically receive fewer vacation days than their European counterparts, making "a month in the country" (or in Italy) much more difficult to achieve. Chris Taylor, *There's More Vacation Time on Tap for You*, CNN.com, Aug. 3, 2006, available at <http://money.cnn.com/2006/08/03/technology/fbvacations0803.biz2/index.htm>.

Supreme Court approval.¹⁵⁸ Great Britain, of course, lacked a constitution, which meant that social reforms, like the abolition of slavery, could come about through parliamentary action alone.

Consider, too, that the colonists decamped for a life of log cabins, forts, wagon trains, Indian raids, and other immediate physical challenges just as Europe was entering the Enlightenment, arts were flourishing, and science was advancing rapidly.¹⁵⁹ Although well educated colonials living in Boston or New York, such as John Adams, Thomas Jefferson, and Benjamin Franklin, managed to keep up with developments and with continental writing that was then full of talk of “the rights of man,” the average settler living on the frontier had little way of doing so and probably even less inclination or time. These structural features of life in the new nation—its wide open spaces, its constitutional system, and its distance from the center of Enlightenment thought—undoubtedly limited its ability to enter fully into world developments that were rapidly expanding the scope of human rights.¹⁶⁰

But the feature I want to highlight is empathy’s connection with the way a society conducts business. In Great Britain, as mentioned, mercantilism rewarded empathy, just as novel reading enhanced it.¹⁶¹ A merchant who could

158. I mean, of course, that social change would often require an amendment, such as the Thirteenth repealing slavery, or else a determination of a law’s constitutionality, such as *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding the statutory regime of separate but equal railroad cars), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). *See also* HUNT, *supra* note 7, at 126 (noting that the original Constitution lacked a Bill of Rights and, instead of being universalistic in its approach, only protected certain individual interests against governmental invasion).

A related structural feature is our federalist system, which ensures an ever-shifting balance of power between the states and the federal government, especially with respect to the Tenth Amendment and the Commerce Clause doctrine. *See, e.g.*, *United States v. Morrison*, 529 U.S. 1 (2005); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

A final structural feature is our moralistic streak. Stemming from our early Puritan heritage, moralism often takes the form of overriding a state’s “compassionate” measures, such as California’s laws permitting the medical use of marijuana to alleviate pain. *See* *Gonzales v. Raich*, 545 U.S. 1 (2005). Someone who detests another person’s behavior on religious grounds is apt to show little empathy for the predicament that drives the other person to behave that way.

159. The Enlightenment is the name for a period associated with writers, such as David Hume, Immanuel Kant, Montesquieu, Adam Smith, and John Locke, that emphasized the power of reason to improve humanity’s condition. *See, e.g.*, ERNST CASSIRER, *THE PHILOSOPHY OF THE ENLIGHTENMENT* (Fritz C.A. Koelln & James P. Pettegrove trans., 1979) (1968).

160. During later times, our greater degree of diversity, especially racial, compared to Europe’s, may well have suppressed the development of fellow-feeling and identification with the broad community. Robert Putnam recently has shown how diverse groups, at least for a substantial initial period, “hunker down,” invest less in the world outside their doors, watch TV, and cultivate less social capital compared to groups that are more homogeneous. Robert Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-First Century*, 30 *SCANDINAVIAN POL. STUD.* 137 (2007).

