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BOOK REVIEW

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

Richard Delgado*


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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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.\(^14\)


6. See John Rawls, A Theory of Justice 11-12 (1971) (proposing that we should act as though behind a “veil of ignorance”).


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.


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.\textsuperscript{12} 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.\textsuperscript{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 \textit{The Red Badge of Courage}\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{16} \textit{See id.} It shows, in short, how to get an “ought” (a normative statement) from an “is” (a
Cambridge Univ. Press 1993) (1903) (labeling this difficulty the “naturalistic fallacy”).

\textsuperscript{17} \textit{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. Trumpping wealth, social status, friendship, and other particularities, they inhere in all persons simply on account of our common humanity.\textsuperscript{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.\textsuperscript{19} Even then, slaves, criminals, the propertyless, women, religious minorities, and other large groups were excluded.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{24} Empathy—the perception that others are like oneself—required a shift in attitude toward the autonomy and wellbeing of others.\textsuperscript{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.\textsuperscript{26} They also included the development of bodily delicacy and the advent of disgust toward such things as spitting or sneezing.

\begin{itemize}
  \item \textsuperscript{18} \textit{HUNT, supra note 7, at 15-16.}
  \item \textsuperscript{19} \textit{Id. at 15-18, 21, 77-78.}
  \item \textsuperscript{20} \textit{Id. at 18, 28.}
  \item \textsuperscript{21} \textit{Id. at 17-18, 20-23.}
  \item \textsuperscript{22} \textit{Id. at 26.}
  \item \textsuperscript{23} \textit{Id. at 27-30.}
  \item \textsuperscript{24} \textit{Id. at 38.}
  \item \textsuperscript{25} \textit{Id. at 27-32.}
  \item \textsuperscript{26} Torture, of course, re-emerged in national consciousness with revelations of events at Abu Ghraib and the military prison in Guantanamo, Cuba. \textit{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.}
\end{itemize}
in public without covering one’s mouth. 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.

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.” 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).” Her focus is on “individual minds,” by which she means ordinary people, not only the great thinkers and writers of the time. It is also on the means by which human rights achieved three interlocking prerequisites—naturalness, equality (i.e., the same for everyone), and universality.

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).

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. 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. Hunt writes that Rousseau’s readers identified...
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.
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 cloddy 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.”

These three novels did not find universal favor. Some clerics accused them of undermining morality and the principles of social order. 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.” Serious supporters included Thomas Jefferson, who recommended them to a friend for their ability to imprint “both the principles and practice of virtue.”

Hunt explains that she focused on novels with “female heroines ... because their quest for autonomy could never fully succeed.” Readers learned that women, who at that time still lacked legal and social rights, aspired to autonomy, just as men did. 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. After gaining independence, the colonies also liberalized the practice, although a little later. 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.”

Another important chapter, “Bone of Their Bone: Abolishing Torture,” focuses on the abolition of harsh punishments, particularly in France. 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. 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
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. Calas died proclaiming his innocence.  

Voltaire brought attention to Calas’s mistreatment in a pamphlet and book in which he used the phrase, “human rights.” Voltaire’s outrage focused, however, not so much on torture itself but on the religious bigotry motivating the judges and police. 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. Enlightenment works, such as Beccaria’s Essays on Crimes and Punishment (1764), rejected judicial torture and even the death penalty. The public spectacles that accompanied executions came to seem tawdry.  

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.”

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. For Hunt, these changes signaled “the advent of the self-enclosed individual, whose boundaries” required respect in social interaction. Self-possession and autonomy brought increasing self-discipline, including the use of handkerchiefs for coughing and sneezing, and

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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. An increased interest in portraits, even by ordinary individuals, also accompanied these changes.

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." Subsequent chapters 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. In particular, Hunt believes that "the French revolution, more than any other event, revealed that human rights possessed an inner logic." 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. But the "bulldozer force of the revolutionary logic of rights" soon turned, in France at least, to the issue of free blacks and slaves. 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. An ex-slave, Toussaint L’Ouverture, invoked the language of rights. 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.

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

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," 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). Biology can at times draw pseudo-classifications among levels of humanity.

Although Hunt does mention that early socialists distrusted rights as egoistic, 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.

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 mechanisms and that torture continues to be carried out (not least of all by the United States). 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." 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."

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 Plan and the recent bailout of the Argentine economy), and Europe has at times acted abominably, we have more often brought up the rear with respect to human rights (e.g., the slaughtering of the Indians and the enslavement of Africans). 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.

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

92. Nazism and the Holocaust come to mind, as well as England’s role in the slave trade. See, e.g., ALEXANDER TSESIS, 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.
96. See Perea et al., supra note 93, at 262-84 (“Comparative Approaches,” which covers reparations to indigenous populations).
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


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].


