Can Law Really Defend Human Rights?
A Conversation with Eric Posner

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The Twilight of Human Rights Law
Eric Posner
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Just how effective are human rights treaties? Since the 1970s, the vast majority of countries has ratified countless international agreements and pledged to respect hundreds of human rights. But do such commitments actually make a difference? In his new book, UChicago’s own Eric Posner makes the controversial claim that universal human rights treaties are fundamentally unenforceable and fail to decrease human rights violations, arguing that we should look instead to other methods to improve the welfare of people worldwide.

The Interview

In your book, The Twilight of Human Rights Law, you argue that human rights law is largely ineffective because it reflects a type of “rule naiveté”—the view that the good in every country can be reduced to a set of rules that can then be impartially enforced. You assert that the vagueness of human rights law and the sheer proliferation of human rights prevent their meaningful enforcement. China, for example, can take away personal and political freedoms under the idiom of human rights by arguing that its actions aid poverty reduction. One solution some have proposed for the unmanageable number of human rights is to prioritize a narrower set of rights that states must enforce above all others. Why do you reject this solution?
Because there isn’t a consensus about what rights or human interests should get priority. There’s a basic disagreement, for example, about whether economic rights or political rights should be given priority. A country like China would say economic rights while the U.S. would say political rights, and lots of people think they should be put on an equal level.

But there’s also a deeper problem, which is that all countries have limited resources. So let’s consider, for example, torture. Everyone would agree it is important not to be tortured, but it’s perfectly possible, and in fact common, to have countries where torture is prevalent because the police are poorly trained and badly paid, and so the practice is deeply entrenched and it is simply not feasible financially or politically to go after torture.

There are all kinds of things that could be done to make people’s lives better, things that seem modest, like building playgrounds or picking up litter in the streets. Those things are expensive as well, and it’s reasonable for a government to say that as long as it’s futile to deal with torture, we should be able to use resources on those other things. But when you think about prioritizing human interests, no one would say it’s more important to get rid of litter than to get rid of torture. So this idea of prioritizing is just not helpful in providing useful guidance for governments.

I think it’s interesting that as a prominent legal scholar you argue, “Humanitarians should abandon the utopian aspirations of human rights law for the hard-won truths of development economics.” Do you think law is fundamentally less effective than developmental economics in providing assistance to foreign countries?

Yes, because law is coercive. It’s very difficult to coerce countries, because even if they are badly run with corrupt governments, the population will generally be more loyal to their own government than to foreign powers they distrust. Crude types of sanctioning such as trade sanctioning will hurt everybody; when sanctions are targeted at high-level officials, the government can reimburse them out of general revenues obtained through taxation of ordinary people. So the coercive side of law, which is what makes it effective in some circumstances domestically, makes it weak internationally.
Foreign aid, by contrast, merely offers money or other benefits to people. And people will be likely to be much more receptive if you offer them benefits than if you threaten them.

Throughout your book, you argue that countries invoke the notion of human rights when it is useful for them, and disregard them when it is not. Do you personally believe that the notion of universal human rights, and law in general, follows solely utilitarian principles? Do you reject the idea of an absolute moral law?

I think there are some common moral values that transcend borders, and I think the key insight of the Enlightenment is that governments should not be able to do what they want—they should have the responsibility of advancing the well-being of the populations underneath them.

I am myself a utilitarian, but my argument’s not based on any particular moral theory. There are lots of common moral values—you don’t betray your friends, you don’t kill someone unless there’s a good reason—but the question is whether we’re advancing people’s well being or some conception of morality through human rights law. I think the problem is that to the extent that there are common values, it’s very thin. It includes certain kinds of murdering and torturing, but it excludes all sorts of family-based morality and relationships between people, and people have very different ideas about what a government can do in order to promote order, what sorts of criminal process people need to be given, and I don’t think any of that is universal. I think what makes sense depends a great deal on the country we’re talking about and the circumstances in that country. So I don’t think it’s very useful to try to establish a code that would apply to all countries. There may be some universal values, but what everybody is concerned about and where the issues are is somewhat below that, the issues about what the government does.

