Book Review

On the Uses and Disadvantages of History for Human Rights Law: Reading Samuel Moyn’s The Last Utopia: Human Rights in History

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In The Last Utopia: Human Rights in History, Samuel Moyn attempts to correct the recent historiography of human rights and international law. He criticizes historians who fail to understand that theories of contemporary human rights, which envision rights in a world not dominated by the sovereignty of nation-states, did not evolve out of historic discussions of political and human rights. Moyn argues that international lawyers and advocates who fail to understand that today’s idealistic definition of human rights arose unexpectedly in the 1970s lack the understanding and drive to properly advocate for today’s utopian vision of rights. In making this claim, he rejects what historians might call a “whig” approach to human rights history—a historical narrative that reveals a clear evolutionary path toward progress. This Book Review examines Moyn’s claims and discusses the origin of the term whig history. It then suggests that whig approaches to history, although possibly inaccurate, in fact have a persuasive power which advocates of human rights and international law could use to further Moyn’s idealistic aims.

In his “untimely meditation” on history, Friedrich Nietzsche reflected upon the extent to which too much history may be a bad thing. “We want to serve history,” he noted, “only to the extent that history serves life: for it is possible to value the study of history to such a degree that life becomes stunted and degenerate . . . .”1 Nietzsche’s modern man finds himself in a

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1. Friedrich Nietzsche, On the Uses and Disadvantages of History for Life, in Untimely
constant struggle with history. The philosopher explains that

[m]an . . . braces himself against the great and ever greater pressure of what is past: it pushes him down or bends him sideways, it encumbers his steps as a dark, invisible burden which he can sometimes appear to disown and which in traffic with his fellow men he is only too glad to disown, so as to excite their envy.²

An escape from the invisible shackles of history would bring man the happiness known only by animals grazing in the field, the ability to “sink down on the threshold of the moment and forget all the past,” and know a calm, blissful, and completely thoughtless form of happiness.³ Nietzsche challenges his reader to discover that “the unhistorical and the historical are necessary in equal measure for the health of an individual, of a people and of a culture.”⁴ If man allows his entire life to be shaped by history, he cannot truly live. If man lives in a perpetual state of forgetfulness, he is hardly man. Stated with typical Nietzschean lyricism:

It is true that only by imposing limits on this unhistorical element by thinking, reflecting, comparing, distinguishing, drawing conclusions, only through the appearance within that encompassing cloud of a vivid flash of light—thus only through the power of employing the past for the purposes of life and of again introducing into history that which has been done and is gone—did man become man: but with an excess of history man again ceases to exist, and without that envelope of the unhistorical he would never have begun or dared to begin.⁵

Properly pursued, the analysis of the past helps define the present. Pursued without limit, history strips the present of any value. The present must be understood as neither the inevitable result of the progress of history, nor as a self-standing moment, born as if from the head of Zeus and divorced from all that came before.

In The Last Utopia: Human Rights in History, historian Samuel Moyn does not cite Nietzsche.⁶ Nevertheless, Nietzsche’s concerns about balancing the historic life with the unhistoric life are highly relevant to Moyn’s subject. Moyn’s protagonist is not one historical figure. Instead, he writes about a particular vision of human rights, created at a particular historical moment,

2. Id. at 61.
3. Id. at 60 (emphasis removed).
4. Id. at 63.
5. Id. at 64.
with a particular set of character traits. Moyn's human rights are not merely a "familiar set of indispensible liberal freedoms" or "more expansive principles of social protection."? Instead, Moyn's human rights compose a:

recognizably utopian program: for the political standards it champions and the emotional passion it inspires, this program draws on the image of a place that has not yet been called into being. It promises to penetrate the impregnability of state borders, slowly replacing them with the authority of international law. It prides itself on offering victims the world over the possibility of a better life. It pledges to do so by working in alliance with states when possible, but naming and shaming them when they violate the most basic norms.8

Moyn's human rights are not the rights found in the French Declaration of Rights of Man and Citizen,9 nor in the 1948 Universal Declaration of Human Rights.10 Instead, his concern is with human rights that are not tied to any particular nation-state or vision of world affairs. His is the human rights of Amnesty International and other non-governmental organizations which monitor the failings of nation-states. Moyn's human rights movement, whose origins he traces to the 1970s, is not the outgrowth of centuries of searching for human rights, but is instead a fundamentally new and idealistic vision of how to best preserve human dignity—born out of the "collapse of other, prior utopias, both state-based and internationalist."11 Human rights entered the vernacular as part of an atmosphere in which "an internationalism revolving around individual rights surged . . . as a pure alternative in an age of ideological betrayal and political collapse."12 Human rights were the utopian response to "belief systems that promised a free way of life, but led into bloody morass, or offered emancipation from empire and capital, but [which] suddenly came to seem like dark tragedies rather than bright hopes."13 After the failure of anticolonialism, communism, and international socialism to protect human rights, contemporary human rights arose to take their place.

