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Theories of Poverty/The Poverty of Theory

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Theories of Poverty/The Poverty of Theory

*Barbara Stark**

You never give me your money
You only give me your funny paper
And in the middle of negotiations
You break down.

—PAUL MCCARTNEY¹

TABLE OF CONTENTS

| | |
|-----------------------------------|-----|
| I. INTRODUCTION..... | 382 |
| II. WHY THEORY..... | 386 |
| A. Why Theory Is Necessary | 387 |
| B. Why Theory Is Problematic..... | 390 |
| III. THEORIES OF POVERTY..... | 391 |
| A. Liberal Theory | 391 |

* Visiting John T. Copenhaver, Jr., Chair of Law, West Virginia College of Law; Professor of Law, Hofstra Law School. Cornell B.A., NYU J.D., Columbia LL.M. Early versions of this paper were presented at the University of KwaaZulu-Natal, Durban, South Africa, the AALS Annual Meeting, and the law schools at Tulane, Emory, Hofstra, and Notre Dame. I am grateful to the organizers and participants, especially Penelope Andrews, Cynthia Grant Bowman, Lloyd Bonfield, Peg Brinig, Martha Fineman, Monroe Freedman, Daniel Greenwood, Joanna Grossman, Julian Ku, Katie Kuh, Holning Lau, Linda McClain, Martha McCluskey, Jonathan Nash, Mary Ellen O’Connell, Lisa Pruitt, and Norm Silber, for their helpful comments. I am also deeply indebted to Hope Lewis and Jeanne Woods for their groundbreaking work on this subject. Warm thanks to reference librarian Patricia Kasting for extraordinary research assistance and to Jennifer Tavares for expert manuscript preparation.

1. THE BEATLES, *You Never Give Me Your Money*, on *ABBEY ROAD* (Apple 1969). I draw on the Beatles for the soundtrack for this Article because their music, like liberal theory, remains pervasive, appealing, and dated. Both seemed to conquer the world, for a while. Each has also demonstrated a remarkable plasticity, a capacity for change-shaping, being all things to all people, that perhaps accounts for their longevity. Just as the Beatles have been appropriated by Target (*You Say Goodbuy, I Say Hello*), *American Idol* (Fox television broadcast, March 11, 2008, contestants chose songs from the Lennon/McCartney songbook) and supermarkets (ubiquitous), for example, liberal theory has been appropriated by African kleptocracies, Chinese communists (Deng Xiaoping, “To be rich is glorious!”) and pragmatic law professors (ubiquitous).

| | |
|--|-----|
| 1. The Moral Duty to the Poor | 395 |
| 2. The Rights of the Poor | 399 |
| 3. Poverty and Utility..... | 402 |
| 4. How Liberal Theories Add Up, and Why They Fall Short | 407 |
| B. Liberalism's Discontents..... | 411 |
| 1. The Theocrats..... | 411 |
| 2. The Radicals | 413 |
| 3. The Skeptics | 415 |
| IV. THE POVERTY OF THEORY | 419 |
| A. Being Creates Consciousness..... | 420 |
| B. "All That Is Solid Melts into Air" | 424 |
| V. CONCLUSION | 428 |

I. INTRODUCTION

The world has never been richer.² At the same time, the number of people living in poverty has increased by almost 100 million³ and the chasm between the rich and the poor has become unfathomable. In 2004, 969 million people lived on less than a dollar a day.⁴ As former World Bank President Robert McNamara summed up, these people experience "a condition of life so characterized by malnutrition, illiteracy, disease, squalid surroundings, high infant mortality and low life expectancy as to be beneath any reasonable definition of human decency."⁵ Yet there are more billionaires than

2. The 2007 global gross domestic product was \$53,347,038. WORLD BANK, WORLD DEVELOPMENT INDICATORS DATABASE 4 (rev. Sept. 10, 2008), *available at* <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf>; JEFFREY SACHS, *THE END OF POVERTY* 26-50 (2005) (describing the growth of the global economy).

3. The number of people living in poverty has increased by roughly 100 million from 1992-2002, even as total world income has increased by 2.5 percent. JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 5 (2003); *see also Oxfam Faults Response to Famine in Africa*, N.Y. TIMES, July 24, 2006, at A10 ("The number of food emergencies [in Africa] has nearly tripled in 20 years.").

4. INTERNATIONAL FOOD POLICY RESEARCH INSTITUTE, *TRENDS IN GLOBAL \$1 A DAY POVERTY* 1 (2007), *available at* <http://www.ifpri.org/media/20071106Deprived/Facts.pdf>.

5. PETER SINGER, *ONE WORLD: THE ETHICS OF GLOBALIZATION* 81 (2d ed. 2004). As Thomas Pogge points out,

ever before,⁶ people who have more money than some less developed countries,⁷ people who, as Barack Obama put it, “make more in [ten] minutes than a worker makes in [ten] months.”⁸ As a recent United Nations University study explained, global wealth is distributed as “if one person in a group of ten takes 99% of the total pie and the other nine share the remaining 1%.”⁹

Few argue that this is inevitable¹⁰ or unimportant,¹¹ but there is little consensus on how to proceed. What should be done?¹² Who

[P]eople so incredibly poor are extremely vulnerable to even minor changes in natural and social conditions as well as to many forms of exploitation and abuse. Each year some 18 million of them die prematurely from poverty related causes. This is one third of all human deaths—50,000 every day, including 34,000 children under age 5.

THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS* 2 (2002).

6. Eric Konigsberg, *A New Class War: The Haves vs. the Have Mores*, N.Y. TIMES, Nov. 19, 2006, § 4 (explaining that the “superrich”—the \$20 million a year households—“are getting richer almost twice as fast as the rich”—the top 1 percent with an average income of \$940,000); see also Jenny Anderson & Julie Craswell, *Make Less Than \$240 Million? You’re Off Top Hedge Fund List*, N.Y. TIMES, Apr. 24, 2007 at A1 (noting that the top twenty-five hedge fund managers earned a combined total of \$14 billion, “enough to pay New York City’s 80,000 public school teachers for nearly three years”).

7. “[T]he assets of the world’s richest three individuals exceed[] the combined Gross National Products of all of the least developed countries, with a population totaling 600 million people.” SINGER, *supra* note 5, at 81 (citing UNITED NATIONS DEVELOPMENT PROGRAMME HUMAN DEVELOPMENT REPORT 3, 36 (1999)); see also *Annual Rankings of Top Earning Hedge Fund Managers*, ALPHA MAG., Apr. 2007 (noting that the top twenty-five managers earned more than \$14 billion, equivalent to the GDP of Jordan or Uruguay).

8. Jeff Zeleny, *Obama Proposes Tax Cut for Middle Class and Retirees*, N.Y. TIMES, Sept. 19, 2007, at A22.

9. Press Release, Anthony Shorrocks et. al., *Pioneering Study Shows Richest Two Percent Own Half the World’s Wealth*, 4 Dec. 5, 2006, <http://www.wider.unu.edu/research/2006-2007>. This has been going on for some time. See, e.g., REPORT OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS TO THE ECONOMIC AND SOCIAL COUNCIL, U.N. Doc E/1999/96 ¶¶ 4–6, reprinted in HENRY STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 239 (2d ed. 2000) (noting growing economic polarization, in which the poorest increasingly lose ground). In the U.S. alone, from 1997 to 2001, the top one percent captured far more of the real national gain in wage and salary income than did the bottom fifty percent. Clive Crook, *The Height of Inequality*, ATLANTIC MONTHLY, Sept. 2006, at 36, 37. Indeed, in the U.S., the rate of polarization is increasing. David Cay Johnston, *Report Says That the Rich Are Getting Richer Faster, Much Faster*, N.Y. TIMES, Dec. 15, 2007, at C3 (“[I]n 2005 the top 10 percent, top 1 percent and fractions of the top 1 percent enjoyed their greatest share of income since 1928 and 1929.”). Whether those at the bottom are nevertheless better off is an open question. The bottom line is that no one knows what the bottom line is: “Most likely, [globalization] has helped some to escape poverty and thrown others deeper into it.” SINGER, *supra* note 5, at 89.

10. This has not always been the case. See, e.g., THE ENLIGHTENMENT: A COMPREHENSIVE ANTHOLOGY 571 (Peter Gay ed. 1973) [hereinafter THE ENLIGHTENMENT]

should do it? These questions should not be left entirely to politicians,¹³ economists,¹⁴ and celebrities.¹⁵ Rather, theory can

(noting that the classical economists of the early nineteenth century, such as Thomas Hobbes, “seemed to preach the futility of reform; if the rich were rich and the poor were poor, and if workers existed to be exploited by their employers, this state of affairs was natural and permanent”).

11. Pope Benedict XVI has “urged the Latin American clergy to feed people’s spirituality as the way to ease poverty.” Ian Fisher & Larry Rohter, *The Pope Addressing Latin American Bishops, Denounces Capitalism and Marxism*, N.Y. TIMES, May 14, 2007, at A10. Pope John Paul II had a different approach. *Pope Asks Rich Nations to Aid Those in Debt*, N.Y. TIMES, Dec. 16, 1998; see also *Hoarding the Wealth* (Marketplace radio broadcast Dec. 5, 2006) (citing economist Jagdish Bhagwati, who criticized the WIDER study cited *supra* note 9. “There numbers are totally meaningless Households in Outer Mongolia are not thinking about what households on Park Avenue in New York are doing. So what’s the point of putting them together and comparing the wealth of one group to the wealth of another group?”).

12. American law has been mocked for its zeal. Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1071–72 (2002) (“Law is on the march. It is progressing. Wealth is being maximized. . . . Reform is on the way. The kettle is boiling.”); see also *infra* note 182 (describing a similar role for international law). But to do nothing leaves the problem to the long-discredited, albeit surprisingly resilient, “invisible hand.” In THE THEORY OF MORAL SENTIMENTS, Adam Smith developed his “all-too-famous notion of the invisible hand: individuals within society, laboring to advance their own interests, actually, without intending it, also advance the interests of society as a whole.” THE ENLIGHTENMENT, *supra* note 10, at 576. As Thomas Pogge notes,

an invisible hand, rather less benign than the one acclaimed by Adam Smith, ensures that the world, driven by the self-seeking efforts, equilibrates toward a model of organization that gives the strong as much as possible while still allowing them to be in compliance with their moral norms. . . . the affluent western states are no longer practicing slavery, colonialism, or genocide. But they still enjoy crushing economic, political, and military dominance over the rest of the world.

POGGE, *supra* note 5, at 6.

13. See, e.g., Jill Lawrence, *Edwards Takes Another Shot at Run for White House*, USA TODAY, Dec. 29, 2006, at A4 (announcing candidacy and goals of ending poverty, providing health care for all, and making the U.S. “the great light for the rest of the world”).

14. See, e.g., SACHS, *supra* note 2; STIGLITZ, *supra* note 3; Reuven S. Avi-Yonah, *Why Tax the Rich? Efficiency, Equity, and Progressive Taxation*, 111 YALE L.J. 1391 (2002) (reviewing DOES ATLAS SHRUG? THE ECONOMIC CONSEQUENCES OF TAXING THE RICH (Joel B. Slemrod ed., 2000)) (collection of papers by public finance economists addressing “the question of whether high marginal tax rates come with an unaffordable high cost to the U.S. economy”).

15. See, e.g., Ron Nixon, *Bottom Line for(Re)d*, N.Y. TIMES, Feb. 6, 2008, at C1 (describing Bono’s “Red” campaign, which has enlisted companies such as Dell and The Gap to market lines that donate a portion of their profits to fight H.I.V. in Africa); Alessandra Stanley, *Humble Celebrity and Eager Interviewer*, N.Y. TIMES, June 22, 2006 at E1 (“Even more than Bill Gates or Bono, [Angelina Jolie] signals a shift in mores among the hyper-rich. After 25 years of ever-escalating exorbitance, the pendulum has swung towards conspicuous nonconsumption. Extravagance is measured not by how much is spent, but how much is given away.”); James Traub, *The Celebrity Solution*, N.Y. TIMES MAG., March 9, 2008, at 38, 40

illuminate what has become a series of heated but murky arguments.¹⁶ It can clarify the possibilities.¹⁷

Part II of this Article explains why theory in general is both necessary and problematic in this context. Part III explains how liberal theories in particular dominate post-Cold War poverty law, as shown in three major legal instruments. It then introduces *other* theories of poverty, those of liberalism's "discontents,"¹⁸ conspicuously absent from post-Cold War poverty law. Part IV, explains why theory itself is impoverished in two distinct senses. First, as Marx noted 150 years ago, "being creates consciousness."¹⁹

(explaining how "Hollywood celebrities have become central players on deeply political issues like development aid"); Bill Saporito, *The Jeff Sachs Contradiction: Celebrity Economist*, TIME, Mar. 14, 2005; *The Diary of Angelina Jolie and Dr. Jeffrey Sachs in Africa* (MTV television broadcast Sept. 14, 2006) (billed as "MTV's new documentary special on the Poverty Crisis in Africa"). Sachs has been called the "macroeconomist to the stars." Daniel W. Drezner, *Brother Can You Spare \$195 Billion?*, N.Y. TIMES, Apr. 24, 2005, § 7, at 18.