I think that’s probably the best way to think about it, as if we wanted to create a code for all governments to tell them how they should govern. There’s very little we can agree to as a practical matter, about what’s a good government here and in Uganda and in Vietnam, because it’s not just that moral values vary. It’s that these places have more or less money, more or less corrupt officials, different ways to raise
taxes, different traditions, people are more or less religious. All those things are going to matter for how a government chooses policy, and those things cannot be captured in a universal document.

In the final chapter of your book, you note that recent literature in development economics suggests that economic growth is “to a large extent a function of events from the distant past” and that “wealth inequalities and institutional developments from centuries in the past may lead to modern institutions, habits, norms, and beliefs that promote or thwart economic growth today.” You suggest that some argue that human rights outcomes may also be determined by a nation’s history. Do you share this deterministic view of human rights, and do you think there are ways in which countries can overcome or mitigate the influence of a deep history and culture of inequality?

I don’t think it’s one-hundred-percent determined by the past. In the literature we’re trying to understand why some countries respect human rights more than others. The way people in the country think and the way people in the government think, those sorts of possibilities will be determined to some extent by the past. And the question is how big that extent is. I think it’s a very important area of research, but I don’t think we know the answer to that question.
But I think that there’s a real pattern. Countries that we think of as much better at respecting human rights today were the same countries who were much better 50 years ago or 100 years ago or 200 years ago. And I think that matters because if there’s a particular country that’s not respecting human rights and violating international law, we have to make a decision about what to do about it—should we put pressure on a country, should we withdraw foreign aid, should we provide technical assistance, should we disregard it? The more that we think that a country’s behavior is determined by the past, the less it would make sense to coerce the country into changing its behavior. But I want to reinforce that I do not think the past is completely determinative.

So what do you think is the most effective way to intervene in certain situations where a specific group is having their basic human rights violated by their governments?

I think the most dramatic examples would be Germany after World War II and Japan after WWII. So, conceivably, after a country is completely destroyed, we go in and occupy them for many years with hundreds of thousands or even millions of soldiers and rewrite their constitutions, and hope they feel ashamed by what happened in the war. But a massive intervention like that is rarely possible and even more rarely justified.

I suspect that there’s no recipe, and that this is one of my points: We can offer technical assistance to countries, and if those countries are willing—you can think of Japan during the Meiji Restoration or China to some extent now or twenty years ago—if people want peace and less civil strife and they think that Western norms and civil institutions would help, then we should by all means be receptive and explain to them how we do things and how our institutions work. I don’t think that people in the West have any practical method for helping oppressed groups in other countries. You can give symbolic help sometimes, you can put pressure to have a few people released from political prisons and so forth, but I don’t think there’s much the West can do.

Another professor at the University of Chicago Law School, Martha Nussbaum, has stated that human rights instruments have played
an important role in building and sustaining the international women’s rights movement. She claims that the Convention on the Elimination of All Forms of Discrimination against Women played a dramatic role by giving supporters a common language to network and communicate across national boundaries. Though you argue that human rights law is largely unsuccessful, do you believe that it should be completely disbanded if there is some evidence that it does some good?

You know, I don’t argue that it’s always ineffective. I don’t think we have enough evidence to know that with confidence. There are some people who have done some rigorous statistical studies that have shown that CEDAW has helped women in some respects and not in other respects. Countries that have ratified that treaty are more likely to have women who participate politically. Of course, the issue of causation is huge: you don’t know if countries ratify the treaty because women already have more rights or if the treaty itself causes the government to grant more rights to women. This is very complicated. I don’t know what to do with this sort of anecdotal evidence; there’s anecdotal evidence on the other side, too, and that’s why I think we need more statistical data in order to figure out what’s going on.