In The Last Utopia, Moyn seeks to remedy what he perceives as a flaw in the current historiography of the modern human rights movement. He explains,

[C]ontemporary historians have adopted a celebratory
attitude toward the emergence and progress of human rights, providing recent enthusiasms with uplifting backstories, and differing primarily about whether to locate the true breakthrough with the Greeks or the Jews, medieval Christians or early modern philosophers, democratic revolutionaries or abolitionist heroes, American internationalists or antiracist visionaries.14

Although Moyn’s utopian movement is merely four decades old, he is concerned that contemporary historians fail to recognize that the contemporary human rights movement was not the inevitable result of progress in Western history. They:

approach their subject, in spite of its novelty, the way church historians once approached theirs. They regard the basic cause—much as the church historian treated the Christian religion—as a saving truth, discovered rather than made in history. If a historical phenomenon can be made to seem like an anticipation of human rights, it is interpreted as leading to them in much the way church history famously treated Judaism for so long, as a proto-Christian movement simply confused about its true destiny.15

These contemporary historians, according to Moyn, pick and choose among references to political rights and human rights throughout history, cobbling together a narrative in which today’s human rights were the inevitable and undeniably just conclusion of two millennia of struggle.16

In retelling the history of human rights, Moyn explains that “[t]o give up church history is not to celebrate a black mass instead.”17 He writes with genuine interest and respect for the contemporary human rights movement, which he considers “the most inspiring mass utopianism Westerners have had before them in recent decades.”18 Only when the history of contemporary human rights has been separated from the laudatory history Moyn condemns can historians understand human rights’ ‘prospects today

14. Id. at 5.
15. Id. at 5-6.
16. The reader of Moyn’s book benefits from a thoughtful and thorough bibliographic essay, which he uses to make “especially vivid the mismatch between scrutiny of earlier eras in the quixotic search for deep roots, on the other hand, and of recent but more relevant periods about which too little is still known, on the other.” Id. at 311. This Book Review does not attempt to discern the validity of Moyn’s claims, so much as to explore the implications of those claims for lawyers. Accordingly, I leave quarrels with Moyn’s substantive analysis of the history of human rights to historians of that subject.
17. Id. at 8.
18. Id. at 9.
and in the future.”19 By explaining the true origins of human rights, Moyn hopes to “understand more honestly how and when human rights took shape as a widespread and powerful set of aspirations for a better and more humane world” that “have done far more to transform the terrain of idealism than they have the world itself.”20

Moyn’s book has received attention from students of international law. At a recent conference at Duke Law School, Judge José A. Cabranes of the United States Court of Appeals for the Second Circuit favorably cited The Last Utopia.21 In addition to offering personal reflections on the relationship between international law and human rights, based on his experience as a lawyer and federal judge, Cabranes described Moyn’s book as a refutation of a “whig” version of the history of human rights. The term “whig” was famously used by the Cambridge historian Herbert Butterfield in 1931 to describe the sort of laudatory history practiced by English constitutional historians—history which, like the “church” history described by Moyn, lionized particular historical moments and figures in order to prove the existence of a constant march toward progress and liberty.22 Cabranes praised Moyn for telling a more honest history of the contemporary human rights movement, and suggested that such honest appraisal can help scholars of international law better understand the relationship between law and human rights.

In addition to appealing to scholars, Moyn’s book offers great value to practicing international lawyers curious about the history of their field. It provides a careful survey of great figures in the field, and the frequently fractured relationship between contemporary human rights and the long history of international law. Moyn’s rejection of a whig history helps elucidate the tensions between law and human rights and provides an important scholarly service to students of the history of human rights and international law. Does he, however, offer a similar service to advocates of the movement he so fervently honors?

Part I of this Book Review explores the relationship between law and human rights as described by Moyn, highlighting the substantive claims he makes about the traditionally fractured relationship between international law and human rights. It also explores Moyn’s argument that international lawyers, although currently dedicated to furthering human rights, may not be well-equipped to further the goals of this utopian vision. Part II explores the concept of whig approaches to history, and suggests that whig history, although rightly a source of concern for historians, provides a valuable service for lawyers practicing in the field of human rights. Whig narratives

19. Id.
20. Id.
22. See Herbert Butterfield, The Whig Interpretation of History (1931). In this Book Review, the use of whig written in lowercase letters refers to the type of history described by Butterfield. The use of Whig with a capital “W” refers to the English political party and the specific historical narrative criticized by Butterfield.
contain a persuasive power necessary to promote the longevity and success of Moyn’s utopia.

I.

The temptation to write the sort of history that Moyn criticizes is understandable. The language of rights—even human rights—did not originate in the 1970s. Instead, from ancient times political theorists discussed the rights of man, attempted to define the content of human dignity, and asked what political system could best protect citizens and non-citizens alike. Rights were discussed by stoic philosophers, medieval natural law theorists, and revolutionaries in America and France.23 Such rights, though, were not “sources of appeal that transcended state and nation . . . [but instead] the rights asserted in early modern political revolutions and championed thereafter were central to the construction of state and nation, and led nowhere beyond until very recently.”24 For Moyn, human rights need to provide more than rights within the framework of a state system. Citing Hannah Arendt in her Origins of Totalitarianism, Moyn questions the value of human rights which are not available to all humans—rights only available to those who have membership in a state.25 “[W]ithout communal inclusion,” Moyn explains, “the assertion of rights by itself made no sense. . .there is a clear and fundamental difference between earlier rights, all predicated on belonging to a political community, and eventual ‘human rights.’”26 Moyn establishes a very specific definition for human rights—and sets a rather high bar for the sort of idealism that must accompany any discussion of such rights. Whether declarations of rights that were used for revolutionary purposes, or the active work of civil libertarians, the goal of most who historically strove for rights was to increase the rights of men within the context of the nation-state system. Indeed, “the main consequence of the availability of rights in domestic politics was not to point outside the state but to enable various constituencies within it to claim their authority.”27 Throughout Moyn’s history, attempts to find human rights, all of which are grounded in the creation of rights contingent on state sovereignty, failed to achieve the idealism he sees in the rights

23. Id. at 12.
24. Id.
25. Id.
26. Id. In recent years, political theorists have increasingly dedicated themselves to studying forms of rights which either transcend borders or which acknowledge the rights of those within nations who have little voice. See, e.g., Seyla Benhabib, The Rights of Others: Aliens, Residents, and Citizens 1-7 (2004) (arguing for a cosmopolitan and thus more inclusive approach to political membership than provided by the Westphalian state system); Will Kymlicka, Multicultural Citizenship 4 (1995) (noting that “[it has become increasingly clear that minority rights cannot be subsumed under the category of human rights. Traditional human rights standards are simply unable to resolve some of the most important and controversial questions relating to cultural minorities . . .”).
27. Moyn, supra note 6, at 32.
language of the 1970s.