16. Will a rising tide eventually lift all boats? Should safety nets assure basic needs? Does the global North owe its prosperity to its exploitation of the global South? Are reparations owed for slavery? I do not suggest that the arguments that swirl around these questions necessarily lack rigor. On the contrary, some have generated a rich and provocative literature. See, e.g., BORIS BITKER, *THE CASE FOR BLACK REPARATIONS* (1972); RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS 201* (2000); RAYMOND A. WINBUSH, *SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE ON REPARATIONS* (2003); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429 (1998). Rather, it is the implicit premise of these questions that remains murky, as explained in Part III.A.

17. Philosophers entered the fray long ago, and the recent work of Peter Singer and Thomas Pogge, among others, certainly illuminates. See, e.g., SINGER, *supra* note 5; POGGE, *supra* note 5. But they are not lawyers. Most of the legal theorists who address these issues tacitly accept the neoliberal order. See, e.g., Symposium, *Global Justice: Poverty, Human Rights, and Responsibilities*, 39 CORNELL INT'L L.J. 477 (2006). Some do not. See, e.g., ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005) (arguing that international law is deeply grounded in colonialism). Some theories may generate better legal strategies or help us avoid squandering resources or good will. Others may simply enlighten. See, e.g., J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 765 (1987) (explaining common attributes of critical theories).

18. STIGLITZ, *supra* note 3; see also SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* (1930); MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT* 3 (1996) ("Our public life is rife with discontent. Americans do not believe they have much say in how they are governed and do not trust government to do the right thing.").

19. *ESSENTIAL WRITINGS OF KARL MARX 83-84* (David Caute ed. 1967) [hereinafter *ESSENTIAL WRITINGS*] ("In direct contrast to German philosophy which descends from heaven to earth, here we ascend from earth to heaven. That is to say, we do not set out from what men say, imagine, conceive, nor from men as narrated, thought of, imagined, conceived, in order to arrive at men in the flesh. We set out from real, active men, and on the basis of their real life process we demonstrate the development of the ideological reflexes and echoes of this life process . . . life is not determined by consciousness, but consciousness by life."); see also

That is, theory is the result of material, historical conditions rather than a force capable of transforming them. Second, because of the particular historical conditions that exist now, including the absence of the discontents, under international law the rich North has no legal obligation to aid the poor South. Rather, the liberal international legal system has neither the legal muscle to effectively address global poverty nor the political will to develop it.

II. WHY THEORY

Harvard psychologist Howard Gardner identifies four types of mental content: concepts, theories, stories, and skills.²⁰ As Gardner explains, “[a] concept, the most elementary unit, is an umbrella term that refers to any set of closely related entities. When we denote all four-legged, furry household pets that bark as dogs, we are revealing our concept of canines.”²¹ We can conceptualize poverty as an objective level of deprivation, such as those living on less than a dollar a day. Or we can conceptualize it as relative deprivation, such as a two-parent American household with two children living on less than \$19,806 per year—the official poverty line in the U.S. in 2007.²² While such Americans are certainly poor,²³ most have access to clean drinking water and electricity, unlike most of the global poor.

How we conceptualize poverty determines the theories we develop to address it. Theories, according to Gardner,

are relatively formal explanations of processes in the world. A theory takes the form “X has occurred because of A, B, C” or “There are three kinds of Y,

ERIC FROMM, *MARX'S CONCEPT OF MAN* 15 (1979) (explaining that this is “Marx’s fundamental idea: man makes his own history; he is his own creator”).

20. HOWARD GARDNER, *CHANGING MINDS: THE ART AND SCIENCE OF CHANGING OURS AND OTHER PEOPLES' MINDS* 19–22 (2004).

21. *Id.* at 19.

22. Editorial, *Counting the Poor*, N.Y. TIMES, Apr. 17, 2007, at A26.

23. Indeed, many argue that this figure is too low. *Id.* (noting twelve alternatives to the measure of poverty utilized by the Census Bureau, all but one of which results in a higher rate than the 12.6 percent, or 37 million Americans, reported by the Bureau in 2005); see also Leslie Kaufman, *Bloomberg Seeks New Way to Decide Who Is Poor*, N.Y. TIMES, Dec. 30, 2007, at 21 (challenging outdated federal poverty standards developed in the 1960s by economist Mollie Orshansky, based on a 1955 Department of Agriculture study. The standards state that impoverished Americans spend a third of after tax income on food).

and they differ in the following ways or I predict that either Z will happen or Y will happen, depending on condition D.”²⁴

Theory operates at different levels of abstraction. Grand theory, or meta-theory, zooms out to look at the big picture and seeks to explain a wide range of phenomena.²⁵ Liberal meta-theory, for example, may explain poverty as a result of restraints on free markets. “Middle-range” theory,²⁶ in contrast, zooms in to a focus on a narrower issue. Middle-range theory might posit, for example, that a particular town is poor because it is far from any major roads.²⁷

Theories and concepts shape each other. For example, Nobel economist Amartya Sen transformed the development agenda by reconceptualizing poverty as a matter of capabilities, such as literacy and access to healthcare, rather than as a lack of income.²⁸ This new concept of poverty demanded new theories of causality and generated new theories of amelioration.²⁹

A. Why Theory Is Necessary

I’ve got to admit it’s getting better, a little better all the time . . .

—LENNON & MCCARTNEY³⁰

24. GARDNER, *supra* note 20, at 19–20. These theories, in turn, over time may reshape the concepts they purport to explain.

25. Grand theory carries its own risks. See, e.g., Tony Judt, *Goodbye to All That?*, 53 N.Y. REV. OF BOOKS 14, Sept. 21, 2006, at 11 (“As for those who dream of rerunning the Marxist tape, digitally remastered and free of irritating Communist scratches, they would be well advised to ask sooner rather than later just what it is about all-embracing ‘systems’ of thought that lead inexorably to all-embracing ‘systems’ of rule.”); see also LESZEK KOLAKOWSKI, *MAIN CURRENTS OF MARXISM* 356 (2005) (describing the “orthodox majority” that “maintained that Marxist doctrine itself contained the answers to all or most of the problems of philosophy”).

26. Martha Fineman was an early proponent of middle-range theory in feminist scholarship. See Symposium, *Is it Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 360.

27. SACHS, *supra* note 2, at 20.

28. AMARTYA SEN, *INEQUALITY* (1992) (describing low income but high literacy and quality health care in Kerala). But see Jason DeParle, *Jobs Abroad Underwriting “Model” State*, N.Y. TIMES, Sept. 7, 2007, at A1 (explaining Kerala’s dependence on remittances from abroad).

29. See, e.g., AMARTYA SEN & MARTHA NUSSBAUM, *THE QUALITY OF LIFE* (1993).

30. THE BEATLES, *Getting Better*, on SGT. PEPPER’S LONELY HEARTS CLUB BAND (Apple 1967). See *infra* text accompanying notes 43–47 (describing the Enlightenment’s promise of progress). For a recent iteration in a related context, see Melissa A. Waters,

Theory is necessary in the context of global poverty for the same reasons that theory is necessary in any system of law: it both explains the law and provides a principled approach to changing it.³¹ At the same time, theory is even more important in the context of global poverty than it is in other contexts. First, there is no single “system” of law addressing poverty. Rather, there are multiple laws, on the national and international levels. This includes “soft law,” aspirational declarations without the binding force of law that nevertheless represent a commitment on the part of the declaring state.³² Theory enables us to map their connections and their lacunae. Second, theory makes it possible to focus on poverty, to frame the discussion so that poverty is at the center, rather than at the margins, or off the radar entirely.³³ Finally, theory is necessary because the Enlightenment dethroned the Church as the ultimate authority³⁴ and enthroned reason in its place.³⁵ This obviously affected all systems of law touched by the Enlightenment, though the basic principles of property and contract law, for example, endured. But why take care of the most vulnerable unless it is a religious duty, unless God commands us to be charitable? There was a void here, an urgent need for theory.³⁶

Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties, 107 COLUM. L. REV. 628 (2007) (explaining how courts are incorporating human rights treaties despite the lack of implementing legislation).

31. See generally MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* (2002).

32. Although some argue that “soft law” is not law at all, it both reflects and reinforces emerging norms and may well have major consequences, especially in this context. The Millennium Development Goals (MDG), for example, arguably the most important poverty initiative since Bretton Woods, are “soft law.” See *infra* Part III.A.1. For a scholarly examination of the role of non-binding norms, see Mary Ellen O’Connell, *The Role of Soft Law in a Global Order*, in COMMITMENT AND COMPLIANCE 100 (Dinah Shelton ed., 2000).

33. See Fran Ansley, *Inclusive Boundaries and Other (Im)possible Paths Toward Community Development*, 50 U. PA. L. REV. 353, 357 (2001).

34. This undermined the authority of monarchs relying upon the divine right of kings. See *infra* note 38.

35. THE ENLIGHTENMENT, *supra* note 10, at 17 (“What united [the philosophers] was the common experience of shedding their inherited Christian beliefs with the aid of classical philosophers They were by and large agreed that Christianity, in company with all other supernatural religions, was wrong, and that science . . . was the way to truth and . . . to happiness.”). As explained below, we are not all heirs to the Enlightenment. See *infra* Part III.B.

36. See *infra* Part III.A.1, *The Moral Duty to the Poor* (explaining how Kant answered this question).

Every legal system needs theory to provide some “relatively formal,”³⁷ coherent explanation. Law cannot be justified without it. Theory ranges from the divine right of kings³⁸ to the dialectic of history,³⁹ but it must be compelling to those it addresses. Theory serves a range of functions. It legitimates authority.⁴⁰ It generates loyalty and support for a regime. It makes people feel that they are part of something larger and more important than themselves, spreading “freedom” throughout the world, for example.⁴¹ It enables people to step outside of the box and imagine alternatives.⁴²

These alternatives, however, are constrained by rigorous critical analysis. Under the premises of the Enlightenment, “theory” was more than a satisfying myth. It was no longer a matter of faith. Rather, it became a scientific hypothesis, capable of being tested and disproved. For example, post-Cold War theories of global poverty are deeply rooted in the Enlightenment of Descartes and Voltaire, the idea that humans are the center of the universe and that reason is the paramount human virtue. Theories of poverty, accordingly, are grounded in hypotheses regarding its root causes, or the conditions that perpetuate it. Under this view, poverty becomes a problem to be solved scientifically by discovering universal rules, experimenting, and collecting empirical data.

Reason was the premise of the Enlightenment, but progress was its promise.⁴³ Through reason, humans would steadily advance in terms of material comfort, as well as knowledge and a better

37. GARDNER, *supra* note 20, at 19 (“*Theories* are relatively formal explanations of processes in the world.”).

38. *See, e.g.*, SIR ROBERT FILMER, *PATRIARCHA AND OTHER WRITINGS* (Johann P. Sommerville ed., Cambridge Univ. Press 1991).

39. *See, e.g.*, HEGEL’S PHENOMENOLOGY OF SPIRIT (Howard P. Kainz trans., Penn. St. Univ. Press 1994) (1807); GEORG WILHELM FRIEDRICH HEGEL, *THE PHILOSOPHY OF HISTORY* (J. Sibree trans., Dover Publications 1956) (1837).

40. *See* THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

41. *See* Noah Feldman, *When Judges Make Foreign Policy*, N.Y. TIMES MAG., Sept. 28, 2008 (describing the Constitution as “outward looking”).