But I don’t think the treaties should be disbanded. Under international law, what would formally have to happen is that all these countries would have to renounce or withdraw from these treaties. And I don’t think anything would be accomplished by that; it would probably be demoralizing, and it doesn’t matter because the treaties aren’t really enforced, so who cares if countries denounce them or not. I think what’s
important is for people to understand that the treaties don’t really affect what the governments are doing and that people, including NGOs, should put more resources into development aid, rather than trying to enforce these treaties in some kind of abstract way.

To give an example that I talked about recently, there’s a treaty called the Convention on the Rights of the Child. That treaty provides children with various protections including personal security, and there’s a human rights committee, which determined that children have a right not to be subject to corporal punishment in schools. So Human Rights Watch persuaded Kenya to pass a law banning corporal punishment in schools. But then this sociologist in Kenya shows that the law had absolutely no effect because teachers think it impossible to maintain order in schools without corporal punishment. I’m sure there are excesses, but it just seems to me like a total misdirection of resources for HRW to try to end corporal punishment in Kenya because of some interpretation of a treaty. There are so many human rights, there’s any number of things they could go after in various countries. What I would like is to have these treaties in the background, but I’d want HRW and the other NGOs to solve problems that are solvable and whose solutions don’t create more problems—like massive lack of discipline in schools where corporal punishment is ended.

That brings us back to development aid. Economists have figured out that it is very hard to do development aid, but you can do it if you do it very rigorously, if you study a certain area and try to understand the people, their needs, and what they are willing to accept. You’re not going to try to change their behavior, so you’re not going to get rid of corporal punishment in schools, but maybe you could, you know, give some money to their schools so they could have smaller classes. That could strike me as a much more productive way to use this money HRW had to spend—to give it to the schools, and if educational outcomes improve, do it some more. So, that’s not disbanding the treaties, that’s just treating them as a less important part of how we engage with people in other countries.

Do you think that there is any role that law can play in addressing these problems that developmental economics cannot?
No, I guess not. I think international law is a weak instrument for policy. It’s certainly not meaningless, but it’s useful in very narrow circumstances.

The treatment of prisoners of war is something the law appears to be reasonably effective at. So if two countries are at war and they’ve taken prisoners, they’ll usually respect the Geneva Conventions. They don’t always do it, but I do think that the Geneva Conventions created a framework that works because of reciprocity: we treat our prisoners well because we’re afraid that if we don’t, you’re going to mistreat yours. If we’re giving 1000 calories a day to prisoners, is that mistreatment or not? The Geneva Conventions provide the standards so that we can have this argument. So I think that works very well and it has a humanitarian purpose. Soldiers are treated better than they would be otherwise. You also have trade law, which has a mechanism that seems to be reasonably effective.

But human rights law is different because of the universalism of it, because of the idea that every person in every country has to have certain basic rights protected. There is no built-in way of enforcing that. There’s none of this reciprocity; in practice it’s really just the West bossing around other countries. The West for the most part doesn’t violate human rights, and when it does, no one stops them because they’re too powerful. Then there are other powerful countries such as China that people can’t do anything about. Countries like China don’t try to enforce human rights in other countries—they don’t care. It’s the West versus the developing world. The developing world is huge, and it’s hard to get all the countries to change, so the whole thing seems pretty futile. But even if it weren’t, different Western countries have different priorities and different resources, and they have to be able to cooperate, so it’s hard to pressure them. You put that together and you have a very weak enforcement mechanism.

If you think that there’s no way to agree upon a universal set of values, what do you think would be our greatest hope for peace?

For peace I think sensible diplomacy. I really think that’s about it. I don’t think there’s any way around the fact that if it’s war that we’re worried about, human rights can lead
to war. Human rights are often invoked as a justification for going to war, as in the case in Iraq and Libya, so if peace is what you’re worried about, it doesn’t seem like human rights is the answer. I don’t think there’s any solution to the basic problem that there are scarce resources, that there’s conflict, people have trouble understanding people in other countries and sympathizing with them. So what you need to prevent war is just very good diplomats and leaders who are sensitive and smart and are not ideological but pragmatic about cooperating with other countries.