The two modern moments in which the language of human rights arose, but failed to reach their full potential as a form of utopia, came during and after the Second World War. The first such moment took place during and immediately following the war, when the United States and its allies used the language of human rights to bolster a vision of postwar politics. At times that vision provided for the self-determination of former colonies, for the rise of various forms of social democracy, and for freedoms unavailable in the Soviet Union. Although the use of the phrase “human rights” during that period seems appealing for historians seeking to write the long history of human rights, the use of the term was not half as expansive as Moyn would have liked. “Human rights,” Moyn explains, “turned out to be a substitute for what many around the world wanted, a collective entitlement to self-determination.”

Unsurprisingly, for advocates of anticolonialism, the other great movement in which rights language was used, self-determination was the primary goal of human rights talk. Claims of postcolonial sovereignty by anticolonialists were claims of state sovereignty, not of any sort of new, post-state rights. Much of The Last Utopia tells the story of approaches to human rights which are better described as political rights—attempts to provide due process, dignity, and opportunity to men and women living within established or, in the post-colonial world, fledgling states. Before the 1970s, mention of human rights may have been a rhetorical flourish, making more palatable the political machinations of the world powers. In the 1970s, however, something changed. Moyn’s fundamental concern is why human rights suddenly became more than mere political rhetoric:

Human rights emerged as a minimalist, hardy utopia that could survive in a harsh climate. These were years of “nightmare” and “nervous breakdown,” notably after the oil shock and the global economic downturn of 1973. But the winter of discontent that swept the West also resulted in the mistrust of more maximal plans for transformation—especially revolutions but also programmatic endeavors of any kind. The crucial question is why human rights, which could not have been the focus of global idealism before the 1940s and failed to infiltrate it in that decade, or in the anticolonial struggles or youth activism that followed in the 1950s and 1960s, did so in the 1970s. For the first time in large numbers, people started to use the language of human rights to express and act on their hopes for a better world. But they did not do so in a void. Human rights were discovered only in contest with and through comparison to

28. Id. at 44-45.
29. Id. at 45.
30. Id. at 85.
other schemes. Human rights were a realism that demanded the possible. If so, they were only intelligible in the broad aftermath of other, more grandiose dreams that they both drew on and displaced.31

Human rights, then, were not wholly the stuff of dreams. They were a serious response to the failure of previous utopian schemes. Such schemes included attempts to protect human rights through the work of the early United Nations and assorted non-governmental organizations which advocated for rights within assorted categories such as religion and gender, and on the local, national, and international level.32 Moyn highlights well-known organizations such as the American Civil Liberties Union and the International League of the Rights of Man. According to Moyn, such early attempts failed to garner sufficient attention or support to achieve a serious impact on human rights, or to gain the support of national governments.33

For Moyn, the development of human rights in the 1970s was less the result of planning than the result of a series of coincidences which allowed a new approach to rights to flourish. The rise of dissidence in the post-Stalinist Eastern Bloc coincided with the growing popularity of Amnesty International as an organization dedicated to “saving the world one individual at a time”34 through work combining information gathering on human rights abuses around the world with motivating individual citizens actively to support the spread of human rights.35 In the meantime, any belief that human rights could be protected by “socialism with a human face” had died, according to Moyn, following the assassination of Chilean president Salvador Allende and the rise of various dictatorships throughout Latin America.36 The simultaneous decline of utopian visions such as socialism and the rise of new approaches such as those practiced by Amnesty International was aided as well by the “canonization of human rights” in the Helsinki process of the Conference for Security and Cooperation in Europe and the use, by Jimmy Carter in 1977, of human rights as part of America’s political rhetoric.37 Ultimately, Moyn sees the

31. Id. at 121.
32. Moyn discusses such work throughout Chapter 4 of The Last Utopia. See id. ch. 4.
33. See id. at 125-26.
34. Id. at 132 (citing personal communication with Arthur Danto, a philosopher at Columbia University and an early founder of Amnesty International USA).
35. Id. at 146-47.
36. Id. at 140.
37. See id. at 149. Because Moyn focuses on intellectual history throughout his work, his discussion of major events, such as the Helsinki Final Act, and the rise of Jimmy Carter are presented as background to the intellectual struggles facing theorists of human rights. His analysis would probably benefit from a more detailed presentation of other political and diplomatic debates that provide an important context in which these intellectual battles took place. As explained by Michael Cotey Morgan of the University of Toronto:

How . . . did a new window of opportunity for international human rights open in the late 1960s and 1970s? Why did human rights become the common international language of the good? A confluence of factors explains this turn: European decolonization and the American civil rights
1970s as a transformative moment in which transnational human rights made a historic difference “first in their competitive survival as a motivating ideology in the confusing tumult of 1970s social movements”—as a new utopian vision born in the wake of old rhetoric.

Such utopianism revealed itself not merely in the workings of the Carter Administration and Amnesty International, but became a central aspect of the study of international law. In a chapter dedicated to the relationship between international law and human rights, Moyn opens with a quotation from Yale law professor Paul Kahn. “At the start of the new century,” Kahn writes, “international law, at least for many theorists and practitioners, has been reconceived. No longer the law of nations, it is the law of human rights.” Such a claim for Moyn is important not merely because of its implication for international law and international affairs, but because “[n]either drawing from the humane spirit of founders centuries ago nor the recoil to World War II’s atrocities, human rights for international lawyers too are rooted in a startling and recent departure.”