42. *See, e.g.*, CATHARINE MACKINNON, *ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES* 34 (2006) (“New theories help make new realities.”); *see also* David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 NYU J. INT’L L. & POL. 335, 441 (2000). For a more cynical justification, *see* Samuel Estreicher, *In Defense of Theory*, 10 GREEN BAG 49, 51 (2006) (“Veblen offered a theory of the leisure class. We are writing the leisure of the theory class.”).

43. *But see* Peter Gay, *The Science of Man and Society, in THE ENLIGHTENMENT, supra* note 10, at 481 (“The philosophers were aware that their enterprise concealed a deep tension: knowledge did not always lead to improvement.”).

understanding of their own nature and place in the world.⁴⁴ The unwavering pursuit of knowledge would assure a better, fairer world.⁴⁵ Through reason, humans would create a world of prosperity for all.⁴⁶ This became, paradoxically, an article of faith.⁴⁷

B. Why Theory Is Problematic

Theory is problematic in this context for the same reasons that theory is always problematic. It sacrifices the messy complexity of reality for the clarity of abstraction. John Rawls' *A Theory of Justice*⁴⁸ has been criticized, for example, because Rawls begins with the assumption that fair decisions about how to structure society can only be made behind a "veil of ignorance." That is, those making the decisions should not know their place in society and how they personally will be affected by their decisions. Rather, the decisions should be fair enough that they will be satisfactory, however one is situated. Rawls' decision makers are disembodied and disconnected. They literally have no physical reality; they are not old, or hungry, or pregnant.⁴⁹ They are not part of any family, community, or social network. As a corollary, theory inevitably omits or distorts the experience of some, while reifying that of others.⁵⁰

At the same time, theory is even more problematic in the context of global poverty than it is in others because of both the limitations of liberal theory⁵¹ and the political reality of liberal hegemony in an international system of sovereign states. Theory is also problematic

44. See, e.g., THE ENLIGHTENMENT, *supra* note 10, at 19 ("[The philosophers] sought knowledge above all for the sake of its utility. . . . Their work in psychology, sociology, political economy, had this practical aim: these were disciplines that, once mastered, would help to make humanity freer, richer, more civilized than before.").

45. See, e.g., Peter Gay, *The Science of Man and Society*, in THE ENLIGHTENMENT, *supra* note 10, at 481 (noting that the two aims of the Enlightenment were knowledge and reform).

46. This was satirized in VOLTAIRE, *CANDIDE: OR OPTIMISM* (Daniel Gordon trans., Bedford/St. Martin's 1998) (1759). See also Gay, *supra* note 43.

47. For a dazzling elaboration, see PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* (1998).

48. JOHN RAWLS, *A THEORY OF JUSTICE* (1971). For critiques of Rawls in the international context, rather than the domestic context, see *infra* note 58.

49. See, e.g., Susan Moller Okin, *John Rawls: Justice as Fairness—For Whom?* in *FEMINIST INTERPRETATIONS AND POLITICAL THEORY* 181 (Mary Lyndon Shanley & Carole Pateman eds., 1991).

50. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 585–86 (1990).

51. See *infra* Part III.A.4.

here because of its applications, the uses to which theory has been put. Human rights are grounded in liberal theory, but so was colonialism.⁵²

Indeed, some argue that the grand theory of the Enlightenment is oblivious to its own “will to power.”⁵³ The Enlightenment made “man” rather than God the center of the universe. But its purportedly universal, objective, rational subject is in fact a Western white man. The Enlightenment’s promised Utopia, similarly, is the universalization of Western culture.⁵⁴ Thus, liberal theory has been used to justify the colonialism and neocolonialism that, some suggest, is responsible for the ongoing impoverishment of the global South.

III. THEORIES OF POVERTY

A. Liberal Theory

Oh, I get by with a little help from my friends . . .

—LENNON & MCCARTNEY⁵⁵

As Louis Henkin has pointed out, international human rights law is not the work of philosophers; it is the work of politicians and

52. See, e.g., Edward W. Said, *Yeats and Decolonization*, in NATIONALISM, COLONIALISM, AND LITERATURE 69–71 (Terry Eagleton et al. eds., 1990) (“By the beginning of World War I, Europe and America held eighty-five percent of the earth’s surface in some sort of colonial subjugation. This, I hasten to add, did not happen in a fit of absentminded whimsy or as a result of a distracted shopping spree.”); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L.J. 1, 1–2 (1999).

53. Nietzsche exposed the Enlightenment “as the unity of reason and domination.” GILLIAN ROSE, *THE MELANCHOLY SCIENCE: AN INTRODUCTION TO THE THOUGHT OF THEODOR W. ADORNO* 20 (1978).

54. According to John Gray, the Enlightenment contemplated “the creation of a single worldwide civilization,” and the United States, “the last great power to base its policies on this enlightenment thesis,” seeks the global domination of democratic capitalism, a “single universal free market.” JOHN GRAY, *FALSE DAWN: THE DELUSIONS OF GLOBAL CAPITALISM* 2 (1998).

55. THE BEATLES, *With a Little Help From My Friends*, on SGT. PEPPER’S LONELY HEARTS CLUB BAND (Apple 1967). In Julie Taymor’s film *ACROSS THE UNIVERSE* (Revolution Studios 2007), a homeless man (Joe Cocker) sings this Beatles song, ironically questioning whether informal social networks in fact enable everyone to “get by” in an affluent democracy.

citizens.⁵⁶ But the politicians who shaped post-Cold War approaches to poverty drew on liberal theory⁵⁷ and three basic liberal conceptions of poverty: poverty as a matter of morality, poverty as a matter of justice, and poverty as a matter of utility.⁵⁸ There are other conceptions,⁵⁹ but these form the core of three major instruments which epitomize post-Cold War approaches: the International Covenant on Economic, Social and Cultural Rights (the “Economic Covenant”),⁶⁰ the Millennium Development Goals (the MDG),⁶¹ and the South African Constitution.⁶²

56. LOUIS HENKIN, *THE AGE OF RIGHTS* 6 (1990); see also SANDEL, *supra* note 18, at 18 (noting that some political philosophers argue that the “case for liberalism . . . is political, not philosophical or metaphysical”).

57. As Virginia Leary explains, “Western culture dominated the formulation of early international standards,” and “the present Western notion of human rights has its roots in eighteenth-century Western European philosophical theory.” Virginia A. Leary, *The Effect of Western Perspectives on International Human Rights*, in *HUMAN RIGHTS IN AFRICA: CROSS CULTURAL PERSPECTIVES* 15, 17 (Abdullahi Ahmed An-Na’im & Francis M. Deng eds., 1990); see also Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT’L L. 589, 594 (1996) (“[A]ll the paramount voices writing and acting in the human rights discourse . . . express the synonymy and close fit of the human rights corpus with its parent, Western liberalism.”). See generally Mark Weston Janis, *Americans and the Quest for an Ethical International Law*, 109 W. VA. L. REV. 571, 573 (2007) (arguing that “Americans have long been inclined to both morality and utility in international law”).

58. As set out in Part III.A., *Liberal Theory*, those who shaped the post-Cold War approaches drew on a wide range of well-known liberal philosophers. Conspicuous by his absence is John Rawls. His groundbreaking book *A THEORY OF JUSTICE*, *supra* note 48, was not published until twenty years after the first of the instruments discussed below was drafted. See *infra* note 60. Later internationalists, however, did not draw on his work because he did not address their concerns. See, e.g., SINGER, *supra* note 5, at 8–9 (recalling his “astonish[ment]” that John Rawls could completely ignore “extremes of wealth and poverty that exist between different societies. . . . In the most influential work on justice written in twentieth-century America, this question *never even arises*.”). For an incisive critique, see Joel P. Trachtman, *Welcome to Cosmopolis, World of Boundless Opportunity*, 39 CORNELL INT’L L.J. 477 (2006). When Rawls did address global justice issues, he contemplated closed societies which did not, in general, have obligations to aid each other. JOHN RAWLS, *THE LAW OF PEOPLES* (1999) (defending closed societies, in large part, on “moral hazard” grounds; i.e., if people may freely migrate to more prosperous places, they will have no incentive to invest their time and effort in the poorer places where they are born).

59. See *infra* Part III.B. But see PARAG KHANNA, *THE SECOND WORLD: EMPIRES AND INFLUENCE IN THE NEW GLOBAL ORDER* 335 (2008) (arguing that “the three distinct superpowers,” the U.S., China, and the European Union, constitute a new “multipolar and multicivilizational” world order, in which none dominates).

60. Jan. 3, 1976, 993 U.N.T.S. 3; see also A. GLENN MOWER, JR., *INTERNATIONAL COOPERATION FOR SOCIAL JUSTICE: GLOBAL AND REGIONAL PROTECTION OF ECONOMIC/SOCIAL RIGHTS* 15–18 (1985) (discussing the need for and development of a separate covenant on economic and social rights); Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT’L L. 365 (1990) (discussing the limited scholarly American work on economic,

There was a brief, shining moment of idealism after World War II, a fervent commitment that “Never again!” would basic human rights be so horrifically violated.⁶³ By ratifying the U.N. Charter, drafted in 1945, member states promised to respect and protect the human rights of their people. These rights, as set out in the Universal Declaration of Human Rights in 1948,⁶⁴ included civil and political rights, such as freedom of expression and the right to vote, and economic, social and cultural rights, such as the right to work and the right to an adequate standard of living.

Before the Universal Declaration could be upgraded to a legally binding instrument, however, the shining moment was over and the Cold War between the Americans and the Soviets had begun. The U.S. refused to recognize the Economic Covenant’s socioeconomic rights, which it viewed as “socialist.”⁶⁵ The Soviets viewed “rights” themselves as unnecessary, a liberal attack against the state. Instead of a single legally binding instrument, accordingly, two covenants were drafted. The International Covenant on Civil and Political Rights (“the Civil Covenant”),⁶⁶ ratified under the first President

social and cultural rights). For a proposal for integrating the Covenant in American law, see Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an “Entirely New Strategy,”* 44 HASTINGS L.J. 79 (1992).

61. U.N. Millennium Development Goals, available at www.un.org/millenniumgoals/ [hereinafter MDGs].

62. The South African Bill of Rights, 36 I.L.M. 744, 748 (1997).

63. See HENKIN, *supra* note 56, *passim* (describing the global explosion after World War II of the “human rights idea”).

64. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., pt. 1 at 71, U.N. Doc. A/810 (Dec. 10, 1948).

65. Alston, *supra* note 60, at 366 (noting “suspicion by many Americans,” who view the Economic Covenant as “a ‘Covenant on Uneconomic, Socialist and Collective Rights’”); see also Jon D. Michaels, *To Promote the General Welfare: The Republican Imperative to Enhance Citizenship Welfare Rights*, 111 YALE L.J. 1457, 1458 (2002) (noting that “substantive welfare rights are completely anathema to the Lockean tradition”). See generally Philip Alston, *Economic and Social Rights*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 137 (Louis Henkin & John Lawrence Hargrove eds., 1994) (describing international neglect of economic, social, and cultural rights).

66. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter Civil Covenant]; G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (UN Resolution adopting Civil Covenant). The indivisibility of the two Covenants, their necessary interdependence, and the fallacy of asserting the primacy of either, is now well-established in international law, at least in theory. See *Indivisibility and Interdependence of Economic, Social, Cultural, Civil and Political Rights*, G.A. Res. 44/130, U.N. GAOR, 44th Sess., Supp. No. 49, at 209, U.N. Doc. A/Res/44/130 (1989) (accepted Dec. 15, 1989). For a concise discussion of the shift in international priorities represented by this resolution, see Peter Meyer, *The International Bill: A Brief History*, in THE

Bush in 1992,⁶⁷ assures familiar civil and political rights. The Economic Covenant, which the U.S. has not ratified, requires the state to assure its people an adequate standard of living, including food and shelter, health care, education, and social security. It has been ratified by 157 states, including all of the other industrialized Western states, China, and Japan.⁶⁸

The second major instrument which drew on liberal theory to address poverty was the South African Constitution, drafted in 1994 after the dismantling of apartheid.⁶⁹ It provides unequivocal support for economic rights. As Article 7(2) provides, the “state *must* respect, protect, promote, and fulfill the rights in the Bill of Rights.” These rights explicitly include rights of access to housing,⁷⁰ healthcare, food, water,⁷¹ social security,⁷² education,⁷³ and a healthy environment.⁷⁴ No state has a clearer constitutional-level commitment to economic rights.