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

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

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. Britain, by contrast, put in place Factory Acts to decrease child labor abuse in mills in 1833, 1844, and 1874.

A comparison of women's reproductive rights, punishment of sodomy and homosexuality, torture, detention of enemy combatants, and...
extraordinary rendition\textsuperscript{118} 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.\textsuperscript{119} Many American states adopted open-range laws that allowed farm animals to roam freely.\textsuperscript{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.\textsuperscript{121} By the same token, British common law diverged from the U.S. version regarding capture of animals.\textsuperscript{122} In England, the Crown exercised authority over wild animals and their habitat. Extensive laws limited hunting, fishing, and trapping. 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."\textsuperscript{123} The capture rule entailed, as well, relaxation of prohibitions against trespass and the right of landowners to exclude hunters.\textsuperscript{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,\textsuperscript{125} and limitations on the rule of no-duty-of-rescue, which

\begin{enumerate}
\item\textsuperscript{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.
\item\textsuperscript{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 Fogg & 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).
\item\textsuperscript{121} Dvorske et al., supra note 120.
\item\textsuperscript{122} See generally Blumm & Ritchie, supra note 120, at 686-90 (discussing British and American rules regarding hunting).
\item\textsuperscript{123} Id.
\item\textsuperscript{124} Id.
\item\textsuperscript{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. And when doctrines such as unconscionability, contracts of adhesion, and the duty to bargain in good faith finally entered U.S. law, they did so via European expatriate law professors like Friedrich Kessler.

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. 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. 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. 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).


128. Id.


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. 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. 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. 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. 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.

Some of the young nation’s most prominent fiction exemplified this dichotomy. D.W. Griffith’s film The Birth of a Nation, based on the novel...
The Clansman\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{143}

Even abolitionist writing, such as Harriet Beecher Stowe's Uncle Tom's Cabin,\textsuperscript{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.\textsuperscript{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.\textsuperscript{146} Most novels and short stories about war glorified it; the few that questioned it, such as Red Badge of Courage,\textsuperscript{147} nevertheless found it bittersweet.
Entire genres of writing, such as Indian captivity tales, 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.

James Fenimore Cooper, perhaps the most sympathetic of the Anglo storytellers about Indians, nevertheless depicted them as radically unlike white men and women. 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. Even Steven Crane, who on occasion wrote admiringly of the Indians, wrote disparagingly of Mexicans.

During much of the formative period of American literature, narratives were rife with stereotypes of noble whites and ignoble Indians, blacks, and Latinos. Filmmaker Marlon Riggs’ award-winning one-hour documentary,
*Ethnic Notions*, 154 depicted a parade of Sambos, mammys, 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

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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 COMMERC, 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. 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. 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.

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. A merchant who could...
place himself or herself in the shoes of customers or competitors might gain
a vital edge.\textsuperscript{162} He or she could make advantageous trades, aided by knowledge
of what the other party wanted.\textsuperscript{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.\textsuperscript{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.\textsuperscript{165}

England, by this time, was almost entirely mercantile.\textsuperscript{166} And, of course,
capitalism and the factory system could be cruel too.\textsuperscript{167} Yet, it was at least
required that shop owners or factory operators negotiate with their hired
hands.\textsuperscript{168} Parliament could, and did, pass child labor laws.\textsuperscript{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.\textsuperscript{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

\begin{enumerate}
\item[162.] See id.; see also Henderson, \textit{Legality and Empathy}, 85 Mich. L. Rev. 1574.
\item[163.] See generally Delgado, \textit{supra} note 44.
\item[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., \textit{Margaret Ellen Newell, From Dependency to Independence: Economic
Revolution in Colonial New England} (1998); \textit{Engines of Enterprise: An Economic History of
\item[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.
\item[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., \textit{Michael Ball & David Sunderland, An Economic
\item[167.] See, e.g., \textit{Upton Sinclair, The Jungle} (Clare Virginia Eby ed., W.W. Norton & Company
\item[168.] The development of unions, of course, accelerated this trend.
\item[169.] See \textit{Trattner, supra} note 112; Nardinelli, \textit{supra} note 113.
\item[170.] See generally \textit{Perea et al., supra} note 93, at 110-12 (discussing these clauses, which are still
in the Constitution).
\end{enumerate}
evolutionary advantage on its possessor, enabling him or her to succeed as a parent, friend, lover, trader, politician, or business person. 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, just as living in a modern, highly bureaucratized setting where human relationships are distant and impersonal can. 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. Unbridled capitalism probably can as well, since it places profits, especially those of the short-term variety, above all else.

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.
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. 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.

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. A second set of costs is more personal: We now look back with incredulity on previous generations who relocated Indians, enslaved blacks,


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

denied women the right to vote or divorce, burned witches, slaughtered enemy civilians, and tortured those who we believed were withholding information we wanted. 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?"

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.

180. Id.