International lawyers seem to be unaware of how recently human rights became their central concern. That lack of awareness makes international lawyers ill-equipped to handle their young, utopian responsibilities.

Lawyers and legal associations appear throughout Moyn’s book. In many cases, lawyers are the guiding forces behind some of the major formulations of human rights during the post-war era. During the Second World War, lawyers helped suggest a language for human rights, largely in response to war promises made by Franklin Roosevelt and his Four Freedoms. Both the American Law Institute and international lawyer Hersch Lauterpacht proposed the drafting of an international bill of rights in the 1940s. The passage of the Universal Declaration of Human Rights in 1948 “theoretically promised a subsequent move to legalization,” but was movement removed the strains that had made Western statesmen reluctant to discuss human rights. A new understanding of the recent past raised public awareness of the horrors of the Second World War. The explosion of international civil society yielded new nongovernmental organizations . . . devoted to promoting human rights. Technological progress made communications and travel faster and cheaper, with the result that news of humanitarian crises traveled more quickly than ever before and information moved more freely between East and West. Finally, in the Soviet bloc, rising dissent after the death of Joseph Stalin challenged the policies that were necessary to maintain domestic stability.


38. MOYN, supra note 6, at 176 (quoting PAUL W. KAHN, SACRED VIOLENCE: TORTURE, TERROR AND SOVEREIGNTY 49 (2008)).
39. Id. at 52.
40. Id. at 52.
stymied by the politics of the United Nations and the Cold War.\footnote{42} In other cases, lawyers stood athwart a growing internationalism. Moyn mentions Frank Holman who, as president of the American Bar Association, famously attacked America’s growing internationalism in an effort to limit the power of treaties and executive agreements.\footnote{43} Holman campaigned for the Bricker amendment which, supported by Senator John Bricker of Ohio, would have forbidden Congress from entering any treaty that conflicted with the Constitution.\footnote{44}

Lawyers are also prominent players in Moyn’s discussion of how former colonies established legal systems and defined the rights of citizens both before and after gaining independence. Human rights activists took advantage of British and French law, which provided at least nominal legal rights to citizens, given the “hierarchical distinction between the law governing metropole and the law governing the colony.”\footnote{45} As independence took hold in former British colonies, legal thinkers such as A.V. Dicey and Ivor Jennings argued about the necessity of bills of rights. (Both, Moyn notes, seemed to believe that a “properly civilized polity” did not need a bill of rights.\footnote{46} Jennings conceded the utility of such a document only because one could not “‘guarantee that colonies . . . will necessarily acquire the sort of intuition which enables us to react almost by instinct against interference with fundamental liberties.’”\footnote{47})

Nevertheless, the work of these international lawyers was not akin to

\footnote{42. MOYN, supra note 6, at 69-70.}
\footnote{43. On the occasion of awarding the American Bar Association Medal to Holman in 1953, the chairman of the ABA’s House of Delegates stated:}

\begin{quote}
Distinguished and patriotic Americans whose stature and influence would intimidate a less courageous man, have differed with [Holman] on the necessity for the protective measures he has advocated, but their opposition has not caused him to deviate from his firm conviction that a constitutional amendment is necessary to prevent treaties and other international agreements from attaining ascendancy over our domestic law.
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44. During arguably the most contentious debate over limiting treaty making powers, Senate Joint Resolution 102 President Dwight D. Eisenhower noted that “Senator Bricker wants to amend the Constitution . . . By and large the logic of the case is all against Senator Bricker, but he has gotten almost psychopathic on the subject, and a great many lawyers have taken his side of the case. This fact does not impress me very much. Lawyers have been trained to take either side of any case and make the most intelligent and impassioned defense of their adopted viewpoint.” DWIGHT D. EISENHOWER, THE EISENHOWER DIARIES 233 (Robert H. Ferrell, ed., 1981). See Nelson Richards, Comment, The Bricker Amendment and Congress’s Failure to Check the Inflation of the Executive’s Foreign Affairs Powers, 1951-1954, 94 CALIF. L. REV. 175 (2006); Glendon Austin Schubert, Jr., Politics and the Constitution: The Bricker Amendment During 1953, 16 J. POL. 257 (May 1954).
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45. MOYN, supra note 6, at 87.
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46. Id. at 112.
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47. Id. (quoting IVOR JENNINGS, THE APPROACH TO SELF-GOVERNMENT 103 (1956)).
\end{quote}
the utopian advocacy of later human rights proponents. The lawyers who debated and drafted visions of human rights between the Second World War and the 1970s were the heirs to an older tradition of international law, more firmly grounded in the work of Hugo Grotius than Jürgen Habermas. "In organizing themselves in the mid-nineteenth century as a new profession," Moyn explains, "international lawyers adopted the goal of mastering power through rules."48 The power which these lawyers sought to control was the traditional power of world affairs—power wielded by the state, the basic unit of politics since the signing of the Treaty of Westphalia in 1648.49 In a world in which the sovereign heads of state seemed to have limitless power, checked only by the might of other sovereigns, international lawyers sought to temper that control through the institution of clear rules which would bind the international state system. "Formalizing actual interstate relations mattered," according to Moyn, "because formalization itself—the construction of rules supervised by a benevolent and progressive caste of enlightened jurists—would bring more humanity to world affairs."50 They did not hope to upend the international state system through new laws. Instead, they believed that "international rules achieved through treaty and custom would inevitably lead sovereigns away from fruitless contention and toward harmonious integration."51 Such lawyers worshipped the state system in such a way that after the Second World War, they found themselves attacked from two sides. At once, they were accused of lacking authority to improve the world they inherited, while at the same time, their work seemed to "foreclose other, and better, moral dreams" of how the world could work.52