The third major instrument to draw on liberal theory to address poverty was the MDGs, which began as a non-binding U.N. General Assembly proclamation in 2000 to eradicate extreme poverty and hunger.⁷⁵ Every state has signed on.⁷⁶ The MDGs are a strategic plan

INTERNATIONAL BILL OF HUMAN RIGHTS xxiii, xxxv (Paul Williams ed., 1981); *see also* Louis Henkin, *Preface*, HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY, *supra* note 63, at xv (“It is necessary to reaffirm what should never have been questioned—that human rights are indivisible and interdependent . . .”).

67. Minnesota Human Rights Library, *Ratification of International Human Rights Treaties—USA*, available at <http://www1.umn.edu/humanrts/research/ratification-USA.html> (last visited Mar. 29, 2008).

68. International Covenant on Economic, Social and Cultural Rights, Multilateral treaties deposited with the Secretary-General-TREATY I-IV -5.asp, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty5.asp> (last visited Mar. 29, 2008).

69. Daisy M. Jenkins, *From Apartheid to Majority Rule: A Glimpse Into South Africa's Journey Towards Democracy*, 13 ARIZ. J. INT'L & COMP. L. 463 (1996).

70. The South African Bill of Rights, *supra* note 62, at art. 26.

71. *Id.* at art. 27.

72. *Id.*

73. *Id.* at art. 13.

74. *Id.* at pt. III.

75. *United Nations Millennium Declaration*, section IIIG.A. Res. 55/2, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/RES/55/2 (Sept. 8, 2000), available at www.un.org/millennium/declaration/ares552e.htm.

76. *See id.*

for realizing eight ambitious goals—including halving world poverty and halting the spread of AIDS—by 2015.⁷⁷

These are not the only instruments addressing global poverty. There are innumerable international instruments addressing these issues,⁷⁸ in addition to regional and national initiatives.⁷⁹ But these are worth focusing on because of their scope, their influence, and because they are grounded in three transformative historical moments: the end of colonialism, the end of apartheid, and the end of the Soviet Union. These instruments, in short, are the paradigmatic post-Cold War approaches to poverty. The following sections explain how these instruments are shaped by liberal conceptions of morality, justice, and utility.

1. The moral duty to the poor

The first conception views poverty as giving rise to a moral obligation, and it is grounded in compassion. The notion that no one should suffer from want or deprivation when others have the means to prevent it, or that a community should take care of its own,

77. *Id.* at ¶ 19.

78. See, e.g., Principles on Housing and Property Restitution for Refugees and Displaced Persons, U.N. Sub-Comm'n on the Promotion and Protection of Human Rights, U.N. Doc. E/CN.4/sub.2/2005/17 (June 28, 2005) (Pinheiro principles), *endorsed* Sub-Comm'n Res. 2005/21, at 39–40, U.N. Doc. E/CN.4/2006/2 (Aug. 11, 2005); U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, DRAFT GUIDELINES: A HUMAN RIGHTS APPROACH TO POVERTY REDUCTION STRATEGIES (2002), *available at* <http://www.unhcr.ch/development/povertyfinal.html#>; Universal Declaration on the Eradication of Hunger and Malnutrition, World Food Conference, U.N. Doc. E/CONF. 65/20 (Nov. 16, 1974), *endorsed* G.A. Res. 3348 (XXIX), at 1 (Dec. 17, 1974); Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, Jan. 22–26, 1997.

79. Regional conventions include: Organization of African Unity, African Charter on the Rights and Welfare of the Child, Nov. 29, 1999, OAU Doc. CAB/LEG24.9/49, *available at* http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf; Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. No. 69; Organization of African Unity, African (Banjul) Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58; Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; European Committee of Social Rights, European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89. Noteworthy national initiatives include Article 41 of the Indian Constitution, which directs the State to “make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.” CONST. INDIA. art. 41.

can be traced to the basic teachings of the world's major religions.⁸⁰ This conception does not focus on the causes of poverty; it does not approach poverty as a problem to be solved. Rather, it assumes that poverty is inevitable and requires ongoing remediation, compassion, and charity.

Morality was grounded in reason, rather than religion, by Immanuel Kant, who argued that everyone has an obligation to help the poor since the “maxim of self-interest contradicts itself when it is made universal law.”⁸¹ That is, everyone would be free to deny aid to the needy, although everyone in need wants aid.⁸² Whatever the cause of another's poverty, we have a moral duty to alleviate it, and we hope others will do the same for us.⁸³

The recognition that those in need—the poor, the sick, the very old, and the very young—have a moral claim against the larger community is limited in two important respects. First, the moral duty to the poor is an obligation of one individual to another, rather than an obligation of the state to an individual.⁸⁴ Second, as a

80. This is a common theme in two of the leading human rights textbooks. HENKIN, *supra* note 56; STEINER & ALSTON, *supra* note 9. It is also predominant in Woods and Lewis's text focusing more specifically on economic rights. JEANNE M. WOODS & HOPE LEWIS, *HUMAN RIGHTS AND THE GLOBAL MARKETPLACE* (2005); *see also* discussion *infra* Part III.B.1.

81. Immanuel Kant, *The Doctrine of Virtue*, in *THE METAPHYSICS OF MORALS* (M.J. Gregor trans., 1964) (1797) *reprinted in* STEINER & ALSTON, *supra* note 9, at 261–62. *See generally* Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES* 111, 122 (1993) (Stephen Shute & Susan Hurley eds., 1993) (arguing that the notion of humans as rational “accounts for the residual popularity of Kant's astonishing claim that sentimentality has nothing to do with morality, that there is something distinctively and transculturally human called ‘the sense of moral obligation’ which has nothing to do with love, friendship, trust, or social solidarity”).

82. Kant, *supra* note 81. *But see* Nicholas Wade, *Is ‘Do Unto Others’ Written Into Our Genes?*, N.Y. TIMES, Sept. 18, 2007, at F1 (describing recent work by biologists linking human morality to “behaviors evolved by social animals to make societies work”); Robert Wright, *Why Darwinism Isn't Depressing*, N.Y. TIMES, Apr. 21, 2007, at A15 (arguing that empathy and love are products of evolution).

83. As Amartya Sen points out, “if one is in a plausible position to do something effective to prevent the violation of [a human right], then one does have an obligation to consider doing just that.” Amartya Sen, *Human Rights and the Limits of Law*, 27 *CARDOZO L. REV.* 2913, 2922 (2006).

84. Religious norms emerged well before the contemporary nation-state, which most scholars trace to the Peace of Westphalia of 1648, *reprinted in* 1 PARRY'S CONSOL. T. S. 119 (1969). Some religions leave charity to the individual and her God. Others take a more proactive role. *See, e.g., supra* note 11 (comparing views of two popes). *See generally infra* Part III.B.1.

corollary, the obligation is voluntary. If the donor declines to give, the putative donee has no legal claim or entitlement.

Like his religious predecessors, Kant does not impose any obligation on the state. Rather, the role of the state in alleviating poverty remains an open question. In the nineteenth century, for example, private British charities regarded state welfare policies as a hindrance.⁸⁵ In the 1940s, in contrast, Catholic leaders in Latin America encouraged their governments to proactively address poverty.⁸⁶ While the state may be persuaded to assume a moral obligation to the poor, morality does not compel such an assumption.

Moral arguments appeal to the would-be benefactor because they are not coercive. They seek to evoke compassion and empathy. The benefactor/donor, while hard-working and talented, is also lucky; the recipients are “unfortunate.”⁸⁷ Those who are well-off but not charitable, if not evil, are not morally conscious.⁸⁸ There is a recurring image of the transformative experience through which the once-blind benefactor apprehends his obligation.⁸⁹ By sharing his wealth, the benefactor becomes virtuous.

85. GERHARD ALBERT RITTER, *SOCIAL WELFARE IN GERMANY AND BRITAIN* 131–78 (1986).

86. See, e.g., Paolo G. Carozza, *From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights*, 25 *HUM. RTS. Q.* 281 (2003).

87. Under the moral conception, recipients may range from “our own” to strangers and even to our enemies. Part of the shame of the response to Hurricane Katrina, for example, was the fact that these were *Americans* who were being left on rooftops and in the stadium; they were “our own.” But see Barbara Stark, *The Future of the Fourteenth Amendment and International Human Rights Law: The Black Heritage Trail*, 13 *TEMP. POL. & CIV. RTS. L. REV.* 557 (2004) (describing historical neglect of Black Americans).

88. Scrooge is the archetype. See CHARLES DICKENS, *A CHRISTMAS CAROL* 33 (Chapman & Hall 1843) (“At this time of the rolling year,’ the spectre [Scrooge’s former business partner] said, ‘I suffer most. Why did I walk through crowds of fellow-beings with my eyes turned down, and never raise them to that blessed Star which led the Wise Men to a poor abode! Were there no poor homes to which its light would have conducted me!’”).

89. Professor Sunstein suggests that Roosevelt had such a moment:

Eleanor Roosevelt believed that her husband had been affected by a small incident that occurred when he was a young man. He arrived to take her home from her volunteer work at the Rivington Street settlement in New York City and came upon a very sick child, whom he carried up several flights of stairs to an ill-lit, unsanitary tenement. Stunned by what he saw, the future president declared, “If ever I get a chance to hit that thing, I’ll hit it hard.”

CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 65 (2004).

The moral conception distinguishes the “unfortunate” poor from the “undeserving” poor, whose poverty is their own fault.⁹⁰ Thus, we sympathize with, and support, the hard-working, self-sacrificing, down-on-their-luck poor.⁹¹ The lazy, dishonest, self-indulgent, willfully ignorant poor, in contrast, are left to the consequences of their own bad choices.⁹²

The moral duty to the poor is a driving force behind the MDGs. The well-off industrialized states have an obligation to help the world’s poor, because if we were poor, we would want others to do the same for us. Whether this is an obligation of the states (or of their people) is a matter for each state to decide.

Viewing obligations under the MDGs as moral obligations, rather than legal obligations, provides an independent basis for compliance and at the same time supports their underlying norms. The MDGs are arguably best viewed as “soft law.” While there may be no state-imposed sanctions, there are in fact consequences for meeting, or failing to meet, benchmarks.⁹³ These may not have the

90. Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L. J. 1499, 1499 (1991) (identifying common assumptions of poverty discourse, including the notion that “[p]oor people are different from us” and “[m]ost of them are morally weak and undeserving”).

91. For excellent examples, see, e.g., the *Neediest Cases* series of articles published by the *New York Times*. NYTimes.com, *Neediest Cases*, <http://topics.nytimes.com/top/news/newyorkandregion/neediestcases.index.html>. See also *The Neediest Cases Fund: A Brief History*, N.Y. TIMES, Nov. 13, 2002 (describing origins of the fund in an act of charity by Adolph S. Ochs, publisher of *The Times*, and Ochs’s continuing concern that “no note of self-interest, false sentimentality or preaching should slip in”).

92. Each conception omits some of the poor but with different implications. Here, even if the good should not let the bad starve, surely they should not support immoral behavior. One consequence is an emphasis on aiding the “innocent,” especially children. Another is an ongoing strategic and rhetorical battle about fault and causation. Can homelessness be a real “choice”? Where autonomy is privileged, there are straight-faced arguments about the “rights” of the homeless to live on the street. See, e.g., ANATOLE FRANCE, *THE RED LILY* 95 (Frederic Chapman ed., Winifred Stephens trans., J. Lane 1910) (1894) (“For the poor, [citizenship] consists in supporting and maintaining the rich in their power and their idleness. At this task they must labour in the face of the majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread.”).