So do you think economic development is ultimately the best way to create universally improved living conditions?

Well, economic development will make people better off, and that’s a sufficient justification for it. In a lot of countries people live on a dollar a day, or two dollars a day and their lives are very hard. If they had more money, that would be good: There would be more literacy, better health. Those things are really important and I think for extremely poor people those things are better than political rights which they can’t really exercise realistically.

Now if countries got wealthier, I think that’s a good in itself, if it’s the poor people who wind up with the wealth, or a substantial portion of it. Would that lead to less war? I don’t know. There are theories that greater
wealth would lead to less war; maybe they are right, I don’t know. Would that lead to more respect for human rights in a political sense? It might. It tends to be the case that wealthier countries are more democratic and have better human rights outcomes, but I don’t think there’s any iron law that that’s the case.

But I do think that we have a better understanding about how to improve wealth and well-being, through vaccination and such; there are relatively straightforward ways of doing that, while it’s much harder to create democracy or political freedom or to persuade people that free speech is good, or religious tolerance is good. So if the goal is to make people who are miserable better off, which seems to me an important goal, then foreign aid, development assistance, migration, those are things that can be helpful.

Do you think a humanities background can offer any advantage in addressing these problems? Is there any role that they can play that economics can’t?

These are big questions that are important to debate, and I do think that a humanities background is helpful. It depends what you want to do. If your life’s goal is to help poor people in developing countries, I suspect some sort of technical degree, maybe in economics, maybe in engineering or something like that, will help you achieve that goal. Language skills, which are in the humanities, some sophistication about how people differ across countries, which is the humanities, I think all of these things are helpful, but if you take your goal to be something like that, you probably just want to have skills, like to be a doctor—that’s a great way to help people. If you want to try to have a debate about human rights law—whether it should exist, or if you reject everything I say and think maybe we should prioritize rights, or maybe we should create more international institutions or something like that—then humanities or law are helpful. I think you have to figure out in what way you can contribute the most to these general problems and then figure out how to advance that through your educational choices.

In the field of philosophy of law, thinkers like Aristotle, Plato, and Kant have famously espoused virtue ethics and the idea that
law should promote good moral character. Do you believe in any alternate philosophies of law outside of utilitarianism? Or do you believe a non-utilitarian role would fall outside of its realm of jurisdiction?

I think in a modern, pluralistic, gigantic society, as opposed to a small republic or city-state, you just can’t expect law to promote virtue. You can expect it to limit conflict and to produce public goods like clean air and so forth, but it’s just too hard in a modern, individualistic society where we try to respect people’s choices. I just don’t think law can do that as a practical matter. It probably couldn’t do it in a small republic either, but I think morality can only be taught to people as kids, and the law can’t do much about that.

So do you think that law should never even aspire to occupy that kind of moral space? If that will never be achievable?

I think that that is even more true internationally. People just have such different ideas of what virtuous behavior is. For a lot of people, it’s just religious. They think what you should do is just to promote the religious good. Other people in the West don’t feel that way at all, so the idea that there could be some sort of common law that could govern both groups seems totally unworkable. And it’s also true within a country, certainly a country that’s diverse like the United States. Maybe in the Netherlands or someplace like Denmark,
people have close enough views so that you can use law to promote a kind of ideology or moral principles in a more effective way.

*Do you think that there will ever be a point, maybe after a certain amount of universal economic development or shared cultural understanding, where we will be able to have a common set of values?*

Not within our lifetimes. You can maybe imagine the whole world being like Europe, if everyone became wealthy, but that would take a really long time.