How international lawyers moved from worship of the international state system to herald a new era in human rights is the topic of the most engaging chapter in *The Last Utopia*. Moyn tells the story of lawyers who feared that "human rights would not be more than paper promises in the post war era," and who recognized that during the anticolonialism period human rights would at most be aligned with the idea of self-determination.53 Following the failure of 1948 and the anticolonialism period to put forward a new approach to human rights, international lawyers "reevaluate[d]" their traditional stance.54 The nature of this reevaluation seems a bit opaque—international lawyers for Moyn seem to have adopted the goal of furthering human rights just as the new language of rights gained increased credibility in other circles. Their work was less heroic than reactionary—responding to the suddenness of human rights as

48. *Id.* at 177.
49. The founding of the modern nation-state is commonly traced to the signing of the Treaty of Westphalia, which brought an end to the Thirty Years' War. See Charles Hill, *Grand Strategies: Literature, Statecraft, and World Order* 85-86 (2010).
50. *Moyn*, supra note 6, at 177.
51. *Id.*
52. *Id.* at 178.
53. *Id.* at 178-79.
54. *Id.* at 179.
they appeared in the 1970s in different social movements.

After the war, as various figures considered how to restore the relevance of rules and laws to a world that seemed destined to play out the chaos of war again and again, lawyers sought to shape international law as a vibrant resource, both to calm the politics of the postwar world, and to ensure that war would not return. Nevertheless, Moyn considers lawyers during that era far less creative than lawyers during the Second World War itself. "If there was any window in the eyes of international lawyers for the turn to the legalization of individual rights," he explains, "it was in wartime, not later. Thereafter, it was obvious that grand principles were being marginalized by the UN Charter, not advanced by it."55

Moyn laments the lack of creativity by international lawyers in the postwar world. Such a lack of creativity seems to have been caused in part by the fact that documents such as the Universal Declaration of Human Rights were, according to Lauterpacht, dangerous because they were ineffective.56 For others, such as the émigré lawyer Josef Kunz, the inability to be creative stemmed from the need for international lawyers not to forsake the rigor of their field for a more idealistic approach to law. Moyn quotes Kunz as saying, "I want to tell you how deeply I feel about human rights . . . On the other hand, we must approach the task as scholars, i.e., objectively and critically. Beautiful words alone cannot solve difficult problems."57 In reference to Lauterpacht, Kunz continued by explaining that "[t]he proposal of some to make individuals direct subjects of international law and to grant them a right of action in a special international court against their own state, has no chance to be realized, for theoretical as well as practical reasons."58

Moyn is skeptical of claims, even by figures in the field of international law, that international law adopted new understandings of human rights in a gradual way. He dismisses the view of Theodor Meron that:

Human rights are undergoing a stage of continuing evolution [such that] [t]hrough a process of accretion . . . elements of state practice and opinio juris form new customary norms of human rights. This continuing process, in which opinio juris appears to have greater weight than state practice, is more interesting than [a] static picture of human rights . . . More rights will be added in the course of time.59

Claims of gradual evolution, however, fail to explain for Moyn how

55. Id. at 182.
56. Id. at 184.
57. Id. at 186 (citing Josef Kunz, Present-Day Efforts at International Protection of Human Rights, 47 PROCEEDINGS OF THE AMERICAN SOCIETY FOR INTERNATIONAL LAW 110, 117 (1951)).
58. Id. at 186-87.
59. Id. at 207 (citing THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 99 (1989)).
human rights became the central concern of international lawyers. The only evolution Moyn concedes is "a kind of catastrophe model, in which change happens in nonlinear moments of unforeseeable mutation: a model that does not fit well with the usual theories of customary progress in the law." Theoretically, the state system remained sovereign; practically, states were unwilling to cede their authority. The supremacy of the state system was only further supported by Cold War tensions, through the struggle between free and communist states.

Moyn ultimately does find heroes in the story of international lawyers who sought to make human rights relevant for international law. Egon Schwelb, a Prague lawyer who would serve the UN Human Rights Division before retiring to Yale Law School, sought in the 1960s to revitalize interest in the Universal Declaration of Human Rights, and revive Lauterpacht's argument that a legal obligation to protect the rights of individuals was not merely a pipe dream. The career of Louis Henkin, described at his death as "the father of human rights law," is used by Moyn as a "proxy" for understanding how human rights became central to international law. Moyn describes Henkin's move from being focused on human rights as a part of the American Jewish Committee in the 1960s to his later work teaching international human rights as a professor at Columbia Law School. Henkin developed an understanding of human rights which involved both the argument that human rights were well-grounded in a nation such as the United States and in the protection of domestic political and civil rights, and in a stronger attack on the philosophical concept of state sovereignty. Henkin "did not register the significance of short-term international sources of ideological change—notably shifting brands of utopianism—that had allowed for the human rights breakthrough of which Henkin was, far more than has been recognized, the beneficiary rather than the cause." That is, Moyn's international lawyers seem unaware of the intellectual roots of the young links between international law and human rights. They, like so many of Moyn's subjects, found themselves in a new world in the 1970s in which the intellectual trajectory of human rights shifted dramatically from being focused on the state toward being focused on the individual. The cause of such a change, though, remains elusive beyond a general sense that a new utopian vision was needed.

Even though international lawyers have adopted the human rights goal as their own, Moyn expresses concern about whether they are the best torchbearers for the utopian movement. "Thanks to the new plausibility it gave abstract norms, the human rights movement made international law a privileged instrument of moral improvement and, indeed, provided it

60. Id. at 207.
61. Id. at 199.
63. Moyn, supra note 6, at 201.
64. Id. at 206.
enormous appeal as a framework for idealistic pursuits." Nevertheless, although international law provided a powerful home in the imaginations of advocates of human rights, international law itself, because of its own "circuitous path to human rights," relied upon the energy of social movements to discover human rights. Accordingly, "the debt of international lawyers to a very specific social movement meant that they would not simply inherit a fund of powerful energy but also face serious constraints in advancing an idealistic agenda in later years." As the inheritors of a utopian vision that they did not have a strong hand in creating, international lawyers seem to be too tied to the customs and practices of their field—if not to the questions that drove their field for centuries. Although the "moral imagination" honors international lawyers for their potential, Moyn's international lawyers, unaware of the power of coincidence and contingency that allowed them to take advantage of social movements in the 1970s, lack the drive to maintain and support modern human rights.