93. The “consequences” are generally imposed on recipient states. See, e.g., United Nations, *THE MILLENNIUM DEVELOPMENT GOALS REPORT 2007*, at 30 (2007) (describing programs under which less developed countries can obtain debt relief after meeting certain criteria). Donor states, in contrast, merely face an increasingly disappointed Ban Ki-Moo, U.N. Secretary General, when they fail to meet promised goals. *Id.* at 3; see also Celia W. Dugger, *U.S. Agency’s Slow Pace Endangers Foreign Aid*, N.Y. TIMES, Dec. 7, 2007, at A1 (noting that the Millennium Challenge Corporation, a federal agency established in 2004, has spent only \$155 million of the \$4.8 billion approved for aid projects).

force or clarity generally associated with law, but such force or clarity is rare in the context of economic rights. These consequences are intended to function like law, moreover, and thus compare favorably with actual law in this context, which, as noted below, often raises difficult issues of enforcement and justiciability.⁹⁴ In addition, soft law can harden.⁹⁵ At least some of the norms set out in the MDGs may be characterized as *lex ferenda*, emerging norms of customary international law.⁹⁶

The South African Constitution is also deeply grounded in morality. The struggle against apartheid has long been recognized as one of the most compelling moral claims of our time. Like genocide and torture, apartheid is widely accepted as a *jus cogens* norm, that is, a norm against which derogation is not permitted.⁹⁷

2. The rights of the poor

The second conception understands poverty as injustice, a result of some unfairness either caused by law and politics or uncorrected by them. Thus, poverty becomes a question of rights, of claims against the responsible state. As Thomas Paine explained, the legal system of property, which gave a propertied elite the exclusive right to benefit from the ownership of land, effectively dispossessed others who were entitled to compensation for their loss.⁹⁸

94. See, e.g., *infra* Part III.A.4.

95. It has been suggested that, like the Universal Declaration, the MDGs are on a trajectory to achieve the status of customary law. Philip Alston, *Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals*, 27 HUM. RTS. Q. 755, 771 (2005) [hereinafter Alston, MDGs]. Even if the MDGs are not regarded as law, as Amartya Sen notes, “We need to see human rights . . . over a much bigger arena, of which legal motivation, actual legislation, and judicial enforcement form only one part.” Sen, *supra* note 83, at 2916.

96. Nankani, Page, and Judge have argued that the MDGs “have the status of international customary law.” Alston, MDGs, *supra* note 95, at 771.

97. Vienna Convention on the Law of Treaties, art. 63, May 23, 1969, 1155 U.N.T.S. 331; see also G.A. Res. 2202 (XXI), ¶ 1, U.N. Doc. A/RES/2202/(XXI) (Dec. 16, 1966) (General Assembly resolution declaring apartheid a “crime against humanity”).

98. “[The landed monopoly] has dispossessed more than half the inhabitants of every nation of their natural inheritance, without providing for them . . . and has thereby created a species of poverty and wretchedness that did not exist before.” THOMAS PAINE, *AGRARIAN JUSTICE* (1797), reprinted in WOODS & LEWIS, *supra* note 80, at 61. For a recent iteration of Paine’s basic idea, see Avi-Yonah, *supra* note 14, at 1404 (explaining that “all income-generating activities can be conceived as a partnership between individuals and the government, and taxation can be justified as the government receiving its share of the partnership income,” and noting that this undermined Locke’s view of individual property

Eighteenth-century French philosophers such as Jean-Jacques Rousseau championed the notion of poverty as injustice.⁹⁹ The French experience under the *ancien regime* (government by the monarch and nobility, for the monarch and nobility), gave the French a more profound appreciation of economic rights than that of the Americans and their British forbearers.¹⁰⁰ The idea that the poor, the vulnerable, have legal claims against the state for “the means of existence” appears in the French Declaration of the Rights of Man and the Citizen,¹⁰¹ as well as in the French Constitution of 1791.¹⁰²

Viewing poverty as a matter of justice adopts the perspective of the poor, who are re-positioned as active “rights-bearers” rather than passive “unfortunates.” Recognizing their rights recognizes—and generates—their power. Enforcement is up to the poor.

rights); see also Eric Foner, *Introduction* to THOMAS PAINE, RIGHTS OF MAN 7, 17–18 (1984); PAUL HUNT, RECLAIMING SOCIAL RIGHTS: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 6 (1996) (“The crucial social chapter of Part Two envisages a graduated income tax to finance a benefit for newly-wedded couples; a maternity allowance; a benefit for poor families enabling them to raise and educate their children; public employment for those in need of work; a system of social security permitting workers to retire on a pension at age sixty; and a benefit for the decent burial for those who die in poverty.”).

99. JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT*, reprinted in HENKIN, *supra* note 56, at 45–48.

100. As Marx put it, “the difference between French and English materialism follows from the difference between the two nations. The French imparted to English materialism wit, flesh and blood, and eloquence. They gave it the temperament and grace that it lacked. They civilized it.” ESSENTIAL WRITINGS, *supra* note 19, at 29. The English philosophers relied upon by the Framers, including John Locke, stressed the importance of rights. The extent to which “rights” included economic rights was more problematic. James Madison, for example, viewed “property” as the crucial right on which all others depended, although his main concern was protecting the rights of property-holders from the threat of the unpropertied majority. See, e.g., JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 96 (1990); see also Barbara Stark, *Deconstructing the Framers’ Right to Property: Liberty’s Daughters and Economic Rights*, 28 HOFSTRA L. REV. 963, 977–78 (2000).

101. DECLARATION OF THE RIGHTS OF MAN AND THE CITIZEN, reprinted in WOODS & LEWIS, *supra* note 80, at 53 (“1. The aim of society is the common welfare. . . . 21. Public relief is a sacred debt. Society owes maintenance to unfortunate citizens, either procuring work for them or in providing the means of existence for those who are unable to labor.”). For an account of Lafayette’s role in pushing the Declaration through the National Assembly during a time of “grave emergency,” see JEREMY WALDRON, *The Declaration of the Rights of Man and the Citizen*, 1789, in “NONSENSE UPON STILTS”: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN 22–25 (Jeremy Waldron ed., 1987).

102. 1791 CONST. (Fr.).

Those who are not poor may be viewed as exploiters, who profit from the labor of underpaid workers. In the alternative, they may be viewed as those who are not poor *now*, but who are members of the same community. They should be taxed by the state for the benefit of all. They too may become poor or needy, and they too can hold the state accountable.

The rights set out in the South African Constitution are grounded in justice claims. In 1913 the white South African government enacted the Native Lands Act, apportioning ninety-three percent of the land to whites.¹⁰³ Africans were not only dispossessed of their land, they were also disenfranchised. In 1948 the parliament assigned each African group to a tribal homeland, stripping Black Africans of South African citizenship.¹⁰⁴ The new constitution, like the new government that came to power in 1994 with the formerly imprisoned African National Congress leader Nelson Mandela as its new president, was deeply grounded in "justice." The South African Constitution unequivocally sets out legal rights for the poor. These rights are intended to redress more than eighty years of injustice.

The Economic Covenant, similarly, is grounded in justice claims. As noted above, it grew out of the Universal Declaration, which in turn drew on Latin American constitutions. Like the South African Constitution, the Latin American constitutions reflected their colonial pasts.¹⁰⁵ The Economic Covenant has also been traced to Franklin Roosevelt's "freedom from want"¹⁰⁶ and his observation that "'[n]ecessitous men are not free men.' People who are hungry and out of a job are the stuff of which dictatorships are made."¹⁰⁷ Finally, the Covenant drew on European versions of the modern

103. Jenkins, *supra* note 69, at 469.

104. *Id.* at 470–71.

105. Leary, *supra* note 57, at 22. The colonial experience obviously varied as a function of geography, history, and politics. But there were still useful lessons. As Professor Anghie explains, Latin American states became independent long before the colonized states of Africa and Asia. They developed legal strategies, such as the Calvo Clause, which were instructive for the newly decolonized states. ANGHIE, *supra* note 17, at 209.

106. This was one of the famous "four freedoms." President Franklin D. Roosevelt, Message to the Congress on the State of the Union (Jan. 6, 1941), 87 CONG. REC. 44, 46–47.

107. President Franklin D. Roosevelt, Message to the Congress on the State of the Union (Jan. 11, 1944), in SUNSTEIN, *supra* note 89, app. I, at 242. Roosevelt became president during the Great Depression, which left millions destitute, their savings wiped out, and their jobs gone because of market forces and government policies beyond their control.

welfare state. Many European states had already enacted some form of universal health insurance or social security.¹⁰⁸ Rousseau's notion of poverty as injustice¹⁰⁹ has spread and melded with its counterparts across Europe. Democratic socialism had become especially popular in the nineteenth century, when liberal governments sought to preempt the appeal of Marxism.¹¹⁰

3. *Poverty and utility*

The third conception understands poverty as the failure to organize legal and economic institutions in a sensible way. Here, poverty is a question of utility, a problem to be analyzed and solved. Jeremy Bentham argued that humans are governed by a simple calculus of maximizing pleasure and minimizing pain: "The [principle of utility] approves or disapproves of every action . . . according to [its tendency] to . . . promote or to oppose . . . happiness."¹¹¹ Poverty should be addressed by the state because it is painful, not only for the poor, but for the larger society of which they are a part. "Morality," properly understood, is simply a function of the principle of utility:

Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we should do. On the one hand, the standard of right and wrong, on the other, the chain of causes and effects, are fastened to their throne.¹¹²

108. See RITTER, *supra* note 85, at 131–50 (describing state social insurance in Britain).

109. See *supra* text accompanying notes 99–102.

110. See, e.g., W.M. SIMON, GERMANY IN THE AGE OF BISMARCK 60 (1968) (noting that Bismarck's first objective "was to defeat and suppress the growing socialist movement in Germany"); see also WILLIAM HARBUTT DAWSON, BISMARCK AND STATE SOCIALISM 34–35 (Howard Fertig, Inc. 1973) (1890).

111. JEREMY BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION (1789), reprinted in WILLIAM EBENSTEIN, GREAT POLITICAL THINKERS: PLATO TO THE PRESENT 516 (4th ed. 1969) (1951).

112. *Id.* at 515. As Peter Gay defines it, "Hedonism . . . holds man to be exclusively driven by pleasure and pain And Utilitarianism we may define as the social application of hedonism: since the largest amount of pleasure is clearly the goal of the individual, the largest amount of pleasure for all must be the goal of society." THE ENLIGHTENMENT, *supra* note 10, at 662.

Since the individual's happiness depends upon the aggregate happiness of the group to which she belongs, individuals will necessarily be concerned about collective well-being.¹¹³

For Bentham, "rights" were a pointless distraction: "Rights are nonsense. 'Natural rights' are nonsense on stilts."¹¹⁴ Rather, the focus should be on actual poverty, rather than abstract "justice." Thus, the poor should be studied, and appropriate social programs should be designed to reduce their suffering and enable them to become productive members of society.

The utilitarian conception of poverty is addressed to the state. The state has an interest in relieving poverty, or at least keeping it manageable, because insecurity is destabilizing.¹¹⁵ Thus, in the nineteenth century, arch-conservative Otto Von Bismarck enacted social security and a form of universal health care in order to blunt the growing appeal of socialism.¹¹⁶ The state, moreover, is also in the best position to effectively address poverty, by collecting data and taxes, and by establishing the whole range of institutions and bureaucracies necessary to assure a decent standard of living, from crèches to nursing homes.¹¹⁷

Utilitarianism was the impetus for the creation of the Bretton Woods institutions established after World War II to finance the reconstruction of Europe.¹¹⁸ In the 1960s the International

113. If they are not, Bentham argued, this should be remedied by education and social institutions. EBENSTEIN, *supra* note 111, at 508.

114. *Id.* Bentham considered the French rights of man "bawling upon paper." Sen, *supra* note 83, at 2917.

115. STIGLITZ, *supra* note 3, at xiv. Stiglitz, former chief economist for the World Bank, pointing out, "[r]arely did I see forecasts about what the [IMF] policies would do to poverty." *Id.*

116. He did not succeed. See RITTER, *supra* note 85, at 140–50.

117. The welfare state, as Professor Henkin notes, owes more to Bismarck than to Marx. HENKIN, *supra* note 56. See generally David Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720 (1972) (discussing Weber's analysis of the relationship between law and development).

118. See, e.g., Articles of Agreement of the International Bank for Reconstruction and Development, 60 Stat. 1440 (1945) [hereinafter Articles] (setting out mission of the World Bank to alleviate poverty); Elizabeth Mandeville, *United Nations Development Program*, in ENCYCLOPEDIA OF HUMAN RIGHTS 2 (David Forsythe ed., 2008) (describing two post-World War II "grand new efforts in international relations and cooperation—the human rights movement, which sought to ensure that these rights were globally afforded and protected, and the development movement, which sought to create standards of living and institutions of support in the developing world to foster societies in which these freedoms could be guaranteed"). See generally STIGLITZ, *supra* note 3, at 11–12 (explaining the economic theory behind the Bretton Woods institutions).