I think back in the 1990s people used to think that all countries would be like Europe, more or less secular, wealthy, a welfare state, peaceful, and I think people are less confident about that now because the world seems to have gone in the opposite direction over the last fifteen years. But maybe this is just a little blip and in fifty or a hundred years things will look more like Europe again. I don’t think there are universal laws that govern historical change. I think there’s a lot of randomness. And so I wouldn’t want to make a prediction, but if I had to I would be skeptical that would happen soon.

*I actually recently read this book about Jeffrey Sachs’ Millenium Villages Project called The Idealist, and I think it discusses a lot of the pitfalls of development economics that you allude to in your book. What are the biggest kinds of traps you think development experts fall into?*

I don’t want people to think that I think that foreign aid is some obvious easy substitute for the human rights regime. It’s in many ways very similar historically because people were excessively ambitious and idealistic. I think it’s based on a very similar kind of error, which is assuming that people in other countries are all alike. When you take into account traditions and cultures and histories, they’re not all just like us, and even if they are just like us, people often react in different ways to something that’s imposed on them by a bunch of foreigners than by their own country.

When you do this in other countries you might have this idea that because vaccines work here they would work there,
or when you give people malaria nets and they use them as fishing nets that are killing fish due to insecticide. Those are the kind of surprises that you have to be aware of. The person who’s very good about this is William Easterly, who wrote this book called *The White Man’s Burden*, and you read that and you feel kind of helpless. His view is that you shouldn’t be hopeless, you have to be very careful. It’s a big trap just to think that there’s some kind of uniform solution.

If I had to pick a big solution, it’s probably migration. More migration for people in the poorest countries. There have been a lot of studies of migration, and it really does help people a lot. They get paid four or five times more, and they send the money back to their homes, and it’s a huge fraction, like in Nepal about 15 percent of the GDP is money being sent back. I wrote an article in *The New Republic* about this with economist Glen Weyl, where we pointed out how the human rights people hate these guest worker programs, because they think that the guest workers are being exploited. The people who really do this a lot are the Gulf states like the UAE, and they bring people in from Nepal, India, Pakistan, and pay them not very much by our standards, but five times what they make back home. It’s secure and they get paid, and they aren’t attacked by bandits the way they often are back home, but they don’t have any rights in these places. They can’t vote, and there are abuses. But in aggregate these things are enormously beneficial for people. The human rights groups attack it because people aren’t given the rights they think migrant workers should be entitled to. We think this should be encouraged because it is a proven way of helping people quite significantly, but there are always trade-offs.

*Do you really think that helps the original country the people come from?*

Apparently it does. There have been articles about brain-drain, but it seems that most people go back when they go to another country to work. They only do it for a few years and they save money so that they can invest it. And they bring back their training and expertise. So the net effect is actually beneficial for the country from which people are coming. This is well-known among economists. So you take a construction worker who’s not that skilled in India, he goes to the UAE
and works in the building industry and makes money, he goes back home and he can invest in business and hire people and so forth.

Sure, he’s been gone for a few years so there hasn’t been labor, but in these countries the problem is not a paucity of unskilled labor. If a person goes for a few years, it’s not noticeable in the economy. Whereas these Gulf States, they don’t have unskilled labor. So, it’s jointly beneficial. A lot of the Indians who came to the U.S. to work in Silicon Valley, they go back, so India has a tremendously successful internet technology industry, which they didn’t have before.

Of course, none of this is easy. If we got rid of all barriers to migration that could be a huge problem, and there could be a political backlash. But I do think that at the margin this would be a much more effective way of helping people than the Millennium Villages.

Do you have another big idea for your next book?

I’m interested in the bailout of AIG in the financial crisis. In the financial crisis there were all of these bailouts of firms. I’m kind of interested in that topic, whether these bailouts were smart, and whether there are ways to regulate them so that they’re less controversial.

I’m also interested in international justice. The practice of prosecuting people who commit international crimes, like the international criminal court does, so I could imagine writing about that from a similarly skeptical perspective. But I don’t want to repeat myself.