Moyn's chapter on international law immediately precedes the epilogue to the book. In the epilogue, he reiterates that human rights became international based on a combination of the "crisis of the nation-state" as well as the "collapse of alternative internationalisms," whether anticolonialist, communist, or socialist. After a brief honeymoon period, in which the language of international human rights peppered the speeches of Jimmy Carter, "partisans of the human rights idea were forced to confront the need for political agenda and programmatic vision—the very things whose absence allowed for their utopia to emerge so spectacularly and discontinuously in the first place." As such, although human rights began in the void left by failed utopias as a new, purely idealistic approach to the world, in order to maintain their relevance human rights were forced to become relevant to the state system.

Moyn refers to modern human rights as containing what he calls "antipolitics." The term seems to imply that these rights are untainted by the realism endemic to the Westphalian nation-state system. Modern human rights are wholly exterior to the concept of crisp borders, and are part of a movement that advocated rights regardless of state membership or the demands of the nation-state system. In order to survive however—to offer the world a program as opposed to merely providing lofty ideals—human rights advocates have found themselves working within the nation-state system to defend these rights. Moyn laments this political turn as a means by which human rights, which began as a way of providing "power to the powerless" became a way to provide "power to the powerful." Instead of displacing politics, human rights have become another tool in the

65. Id. at 211.
66. Id.
67. Id. at 212-13.
68. Id. at 213.
69. Id.
70. Id. at 227.
toolbox available to states in enacting their very political goals. While the rhetoric of human rights remains strong and utopian, in their integration with politics they have lost their vibrancy. By choosing to remind his readers of the youth of international human rights, instead of supporting a whig theory in which international human rights were an inevitable development, Moyn hopes to warn human rights advocates of the fragility of their cause and the deeply contingent circumstances under which that cause arose.

A harsh critic of whig history, Moyn writes with the passion of a true believer. He is willing to sacrifice a long narrative, in which modern human rights advocates are the intellectual heirs to an ancient tradition of rights-talk, for the sake of both speaking truth to the history of a movement he respects, and of signalling to advocates that modern human rights may have fallen from their utopian heights. International lawyers, trapped between the Talmudic and state-based history of their field and the thorough idealism of international human rights, provide for Moyn a clear example of how the ends of human rights may be sacrificed based on the means by which they are achieved. Still, one has to wonder whether severing modern human rights from historical human rights will in fact save the utopia Moyn honors. That is, could the adoption of a whiggish understanding of human rights actually help advocates of human rights—whether activists or lawyers—better serve their cause? Stated differently, even if whig history is not good history, could it support good advocacy?

II.

Herbert Butterfield’s Whig Interpretation of History offered a harsh criticism of historians who sought to engage in the battles waged by their subjects. Such historians did so by “taking sides” between figures in history such as Philip II of Spain and Elizabeth I of England, or politicians such as William Pitt the Younger and Charles James Fox. Butterfield rejected the idea that the historian could act as “the avenger...standing as a judge between the parties and rivalries and causes of bygone generations.”71 In order to play the role of avenger, the British historian he criticizes “busies himself with dividing the world into the friends and enemies of progress.”72 Such a narrative, which presents a chain of events contributing to the rise of whatever the historian likes—a political idea, a historical figure, or an event—is certainly engaging and puts the historian in a powerful role. He can shape the past to suit his present purposes. “And this immediate juxtaposition of past and present, though it makes everything easy and makes some inferences perilously obvious, is bound to lead to an oversimplification of the relations between events and a complete misapprehension of the relations between past and present.”73 What the

71. Butterfield, supra note 22, at 1.
72. Id. at 5.
73. Id. at 14.
whig historian gains in force of argument and rhetorical flourish, he loses in accuracy.

Nevertheless, although whig interpretations may be anathema to practicing historians, they provide compelling ways of understanding history—particularly for those who, unlike historians, may take the role of an active participant, rather than a distant critic, of politics. The inaccurate narrative of a whig historian may provide justification for political actors who seek to further strategic goals—a particular policy can be defended persuasively if those goals are viewed as the inevitable result of historical development. Given Moyn's concern that international lawyers may lack the energy and means to further the approach to human rights presented to them by the 1970s, it is worth asking whether his antidote to the problem—revealing that contemporary human rights are not the result of a whig narrative—may do more harm than good to human rights advocacy. Without denying Moyn's responsibility as a historian to correct inaccuracies in a whig narrative, the question still remains: could a little whig history help international lawyers advocate for human rights by transforming a revolutionary movement into a movement compatible with the history of human rights?

In contrast to whig historians, Butterfield presented the general historian, "conscious of the fact that he is trying to understand the past for the sake of the past, and though it is true that he can never entirely abstract himself from his own age, it is nonetheless certain that this consciousness of his purpose is a very different one from that of a whig historian." Unlike the whig historian who "tells himself that he is studying the past for the sake of the present," the general historian merely narrates a given historical moment by putting himself in the context of that moment. Any sense of revulsion or joy over an idea or historical figure is suppressed by the historian and replaced with the most innocent and basic form of curiosity, a desire to understand the past. With such innocence, and avoidance of judgment, a historian need not overstate the achievements of historical figures, or whitewash their flaws.