Monetary Fund and the World Bank shifted their focus to the developing world.¹¹⁹ But the large-scale projects intended to transform Third World states into modern industrialized economies did little for the poor in those states.¹²⁰ These projects increased gross domestic product by increasing the wealth of the ruling elites,¹²¹ but the poor remained poor.¹²² Many of the ambitious development projects of the 1980s were failures, encouraging bribery and other forms of corruption, rather than the hoped-for economic growth.

The Millennium Development Goals may be understood as the latest in a long line of development initiatives. Their proponents, like their predecessors, are the heirs of Bentham. The MDGs are grounded in utility. “Justice” is peripheral.¹²³ While poverty is to be “halved” by 2015, for example, the rights of the remaining poor are not addressed. Nor do the wealthy states owe the poor states for earlier exploitation. Rather, the developed states are urged to support the less-developed countries in order to create future markets for the benefit of all.

119. STIGLITZ, *supra* note 3, at 14–15 (explaining that the World Bank was originally “supposed to be in charge of structural issues”—state financial institutions, markets, trade policies. The IMF in contrast, was supposed to focus on macroeconomics—state monetary policy, inflation, foreign debt. There is clearly a potential for overlap, “since almost any structural issue could affect the overall performance of the economy”); Mandeville, *supra* note 118 (noting that the UNDP currently focuses on the MDGs). For a recent analysis of the World Bank’s human rights initiatives, see Roberto Dañino, *The Legal Aspects of the World Bank’s Work on Human Rights*, 41 INT’L LAW. 21, 24–25 (2007).

120. See, e.g., Abby Rubinson, Note, *Regional Projects Require Regional Planning: Human Rights Impacts Arising from Infrastructure Projects*, 28 MICH J. INT’L. L. 175, 177 (2006).

121. See, e.g., Barry Bearak, *In Crisis, Zimbabwe Asks: Could Mugabe Lose?*, N.Y. TIMES, Mar. 7, 2008, at A1 (describing the decades of Mugabe’s rule, during which he mutated from a revolutionary leader to a tyrant who has led his country to a surreal national inflation rate of 100,000 percent); *Mobutu’s Xanadu*, N.Y. TIMES MAG., Sept. 26, 1999, at 82 (describing Gbadolite, a remote village in the Congo, an eerie wasteland which dictator Mobutu once filled with “three palaces, a high-rise luxury hotel and conference center”).

122. See STIGLITZ, *supra* note 3, at 5. *But see* SACHS, *supra* note 2, at 355 (crediting globalization with raising two-hundred million people in India and three-hundred million people in China out of extreme poverty since 1990).

123. This does not mean that the MDGs are peripheral to rights claims. See Alston, *MDGs*, *supra* note 95, at 755 (arguing that the MDGs are “of major relevance for human rights” and are not peripheral to rights claims).

The MDGs may also be understood as a utilitarian effort to mitigate the ill effects of globalization,¹²⁴ or, more positively, to extend the benefits of globalization to the poor.¹²⁵ This includes those casualties of the fall of the Soviet Union, including citizens of former Soviet bloc states who abruptly found themselves without state jobs and benefits, as well as revolutionary governments in Africa, who could no longer depend on arms or aid. As Nobel economist Joseph Stiglitz has shown, absent adequate safety nets and infrastructure (schools, roads, banks), free trade does less-developed countries more harm than good.¹²⁶

Jeffrey Sachs, Director of the MDG project, was an early proponent of the Washington Consensus.¹²⁷ Sachs advised besieged governments in Latin American and fledging governments in Eastern Europe that free, vigorous markets would save their troubled economies.¹²⁸ In Africa, however, Sachs realized that markets could not function where populations are decimated by malaria and AIDS, where there are no roads to ports or hospitals, and where there are

124. STIGLITZ, *supra* note 3, at 9 (defining globalization as “the closer integration of the countries and peoples of the world which has been brought about by the enormous reduction of costs of transportation and communication, and the breaking down of artificial barriers to the flows of goods, services, capital, knowledge, and (to a lesser extent) people across borders”); Boaventura de Sousa Santos, *Oppositional Postmodernism and Globalization*, 23 LAW & SOC. INQUIRY 121, 135 (1998) (defining globalization as “the process by which a given local condition or entity succeeds in expanding its reach over the globe and, by doing so, develops the capacity to designate a rival social condition or entity as local”); *see also* GLOBALIZING INSTITUTIONS: CASE STUDIES IN REGULATION AND INNOVATION 11 (Jan Jenson & Boaventura de Sousa Santos eds., 2000).

125. *See supra* note 122. Some argued that the collapse of the Doha round of the world trade talks precluded agreement on effective measures to “lift millions out of poverty, curb rich countries’ ruinous farm support and open markets for countless goods and services.” *The Future of Globalisation*, THE ECONOMIST, July 29, 2006, at 11.

126. *See, e.g.*, STIGLITZ, *supra* note 3, at 18 (explaining how SAPs have left countries like Bolivia worse off); JOSEPH E. STIGLITZ & ANDREW CHARLTON, FAIR TRADE FOR ALL: HOW TRADE CAN PROMOTE DEVELOPMENT (Oxford Univ. Press 2005).

127. David M. Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 1, 17 (David M. Trubek & Alvaro Santos eds., 2006) [hereinafter THE NEW LAW AND ECONOMIC DEVELOPMENT] (grounding the Washington Consensus in Margaret Thatcher’s famous dictum that “there is no alternative”); David Kennedy, “*The Rule of Law, Political Choices, and Development Common Sense*,” in THE NEW LAW AND ECONOMIC DEVELOPMENT 95, 129 (claiming that under the Washington Consensus, “an economy was now imagined as a ‘market’ in which individual economic actors transact with one another Government is there less to manage the economy than to support the market. Moreover, there is no reason to think of economics in *national* terms”).

128. SACHS, *supra* note 2, at 99–137.

no hospitals or ports. Now Sachs promotes “on-the-ground solutions for ending poverty,” such as mosquito nets, water filters, soil analysis, and infrastructure support.¹²⁹

Although the MDGs may not be legally binding, states are encouraged to be active participants in the Millennium Project,¹³⁰ especially the eighth goal, which is to establish “global partnerships.” As Professor Alston notes, this holds out the incentive that wealthy developed states will provide resources to states showing significant progress.¹³¹

The Economic Covenant, while concerned with rights and rooted in justice, is also grounded in utility—the notion that poverty is a problem that can be solved through measures such as “technical assistance” and self-monitoring reports.¹³² As set out in Article 2, the state is not required to assure economic rights immediately. Rather, it is only required to head in the right direction, to “achieve progressively the full realization of the rights.”¹³³ If a state cannot afford to provide its people with the basic necessities, it is only required to assure “core subsistence” rights.¹³⁴ Guidelines are

129. *Id.* at 226–43. Sachs does not suggest that such measures alone can end poverty. *See id.* at 84 (setting out a complex and comprehensive checklist for constructive analysis).

130. *See supra* text accompanying notes 82–85 (explaining how the MDGs are as “binding” as most other international law addressing economic rights); *see also* Editorial, *Making Poverty History in 2006*, N.Y. TIMES, Jan. 1 2006, at 7 (noting that Britain, France, and Germany have set a timetable for spending .7% of their GNPs on development; the United States has not).

131. *See* Alston, *supra* note 95, at 775 (noting that the eighth goal “is also a strong candidate [for customary international law status] especially in light of the existence of an international duty to cooperate, as enshrined in the U.N. Charter and elsewhere”). *But see infra* note 197.

132. *See, e.g.*, U.N. INSTITUTE FOR TRAINING AND RESEARCH, MANUAL ON HUMAN RIGHTS REPORTING UNDER SIX MAJOR INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 45–48, U.N.Doc. HR/PUB/91/1, U.N. Sales No. GV.97.0.16 (1997) [hereinafter MANUAL]; The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. E/CN.4/1987/1, Annex. (1987), *reprinted in The Implementation of the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 121, 122–35 (1987) (considering the obligations of state parties to the Economic Covenant). *But see* Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT’L. L. 113, 113–18 (2008) (critically discussing the concept of the “minimum core”).

133. *See* MATTHEW C. R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 22–26 (Oxford Univ. Press 1995) (discussing the obligation to “progressively realize” rights).

134. *See* MANUAL, *supra* note 132, at 45–48 (describing obligation to assure “core subsistence” rights without explicitly defining them); *see also* Young, *supra* note 132, at 128.

provided for state bureaucrats, who are required to prepare periodic reports.

While the South African Constitution has roots in justice and morality, similarly, pragmatic utility is the bedrock of the new order. Thus, the Constitutional Court upheld the grant of amnesty for the leaders of the apartheid regime, and limited reparations to one-time payments from corporations found to have profited from apartheid.¹³⁵ As the Court concluded in the *Anzian Peoples* case, the *state* “is best equipped to determine what measures may be most conducive for . . . reconciliation.”¹³⁶

4. How liberal theories add up, and why they fall short

As set out in the chart below, each of these conceptions has its proponents, its justification, and its enforcement mechanisms. Each addresses a different political actor. Each is internally coherent; that is, each makes sense in its own terms. Their justifications, grounded in the reason of the Enlightenment, follow within that framework. The enforcement mechanisms (from private charity through moral choice to the welfare state) respond to the problem as specified, and the addressees are not only receptive to these arguments but defined by them. If justice is the governing conception, for example, the “poor” become rights-bearers.

| | Morality | Justice | Utility |
|---------------|-------------------------------|--|--|
| Proponents | Kant | Rousseau, Paine | Bentham |
| Justification | Do the right thing. | Society establishes property, owes those dispossessed. | Greatest good for the greatest number. |
| Enforcement | Moral choice, private charity | Rights, set out in laws, enforceable in courts | Bureaucratic social programs |

135. See *Anzian Peoples Org. v. President of the Republic of S. Africa*, 1996 (4) SALR 637 (CC) at 50 (S. Afr.) (describing the process through which the new constitution was drafted). See generally Lorna McGregor, *Individual Accountability in South Africa: Cultural Optimum or Political Façade?*, 95 AM. J. INT'L L. 32 (2001) (analyzing program for individual accountability in South Africa).

136. *Anzian Peoples Org.*, 1996 (4) SALR 637(CC) at 29.

| | | | |
|--------------------|----------------------------|-----------------------------|---|
| Addressed to . . . | Benefactors (the not-poor) | The poor/ workers/ peasants | The State (or the bureaucrats who run it) |
|--------------------|----------------------------|-----------------------------|---|

A family that has lost its home because of the government's failure to properly maintain a levee, for instance, may well be entitled to compensation.¹³⁷ At the same time, the prospect of such compensation may not address their immediate need for food and shelter. Nor does it obviate the moral obligation of others to provide it.¹³⁸ From a utilitarian perspective, both approaches should be developed and coordinated.

But there are also tensions between these approaches. Focusing on enforcement, for example, the moral duty to the poor is an obligation of one individual to another, rather than an obligation of the state to the individual. If we view poverty as a question of justice, in contrast, it is not a matter of the virtuous benefactor giving but a matter of the unfairly deprived *taking back* what is rightfully theirs. As a corollary, while each conception addresses a key political player—the not-poor, the poor, or the state—it often does so at the expense of another. “Justice” arguments may be relied upon to justify nationalization or expropriation of foreign-owned property, for example, to the outrage of the foreign owners.¹³⁹ The utilitarian state may aggressively remove children from their dysfunctional families and communities, while those seeking “justice” for those families and communities may argue that it is the state’s obligation to better support them.¹⁴⁰

137. See, e.g., William P. Quigley, *Thirteen Ways of Looking at Katrina: Human and Civil Rights Left Behind Again*, 81 TUL. L. REV. 955, 956 (2007) (noting that wealth determined whether “you live on higher or on lower ground in a city below sea level”). See generally Arjun Sengupta, U.N. Independent Expert on Human Rights and Extreme Poverty, *Hurricane Katrina, A Window on Extreme Poverty in the U.S.*, U.N. Doc E/CN 4/2006/43/Add.1 (Mar. 27, 2006) (observing that the richest nation in the history of the world had done little to nothing to reconstruct New Orleans two months after Katrina).