161. *See* Delgado, *supra* note 44, at 75-77 (explaining how the faculty of empathy benefits the

place himself or herself in the shoes of customers or competitors might gain a vital edge.¹⁶² He or she could make advantageous trades, aided by knowledge of what the other party wanted.¹⁶³ The same held true of New England, where trade and manufacturing required that buyers and sellers, and employers and workers, deal with each other and strike bargains.¹⁶⁴ A settler economy or one based on labor-intensive farming or extraction (gold mining, hunting, trapping furs, or logging) placed no such premium on human empathy. Indeed, a slave owner who identified overly with his slaves would find it harder to exploit them, just as a settler who hesitated to cut down a stand of old-growth trees would lose out in competition to one who quickly lifted the axe.¹⁶⁵

England, by this time, was almost entirely mercantile.¹⁶⁶ And, of course, capitalism and the factory system could be cruel too.¹⁶⁷ Yet, it was at least required that shop owners or factory operators negotiate with their hired hands.¹⁶⁸ Parliament could, and did, pass child labor laws.¹⁶⁹ In the United States, a slave owner did not have to negotiate with his slaves, and neither Congress nor the states could abolish slavery or limit the slave trade due to the six “slavery clauses” in the original Constitution.¹⁷⁰

As noted, empathy will often benefit its possessor. If one has the ability to grasp what another person—a lover, a child, a partner in business—wants, one can offer the person what she is hungering for and hope to receive something in return. As law and economics would put it, empathy, whether gained from reading novels or from direct experience, ought to confer an

possessor).

162. *See id.*; *see also* Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574.

163. *See generally* Delgado, *supra* note 44.

164. The New England economy, especially in cities such as Boston or New York, was based on trade, rather than large-scale farming, as in the agrarian South, or hunting, trapping, and ranching, as in the West. *See, e.g.*, MARGARET ELLEN NEWELL, *FROM DEPENDENCY TO INDEPENDENCE: ECONOMIC REVOLUTION IN COLONIAL NEW ENGLAND* (1998); *ENGINES OF ENTERPRISE: AN ECONOMIC HISTORY OF NEW ENGLAND* (Peter Temin ed., 2000).

165. In other words, in these situations, empathy might serve a reverse-evolutionary function, disabling its possessor from operating effectively. Surgeons learn to distance themselves—develop detachment—from the patients on whom they are operating. Executioners presumably develop a matter-of-fact frame of mind, and so on.

166. Cities like London and Birmingham were centers of trade and industry by the time U.S. westward expansion began in earnest. *See, e.g.*, MICHAEL BALL & DAVID SUNDERLAND, *AN ECONOMIC HISTORY OF LONDON, 1800-1914* (2001).

167. *See, e.g.*, UPTON SINCLAIR, *THE JUNGLE* (Clare Virginia Eby ed., W.W. Norton & Company 2003) (1906).

168. The development of unions, of course, accelerated this trend.

169. *See* TRATTNER, *supra* note 112; Nardinelli, *supra* note 113.

170. *See generally* PEREA ET AL., *supra* note 93, at 110-12 (discussing these clauses, which are still in the Constitution).

evolutionary advantage on its possessor, enabling him or her to succeed as a parent, friend, lover, trader, politician, or business person.¹⁷¹ The empathic person can make shrewd offers of exchanges in a way more likely to succeed than the person lacking such ability.

But empathy does not come easily. Living in a rude, threatening environment can sidetrack its development,¹⁷² just as living in a modern, highly bureaucratized setting where human relationships are distant and impersonal can.¹⁷³ Extreme inequality in society would also inhibit its development, since there is little point to cultivating a close relationship with a destitute stranger who has little to trade.¹⁷⁴ Unbridled capitalism probably can as well, since it places profits, especially those of the short-term variety, above all else.¹⁷⁵

Still, in most settings, empathy is an advantage and one of the most prized human traits. It makes others eager to deal with you and feel reassured that you will reciprocate their friendship. That is why, all things being equal, we are apt to trust and value the friendship of a well read, humanistically trained person. And it is why nations who “fall behind the curve”—for structural or material reasons, or because of the type of literature they wrote and consumed—in developing fellow feeling and a respect for human rights will find themselves pursuing a lonely path. Should it be surprising, then, that the United States lags behind the rest of the world in signing human rights and environmental treaties, in repudiating torture and harsh punishments, and in providing first-rate education and health care to all its citizens? One benefit of Lynn Hunt’s book is that it invites introspection about national culture, reading habits, and their relationship to participation in the world. But the more subversive lesson—and the deepest of all—is that the nation that allows itself to remain in the rearguard of vital human movements will eventually pay the price in a suppressed economy, poor trading relations, and an inability to persuade others to join it in geopolitical actions that it considers necessary to its way of life.