A certain amount of whitewashing will take place for the general historian, of course. Butterfield notes that the general historian "is always forgiving sins by the mere fact that he is finding out why they happened." In other words, historians will choose subjects that strike their fancy by delving into their lives and what they uncover will help redeem or vilify them in the eyes of readers. The purpose of the general historian, though, is to maintain as much neutrality as possible. He accepts that the present cannot be explained with one explanation and that the "process of mutation which produced the present is as long and complicated as all the most lengthy and complicated works of historical research placed end to end, and knit together and regarded as one whole." The general historian

74. Id. at 16.
75. Id. at 18.
76. Id. at 22.
accepts the extraordinary complication of the past, and does not attempt to simplify it.

"The fallacy of the whig historian," Butterfield explains, "lies in the way in which he takes [a] short cut through this complexity." 77 Any historian needs to abridge, and Butterfield concedes that point. Historians have to select among sources and historical moments, and thus always simplify the past. 78 The distinction, however, between the whig historian and the general historian lies in their intent. Where the former writes to exonerate a particular viewpoint, and seems willing to pick and choose to ensure that his version of the story comes out on top, the latter's interest may shape his choice of subject such that he somehow allows the past to speak for itself—avoiding the addition of a particular narrative of progress or decline.

It is easy to pillory whig historians for distorting the past. 79 Nevertheless, some have recognized that Butterfield's complaint was perhaps overstated. Indeed, in Nobody's Perfect: A New Whig Interpretation of History, Annabel Patterson suggests that the Whig interpretation of history has much to offer. 80 Patterson's work focuses on the particular subject with which Butterfield took issue—the effect of English Whigs on the development of liberal thought. In reviving Whig history, Patterson begins with the reasonable assumption that "every historical period contains its own mixture of actors who are moved primarily by principle, those who are moved primarily by self-interest, and some highly interesting

77. Id.
78. If historians did not reveal some selection bias they might seem as mawkish as Edmund Causabon, the tedious and pedantic scholar in George Eliot's Middlemarch, whose attempt to write a comprehensive Key to All Mythologies shows the excesses of overly disinterested and encyclopedic scholarship. See GEORGE ELIOT, MIDDLEMARCH (1869).
79. Famously, E.H. Carr once noted with regard to Butterfield's Whig Interpretation of History that "though it denounced the Whig interpretation over some 130 pages, it did not, so far as I can discover without the help of an index, name a single Whig except [Charles James] Fox, who was no historian, or a single historian save Acton, who was no Whig." E.H. CARR, WHAT IS HISTORY? 50 (1962). Another scholar notes that "Carr is not quite correct. [Henry] Hallam is mentioned on page 4, and Hallam was a historian and a Whig, though he was both just barely. Two other names appear on page 96 of Butterfield's book. But these exceptions neither vitiate Carr's criticism, nor mitigate Butterfield's offense." DAVID HACKETT FISCHER, HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT 281 (1970). It should be noted that Butterfield himself repudiated his strong views on the inaccuracies of whig English constitutional history in 1944 when he published The Englishman and His History, in which he dramatically noted that ". . . it will always be true that in one important aspect—in yesterday's meaning of the term at least—we are all of us exultant and unrepentant whigs. Those who, perhaps in the misguided austerity of youth, wish to drive out that whig interpretation. . . . are sweeping a room which humanly speaking cannot long remain empty." HERBERT BUTTERFIELD, THE ENGLISHMAN AND HIS HISTORY 3-4 (1944). That such a work was written during a war between the English speaking world and Nazism is no coincidence.
80. See ANNABEL PATTERSON, NOBODY'S PERFECT: A NEW WHIG INTERPRETATION OF HISTORY 1 (2002) ("Rather than merely recuperate liberalism through its founding fathers, an act of refurbishing the public memory, I hereby offer a challenge to one of the reigning conventions of the modern Anglo-American academy. I propose to reinstate a "whig interpretation of history," in defiance of the historiographical orthodoxy that declares such an interpretation archaic and procedurally mistaken.").
combinations of both." She remarks, against historiographical trends, that it is worth noting that in the rise of English liberalism, many more of the people dedicated to particular principles of English liberalism tended to call themselves Whigs rather than Tories. Even if such figures were not always Whigs, and not even always dedicated to particular principles of liberalism (hence the name of her book—Nobody’s Perfect), “imperfect agents of principle do not render principle itself nonexistent or nonviable. On the contrary, their behaviour tends to clarify principle’s longevity and rigour.” The Whig history of English constitutional history may not be a perfect narrative—and it may not always chronicle clear and unimpeded progress—but it can be accurate and have value all the same.

Patterson defends Whig history itself, but it seems that her defense of Whig history can also help defend whiggish approaches to history more generally. In her defense, she points out that even if the Whig narrative is not perfect, it may still be mostly correct. Patterson saves Whig history by pointing out that there really were Whigs who helped develop English liberalism. She restores to them credit for the rise of liberalism—credit which Butterfield would take away. That lesson, that an imperfect story of progress may have value, is relevant to Moyn’s subject. Historians who write the sort of history Moyn criticizes accept various definitions of human rights as part of one larger narrative. Descriptions of human rights throughout history are different than the definition that arose in the 1970s, but those versions of human rights were, at the very least, attempts at determining the rights of man.

Moyn seems to reject accommodating any whig history. It is undeniable that Moyn has a profound respect for international human rights. He presents the contemporary movement as an inspiring response to a world in which various utopias have failed, and which can provide protection to men and women who are not able to find refuge in the Westphalian nation-state. The Last Utopia is something of a call-to-arms for human rights activists, demanding that they recognize just how fragile and unique the post-1970s approach to human rights is. The stability and success of the movement, he suggests, depends on advocates and scholars understanding that today’s human rights are not the human rights of the past. They should speak a new utopian language, one which cannot survive in a world of state sovereignty. A whig approach to human rights, in which today’s rights grow from a history that reaches back to ancient stoic philosophy, will distract them from the powerful and deeply contingent form of human rights pursued today.