138. See, e.g., Comic Relief 2006, available at www.comicrelief.org (urging viewers to donate to Katrina victims and animal rescue operations).

139. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964); see also *infra* note 211 (discussing Sabbatino and its aftermath); discussion *infra* Part IV.A. (discussing the defeat of the NIEO and the Texaco/Libya Arbitration).

140. See, e.g., DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (Basic Civitas Books 2001). See generally WALDRON, *supra* note 101, at 1, 5 (“Bentham and those who follow him . . . are right to point out the importance of establishing

The same dynamics are evident in the legal instruments that shape post-Cold War approaches to poverty, because these instruments are driven by the same liberal conceptions of morality, justice, and utility. The Economic Covenant, like the South African Constitution, is written in the language of “rights” and animated by appeals to justice. A rights-based approach to poverty is necessary to address and rectify historical injustice, as in South Africa. It is necessary to empower the poor and to elevate economic rights to the status of civil and political rights.¹⁴¹ But a rights-based approach is not sufficient.¹⁴² While it imposes obligations on the state, it does not address state concerns. Indeed, rights can embarrass the state, or generate instability. In South Africa, for example, the state’s inability to provide jobs or assure a decent standard of living for growing numbers of South Africans contributes to growing unrest.¹⁴³ The distance between the articulation of a right, by a court or in a treaty, and its actual realization becomes a political minefield.¹⁴⁴

The South African Constitution and the MDGs are deeply grounded in morality. The MDGs make a moral pitch to the philanthropists and celebrities whose support they seek. Getting photographed with African children makes them look “good.”¹⁴⁵ But

systematic relations between rights and other elements of the normative systems in which rights occur.”).

141. As Professor Alston observes, “the characterization of a specific goal as a human right elevates it above the rank and file of competing societal goals, gives it a degree of immunity from challenge and generally endows it with an aura of timelessness, absoluteness, and universal validity.” Philip Alston, *Making Space for New Human Rights: The Case of the Right to Development*, 1 HARV. HUM. RTS. Y. B. 3 (1988). Professor Alston has cautioned, however, against the uncritical recognition of new rights. Philip Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT’L. 607 (1984).

142. Muna Ndulo, *Imagine a World Without Hunger: The Hurdles of Global Justice*, 39 CORNELL INT’L L.J. 779, 783 (2006) (arguing that human rights are necessary but not sufficient to “implement the fundamental economic right to survival”). See generally Marius Pieterse, *Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited*, 29 HUM. RTS. Q. 796 (2007).

143. See generally Joseph E. Stiglitz, *Bleakonomics*, N.Y. TIMES BK. REV., Sept. 30, 2007, at 12 (“[U]nemployment for [South Africa’s] black majority is 48 percent; and the number of people living on less than \$1 a day has doubled to four million from two million since 1994, the year the A.N.C took over.”).

144. Philip Harvey, *Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously*, 33 COLUM. HUM. RTS. L. REV. 363 (2002).

145. See, e.g., Kate Doty, *Who’s the Most Charitable of Us All? Celebrities Don’t Always Make the Cut*, N.Y. TIMES, Sept. 10, 2007, at C7 (noting Angelina Jolie’s acknowledgement that her charitable work distracts the public from her “colorful personal life”).

morality does not sensibly distribute costs or benefits.¹⁴⁶ Nor does it provide an antidote for donor fatigue.

Utility also plays a crucial role in each instrument. It is the organizing principle in the detailed guidelines promulgated in connection with the implementation of the Economic Covenant.¹⁴⁷ It is the reason the South African Constitutional Court rejected the “justice” arguments of the Azanian People’s Party.¹⁴⁸ It underlies the “benchmarks” and “goals” of the MDGs.¹⁴⁹ But utility may be unfair,¹⁵⁰ and even immoral.¹⁵¹

These tensions highlight liberalism’s fundamental ambivalence about poverty. It is certainly a concern, and it becomes more of a concern when it becomes severe enough to threaten the stability of the state,¹⁵² but poverty is not a priority of the liberal state or the liberal international legal system. Thus, there is wide-ranging discussion about causes of poverty and possible solutions. But there is little rigorous effort to reconcile conflicting views and even less political will to implement the rare agreements.¹⁵³

Liberalism, in fact, can tolerate even the most crushing poverty, particularly in other states. As a practical matter, liberal economies can chug along quite comfortably with as much as ten percent unemployment.¹⁵⁴ As a practical matter, a neoliberal world economy

146. Stephanie Strom, *Big Gifts, Tax Breaks, and a Debate on Charity*, N.Y. TIMES, Sept. 6, 2007, at A1 (“Roughly three-quarters of charitable gifts of \$50 million and more . . . went to universities, private foundations, hospitals and art museums.”).

147. See, e.g., MANUAL, *supra* note 132, at 45; *Limburg Principles*, *supra* note 132, at 125–26 (describing steps that should be taken by states “towards full realization of the rights contained in the Covenant”).

148. See *Oxfam Faults*, *supra* note 3.

149. See *supra* text accompanying notes 124–27.

150. Some economists have argued that “fairness has no place in legal theory.” Aviyonah, *supra* note 14, at 1414 n.122 (citing Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 967 (2001)).

151. SANDEI, *supra* note 18, at 9 (“The case against utilitarianism was made most powerfully by Immanuel Kant The utilitarian calculus treats people as means to the happiness of others, not as ends in the themselves, worthy of respect.”).

152. See, e.g., *supra* text accompanying notes 102–06; see also STIGLITZ, *supra* note 3, at 11 (describing the impact of the Great Depression on Bretton Woods).

153. See, e.g., THE MILLENNIUM DEVELOPMENT GOALS REPORT 2007, *supra* note 93, at 30 (describing failure of donor states to reach benchmarks); Dugger, *supra* note 93 (describing the failure of the U.S. to spend funds already approved).

154. STIGLITZ, *supra* note 3, at 57 (explaining how industrialized states can absorb the “pain of layoffs”). See generally STRUCTURAL UNEMPLOYMENT IN WESTERN EUROPE (Martin Werding ed., 2006) (analyzing persistently high levels of unemployment); ECONOMIC POLICIES AND UNEMPLOYMENT DYNAMICS IN EUROPE (S.G.B. Henry & Dennis J. Snower

can tolerate 1.1 billion living on less than a dollar a day.¹⁵⁵ The rising tide of globalization has left millions high and dry.¹⁵⁶ As the discontents explain below, liberalism does not require the eradication of poverty. Indeed, it has been suggested that *some* poverty stabilizes the system.¹⁵⁷

B. Liberalism's Discontents

Liberalism has always had its discontents, its detractors.¹⁵⁸ Since the eighteenth century, socialism has offered an alternative vision for those referred to below as the “radicals.” The Enlightenment itself, the grander metanarrative from which the metanarratives of liberalism as well as socialism evolved,¹⁵⁹ has also been contested. It has been challenged by the theocrats, those who believe that secular humanism is the wrong metanarrative. It has also been challenged by the skeptics, and their postmodern progeny, who question all metanarratives. The theocrats, the radicals, and the skeptics all question liberalism’s emphasis on individual autonomy, which they view as counter to spiritual communion, solidarity, and community.

eds., International Monetary Fund 1997) (examining high unemployment in five European states).

155. *See supra* text accompanying note 4.

156. Howard W. French, *Lives of Grinding Poverty, Untouched by China's Boom*, N.Y. TIMES, Jan. 13, 2008 (citing recent World Bank study suggesting that there are three-hundred million people who are still poor in China).

157. STIGLITZ *supra* note 3, at 23–24 (describing tension between the IMF objective of global stability and the World Bank objective of eliminating poverty). While a neoliberal world economy may well depend on new markets, and some neoliberals are undoubtedly eager to transform the world’s poor into avid consumers, whether this is possible remains a very open question. *See* HENKIN, *supra* note 61, at 22–27 (contrasting Locke’s emphasis on civil and political rights with Rousseau’s recognition of economic and social rights).

158. The number of discontents depends on how they are defined. According to Stiglitz, “It is clear to almost everyone that something has gone horribly wrong.” STIGLITZ, *supra* note 3, at 4. They all question the liberal emphasis on autonomy. *See, e.g.*, SANDEL, *supra* note 18, at 11 (noting that while “egalitarian” liberals support “certain social and economic rights” and “libertarian” liberals do not, “Kantian liberalism begins with the claim that we are separate, individual persons, each with our own aims, interests, and conceptions of the good life”).

159. Judt, *supra* note 25, at 6 (“The Marxist project . . . was one strand in the great progressive narrative of our time: it shares with classical liberalism, its antithetical historical twin, that narrative’s optimistic, rationalistic account of modern society and its possibilities.”).

1. *The theocrats*

Charity is a basic tenet of many of the world's religions. The Bible and the Qur'an both mandate charity.¹⁶⁰ Buddhism, similarly, commands that one-quarter of one's wealth be given for religious purposes, including care of the poor.¹⁶¹ African spiritual traditions also require believers to care for aliens and the poor.¹⁶² The responsibility to the poor is that of the individual or the community; however, it is not the responsibility of the state. Religious approaches do not necessarily conflict with liberalism, except when theocrats challenge the secular state.

The Great Separation between church and state can be traced to Thomas Hobbes, who argued in the seventeenth century that the two were fundamentally incompatible.¹⁶³ Europeans reeling from the Wars of Religion were receptive to this idea, and the separation of church and state became a core tenet of the Treaty of Westphalia in 1648.¹⁶⁴

Despite the separation of church and state and the challenges of science, religion survived the Enlightenment. For many, reason provided no substitute for the moral authority or clarity of religion, buttressed by centuries of tradition and culture. Some stayed with the church simply because they believed in God, their faith confirmed by a profound spiritual experience that science could not explain,¹⁶⁵ let alone inspire. Religion remained a powerful force

160. See, e.g., *Isaiah* 58:6-8 (King James) ("Is not this the fast that I have chosen? to loose the bands of wickedness, to undo the heavy burdens, and to let the oppressed go free, and that ye break every yoke? Is it not to deal thy bread to the hungry, and that thou bring the poor that are cast out to thy house? when thou seest the naked, that thou cover him; and that thou hide not thyself from thine own flesh?"); 2 *Corinthians* 9:7 (King James) ("Every man according as he purposeth in his heart, so let him give; not grudgingly, or of necessity: for God loveth a cheerful giver."); 9:60 *The Qur'an* ("Charities shall go to the poor, the needy, the workers who collect them, the new converts, to free the slaves, to those burdened by sudden expenses, in the cause of ALLAH, and to the traveling alien. Such is ALLAH'S commandment . . .") (all cited in WOODS & LEWIS, *supra* note 80, at 45).

161. WOODS & LEWIS, *supra* note 80, at 43.

162. *Id.*

163. MARK LILLA, *THE STILLBORN GOD: RELIGION, POLITICS, AND THE MODERN WEST* 74-91 (2007).

164. See *Peace of Westphalia*, *supra* note 84, at para. 28 (establishing "Liberty of Conscience for Protestants and Catholics").

165. *But see* FREUD, *supra* note 18, at 49 ("The whole thing is so patently infantile, so foreign to reality, that to anyone with a friendly attitude to humanity it is painful to think that the great majority of mortals will never be able to rise above this view of life."); WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* (1902).

throughout Europe and America, deterring bad behavior and encouraging good acts, including acts of charity. For some, religion has become increasingly important as secular morality has become increasingly dubious.¹⁶⁶

In addition, it has been argued that religion provides a rich sense of community, meaning, and connection. Thus, modern communitarians draw on the notion of religious community¹⁶⁷ as an alternative to what Max Weber called the “disenchantment” of modern life.¹⁶⁸ Weber warned that the reason of the Enlightenment had been appropriated to “organize life from the top down, through structures of hierarchy, specialization, regulation and control,” producing what he called the “‘iron cage’ of modern life.”¹⁶⁹

While the influence of religion remains widespread, in the West religious authorities generally defer to the state.¹⁷⁰ For many non-westerners who are not the heirs of the Enlightenment, religion has remained inextricably bound up with political authority. As Mark Lilla describes the divide between secular and theological cultures: “On one shore the basic political structures of society are imagined and criticized by referring to divine authority; on the other they are not.”¹⁷¹ A secular state, for theocrats, is an immoral, Godless state, in which a moral and spiritually fulfilling life is impossible.¹⁷²

166. JONATHAN GLOVER, *HUMANITY: A MORAL HISTORY OF THE 20TH CENTURY* 1 (2000) (“In Europe at the start of the twentieth century most people accepted the authority of morality . . . Reflective Europeans were also able to believe in moral progress, and to see human viciousness and barbarism as in retreat. At the end of the century, it is hard to be confident either about the moral law or about moral progress.”).