171. Delgado, *supra* note 44, at 75-76.

172. In such an environment, one often thinks solely about survival.

173. In such settings, the opportunities for learning—and receiving reinforcement for—empathy are fewer than in ones that afford more social interaction. *See, e.g.*, Delgado, *supra* note 44.

174. *See, e.g.*, Delgado, *supra* note 44, at 75-76; *see supra* note 173 and accompanying text.

175. With short-term profits, one is relatively unconcerned with long-term relationships, which are built on trust and reciprocity and are capable of extending over a long period of time. Instead, one seeks the quick return. *See* Richard Delgado, *Rodrigo’s Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387 (1993).

CONCLUSION

If human rights are expanding, as Hunt writes, under the impact of increasing exposure to other human beings, what does this mean for the party of social reform?

If she is right, the force that underlies the expansion of human rights is empathy, a complex set of emotions that come into play at the sight of fellow human beings suffering. We must first, however, come to see those beings as “like us.”

She shows that a prime means by which persons broaden their sympathies is literature, especially fiction. Through imaginative identification with the characters of a novel or story, the reader comes to see members of stigmatized outgroups as fellow beings deserving respect and concern.

What follows from this? First, minorities should tell their stories often and insistently.¹⁷⁶ They should also circulate counterstories, tales, and narratives designed to jar complacent majoritarian scripts, such as “without intent no discrimination,” “colorblindness” as the best strategy, or the myth of upward mobility—that anyone can make it in this country who so desires.¹⁷⁷

Members of these groups should also affirm their own carnality: “We have bodies—we bleed, cry, and hurt just like you.” At the same time that they seek to increase imaginative identification with themselves and their struggles, they should also gently remind mainstream society of the utility of bringing Latinos, blacks, women, and gays into their community and economy.

They should further point out that pursuing the opposite course will impose costs—some material and others personal. America today needs allies and goodwill in the difficult period that will accompany adjusting free-market capitalism to a global marketplace, while at the same time waging a war on terror.¹⁷⁸ A second set of costs is more personal: We now look back with incredulity on previous generations who relocated Indians, enslaved blacks,

176. Compare HUNT, *supra* note 7, at 104, with Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) [*hereinafter* Delgado, *Storytelling*] (urging that reformers tell insistent stories about the groups they champion).

177. Delgado, *Storytelling*, *supra* note 176 (describing the role of counterstories in advancing social reform agendas).

178. The mistreatment of domestic minorities and the compilation of a poor record with respect to women’s issues, such as reproductive freedom, harm America’s image abroad. See, e.g., Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980); Richard Delgado, *Rodrigo’s Roundelay: Hernandez v. Texas and the Interest-Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23 (2006).

denied women the right to vote or divorce, burned witches, slaughtered enemy civilians, and tortured those who we believed were withholding information we wanted.¹⁷⁹ If, as Hunt points out, human rights are expanding, it follows that some practices that we tolerate today will come to seem reprehensible and wrong, so that our children will ask, “How could we have done *that*?”¹⁸⁰

Establishing new human rights, or even defending old ones during bad times, is hard work. Lynn Hunt’s book suggests approaches for reformers—storytelling and appeals to self-interest—that we have known about for some time. But her book also shows exactly why it is important to deploy those tools, the conditions under which they are likely to succeed, and, implicitly, why the United States has sometimes been slow to adopt new protections for vulnerable groups—flesh of our flesh—or, sometimes, for people who simply were inconvenient and in the way.

179. See Delgado & Stefancic, *supra* note 138, at 1259-71.

180. *Id.*