Nevertheless, the story told by Moyn, of lawyers, politicians, and activists whose understanding of human rights is incomplete, seems to beg for the sort of analysis provided by Patterson. A whig approach to human rights is the story of different forms of human rights—none of which really match the rights discussed by scholars today. While such a story is

81. Id. at 17.
82. Id. at 19.
imperfect, perhaps Patterson’s attempt to salvage Whig history may salvage this history as well. Did human rights after the Second World War provide more rhetorical flair than action? Probably, but nobody’s perfect. Did the language of human rights blossom into its post-state utopian form during the era of anticolonialism? No, but nobody’s perfect. Did international lawyers ever truly come to grips with the reason why human rights became a central part of their field? Perhaps not, but again, nobody’s perfect.

A whig understanding of human rights would maintain that earlier approaches to human rights were part of the rise of international human rights in the 1970s. A whig history need not deny that the political, diplomatic, and intellectual influences in the 1970s created a different form of rights than earlier attempts. Nevertheless, a whig history would not define modern human rights as such an alienated and rarified concept. It may suggest that modern human rights were related to, and in part stimulated by, discussion of human rights that had taken off following the Second World War. Moyn acknowledges that most of his cast of characters did not understand how the intellectual fervor of the 1970s created a new form of human rights. Men such as Henkin and Schwelb recognized a climate shift in the world of human rights, but they did not necessarily know where it came from. In part, though, they embraced new approaches to human rights in reaction to the failures of those that came before. While the details of rights were changing, rights were being discussed nonetheless. Understanding the various forms that rights took may help place human rights scholars and advocates in an intellectual tradition—one that has changed, but one whose value is older than forty years.

The clearest reason why Moyn rejects whig history is because of the perceived threat from the nation-state system to his last utopia. Throughout the book, various forms of human rights seem to be incomplete because they are only able to be protected by nation-states. Whether in the debates surrounding the founding of the United Nations or in the anticolonialist movement, in any conflict between contemporary human rights language with Westphalian rights language, the latter language triumphed. Moyn hopes that by emphasizing the distinction between traditional human rights and contemporary human rights, advocates of contemporary rights will not be tempted to return to a pre-utopian approach. For the human rights advocate however, such alienation may do more harm than good. Indeed, the introduction to a leading law school case book on human rights notes that:

The national character of rights in a world of states today is the reality for the advocate, for the lawyer, and for the student. The individual will see his/her rights, and the lawyer or advocate would seek to protect those rights, primarily through national laws and institutions. In the United States, for example, rights are determined, defined, and protected by layers of domestic law—municipal and
State law, federal law, federal and State constitutional law. The individual, the advocate, the lawyer, will turn to international law and institutions in order to enhance support for and to vindicate his/her rights under U.S. and State law, including international law that has become part of U.S. law.\textsuperscript{83}

From the perspective of the advocate or lawyer, the nation-state remains a necessary part of the protection of human rights. Maintaining a connection with the history of human rights law is a vital means to continue to support the spread of such rights. Although modern human rights may have been more utopian in origin, in practice their connection to rights in a world of nations is an important part of their survival and continued development.

Embracing a whig history of human rights also has persuasive power for the average person, as well as a practicing lawyer or advocate. The revolutionary rhetoric of the 1970s may have appeal for scholars and the purest of idealists, but such language seems more likely to alienate than to motivate. Moyn's attempt to distance modern human rights from historic human rights seems like an example of cutting off the proverbial nose to spite the face. He wishes to maximize the spread of human rights, but only a particular form. A whig history preserves what can be preserved of the internationalist approach to human rights, within the regnant nation-state framework. Moyn's history, of course, serves a valid purpose of ensuring that people do not forget that human rights might thrive in an imagined world beyond the Westphalian system. That message may help push human rights forward in the years to come.

The struggle between whig history and Moyn's history is ultimately a struggle between how human rights advocates should understand their calling. Are they strengthened by a connection to the past, or does that connection to the past dilute their idealism? Nietzsche wrestled with this question in his history essay, noting that each man needs to balance a life lived repeating the achievements of others and rebelling against the status quo. Moyn's human rights are a form of rebellion, and by separating them from the longer history of human rights, he hopes to ensure that their adherents maintain their revolutionary fervor. Nevertheless, as international human rights have become the status quo, at least among international lawyers, he may be served by enshrining them in a larger narrative; a narrative in which what were once revolutionary ideas became the status quo because people began to accept them as true. Memorializing the new rights in history may take away their revolutionary fire, but may also help ensure their influence on world politics in the long term.

In the end, Moyn offers a compelling thesis, recognizing that the term "human rights" has not necessarily followed a clear evolution across generations. He provides a valuable service to the continuing history of

\textsuperscript{83} Louis Henkin et al., Human Rights, viii (1999).
human rights—and a reminder that sometimes ideas which seem similar are more different than one might expect. In making this argument, he stakes a daring claim about the value of utopian ideals in a world in which the hard-nosed realism of politics may easily quash idealism. International lawyers and advocates, however, may wish to accept his argument circumspectly. Rights grounded in the length of history, and seen as the result of centuries of struggle and innovation, are certainly more compelling than rights whose origins—although recent—are murky. And although the assertion that today's human rights are the logical outgrowth of centuries of progress may be historically inaccurate, as advocates continue to push for more rights for more people, reliance on the long march of history may offer more than rhetorical flourish. Whig history, well used, has a persuasive quality upon which advocates may eagerly choose to rely.