167. This sense of community offers a basis for responding to “Emerson’s challenge to the man who solicited his contribution to the poor—‘Are they *my* poor?’” SANDEL, *supra* note 18, at 17.

168. John Patrick Diggins, *The Godless Delusion*, N.Y. TIMES BK. REV., Dec. 16, 2007, at 2. See generally KOLAKOWSKI, *supra* note 25, at 1061 (describing the Frankfurt School, which warned of “a society in which the means whereby a professional bureaucracy could manipulate the masses were becoming more and more effective: this applied both to Fascist and Communist totalitarianism and to the Western democracies”).

169. Diggins, *supra* note 168, at 15.

170. LILLA, *supra* note 163, at 305 (observing that contemporary European political thinkers assume “that the ‘age of religion’ is over in the West”). The Vatican has a seat at the U.N. See, e.g., Robert John Araujo, S.J., *The International Personality and Sovereignty of the Holy See*, 50 CATH. U. L. REV. 291, 346 (2001).

171. LILLA, *supra* note 163, at 5.

172. See LILLA, *infra* note 190, (quoting the President of Iran’s letter to President Bush).

2. *The radicals*

You say you want a revolution

Well, you know, we all want to change the world . . .

—LENNON & MCCARTNEY¹⁷³

Rousseau, like many of his contemporaries, understood the importance of basic socioeconomic benefits, such as health, education, and welfare.¹⁷⁴ He argued that it was the obligation of the state to assure these benefits. This obligation, however, did not create a reciprocal “right” in the individual. Rather, according to Rousseau, such rights are renounced by individuals in the act of joining society and subjecting themselves to the “general will.”¹⁷⁵

In the nineteenth century, Karl Marx went considerably further, arguing that liberal “rights” were in fact antithetical to the enjoyment of basic needs. Rather, “rights” were part of the structure of the very state system that precluded such enjoyment. As he explained in *On the Jewish Question*:

None of the supposed rights of man, therefore, go beyond the egoistic man, man as he is, as a member of civil society; that is, an individual separated from the community, withdrawn into himself, wholly preoccupied with his private interest and acting in accordance with his private caprice. Man is far from being considered, in the rights of man, as a species-being; on the contrary, species-life itself—society—appears as a system which is external to the individual and as a limitation of his original independence. The only bond between men is natural necessity, need and private interest, the preservation of their property and their egotistic persons.¹⁷⁶

173. THE BEATLES, *Revolution, on HEY JUDE* (Apple 1970).

174. See *supra* Part III.A.2.

175. ROUSSEAU, *supra* note 99, at 45–46. See generally GEORGE LICHTHEIM, *MARXISM: AN HISTORICAL AND CRITICAL STUDY* 3 (1961) (explaining how Rousseau’s “growing influence among the educated elite of Germany prepared the way for a sympathetic reception of the French Revolution in its earlier, pre-terrorist, phase”).

176. Karl Marx, *On the Jewish Question, reprinted in* HENKIN, *supra* note 56, at 56. As Marx puts it, “[The Bourgeoisie] has resolved personal worth into exchange value, and in place of the numberless indefeasible chartered freedoms, has set up that single, unconscionable freedom—Free Trade.” KARL MARX, *COMMUNIST MANIFESTO* 6 (Penguin 1967). Marx viewed poverty as a dynamic force: “[S]o long as [theoreticians] are at the beginning of the struggle, they see in poverty nothing but poverty, without seeing in it the revolutionary, subversive side, which will overthrow the old society.” KARL MARX, *POVERTY OF PHILOSOPHY*

For Marx, liberalism asked the wrong questions. It consistently and intentionally privileged the needs of capital over the needs of workers. Its ideology of “rights” was mere window dressing.¹⁷⁷ Thus, for Marx and Rousseau individual rights were not the answer.

3. *The skeptics*

The skeptics include those who question the metanarratives of the Enlightenment and theocracy, in particular, as well as metanarratives in general.¹⁷⁸ While Third World nationalists and first world postmodern theorists¹⁷⁹ make strange bedfellows, they present similar challenges to liberal internationalists. They scoff at the metanarratives of the Enlightenment, socialism as well as liberalism, and the metanarratives of the theocrats as well. As Pierre Schlag explains,

postmodernism questions the integrity, the coherence, and the actual identity of the humanist individual self For postmodernism, this

125–26 (printed in U.S.S.R., 1894) (1963 ed., International Publishers Co., Inc.) [hereinafter POVERTY OF PHILOSOPHY].

177. See POVERTY OF PHILOSOPHY, *supra* note 176, at 206 (“If the free traders cannot understand how one nation can grow rich at the expense of another, we need not wonder, since these same gentlemen also refuse to understand how in the same country one class can enrich itself at the expense of another.”); see also FROMM, *supra* note 19, at 37 (“One must of course not confuse the aim of overcoming the abysmal poverty which interferes with a dignified life, with the aim of an ever-increasing consumption.”).

178. This includes those who view “universalism,” or secular *Western* universalism, as a Western “will to power” or quest for hegemony. This critique may be addressed to radicals as well as liberals. See, e.g., Eve Darian-Smith, *Power in Paradise: The Political Implications of Santos’s Utopia*, 23 LAW & SOC. INQUIRY 81, 86 (1998) (concluding that Santos’s goal “is, above all, modernist: it conceals relations of power in the march toward emancipation of the oppressed”).

179. Human rights law and postmodern theory were both reactions to the camps, drawing on very different traditions. For postmodernism’s pre-World War II antecedents, see NIETZSCHE AS POSTMODERNIST: ESSAYS PRO AND CONTRA (Clayton Koelb ed., 1990). For an even earlier iteration, see MARTHA NUSSBAUM, LOVE’S KNOWLEDGE (1990) (describing ancient Greek skeptics). Not all postmodern theorists are skeptics. See Martti Koskeniemi, *Letter to the Editors of the Symposium*, 93 AM. J. INT’L L. 351, 360 (1999) (arguing against an “anything goes” cynical skepticism, the giving up of political struggle and the adoption of an attitude of blasé relativism. This would, however, presuppose the internalization of an unhistorical and reified conception of the postmodern in which the truth of skepticism would be the only truth not vulnerable to that skepticism”). As Glover similarly notes, “People’s projects of self-creation may be guided by quite different values from [Nietzsche’s].” GLOVER, *supra* note 166, at 17.

humanist individual subject is a construction of texts, discourses, and institutions. The promise that this particular human agent would realize freedom, autonomy, etc. has turned out to be just so much Kant.¹⁸⁰

As noted above, it has been suggested that the universal subject of liberalism is a Western white man.¹⁸¹ This is particularly suspect in the context of global poverty, whose face is more typically that of a woman of color in the global South.¹⁸² Additionally, some argue that reason and science themselves pose dangers. Indeed, some have questioned the role of the Enlightenment itself in the Holocaust.¹⁸³ After all, the “final solution” was not a barbarian rampage, but an orderly, systematic, “scientific” program of genocide, bureaucratic and perversely “rational.”¹⁸⁴

Skeptics are more likely to question the metanarrative of global poverty than to address the needs of the global poor. Some skeptics take care of *their* poor,¹⁸⁵ whether through extended kinship systems,

180. PIERRE SCHLAG, *LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN LEGAL MIND* 24 (N.Y.U. Press 1996).

181. See *supra* Part II.B.

182. Cf. MDG REPORT 2007, *supra* note 93. The notion of a “typical” face of poverty, of course, suggests the very universality eschewed here. See, e.g., Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT’L L. 379, 383 (1999) (“International law asserts a generality and universality that can appear strikingly incongruous in an international community made up of almost two hundred different nationalities and many more cultural, religious, linguistic and ethnic groups.”).

183. See MAX HORKHEIMER & THEODOR ADORNO, *DIALECTIC OF ENLIGHTENMENT* (John Cummings trans., Herder & Herder 1972); see also GILLIAN ROSE, *THE MELANCHOLY SCIENCE: AN INTRODUCTION TO THE THOUGHT OF THEODOR W. ADORNO* 19 (1978) (“Nietzsche, according to Adorno, refused ‘complicity with the world’ which . . . comes to mean rejecting the prevalent norms and values of society on the grounds that they have come to legitimize a society that in no way corresponds to them—they have become ‘lies.’”) (citations omitted).

184. See JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* 2, 89 n.5 (1998) (arguing that states seek to make the life of society “legible” in order to make it controllable by political power). Santos argues that law is the “alter ego” of science. BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION* 4 (1995).

185. See SANDEL, *supra* note 167 (quoting Emerson’s response to a request for charity: “Are they *my* poor?”). I refer here to groups whose actual allegiance is to a clan, a tribe, or a local community. They are not ruled by abstract principles, but by leaders whose authority depends on their understanding of conditions on the ground. Postmodernists, in contrast, are defined by a theoretical position rather than their affinity groups.

or local, *ad hoc* relief efforts. Nevertheless, this does not mean that vulnerable group members do not fall between the cracks,¹⁸⁶ but it might mean that fewer are pushed. For instance, the forgotten victims of Katrina, the one-time farmers displaced by NAFTA, and the rural Chinese peasants too old or sick to leave an abandoned countryside are not *their* poor.¹⁸⁷

| The Discontents | | | |
|-------------------|---|--|---|
| | The Radicals | The Skeptics | The Theocrats |
| Their Critique | Alienates workers, omits 'species-life' | "so much Kant," liberalism has its own will to power | Empty, soulless |
| Their Alternative | Workers own the means of production, the people have sovereignty over their own resources | Avoid metanarratives, local community solutions | Spiritual community, brotherhood, deep compassion |

The critiques of the discontents may be roughly understood as strong forms of the three liberal conceptions of poverty discussed above, unconstrained by liberalism's moderating influence.¹⁸⁸ Thus, unconstrained by a commitment to state secularism, a moral duty to the poor becomes a deeper commitment for the theocrats. Unconstrained by liberalism's commitment to autonomy, liberty, and, crucially, private property, the rights of the poor become the redistribution of the radicals. Unimpressed by liberalism's empty prosperity, the failure of markets to address deeper human needs,

186. See, e.g., BBC News, *Defending the Rights of the Mentally Ill*, Oct. 13, 1999, available at <http://news.bbc.co.uk/2/hi/health/187750.stm> (noting that the U.N. estimates that three-quarters of the 1,500 million who suffer from mental illness are from developing countries).

187. See *supra* note 87; see also French, *supra* note 156 (describing rural Chinese peasants).

188. See, e.g., Kennedy, *supra* note 42, at 359 ("International law has seen itself as the voice of civilization, of the center, of the modern, of the future, and of universal humanism and progress against, or in dialog with, the voices of the non-Christian world, the primitive, underdeveloped, non-Western, outlaw world of those who do not yet see things from a high place.").

and their tendency to commodify *everything*, including “freedom” itself,¹⁸⁹ hard-eyed utilitarians become even harder-eyed skeptics.

But this view of the discontents—as mere versions of familiar liberal approaches—misses the point. Despite a superficial kinship, they are qualitatively distinct. Neither their critiques nor their approaches to poverty fit within the liberal paradigm. Theocrats envision a community sharing a rich spiritual life, governed by an omniscient, benevolent God. As President Mahmoud Ahmadinejad of Iran wrote to President Bush in May 2007, “Liberalism and Western-style democracy have not been able to help realize the ideals of humanity. Today, these two concepts have failed. . . . [T]he world is gravitating toward faith in the Almighty and justice and the will of God will prevail over all things.”¹⁹⁰ The radicals envision a world in which the hoarding of capital is not respected but despised, and the neglect of the most vulnerable unthinkable.¹⁹¹ As Tony Judt puts it, “From first to last, Marxism’s strongest suit was . . . the moral seriousness of Marx’s conviction that the destiny of our world as a whole is tied up with the condition of its poorest and most disadvantaged members.”¹⁹²

Skeptics envision a world unencumbered by grand visions. Their world is not homogeneous, but heterogeneous. They question the normative assumptions of post-Cold War approaches to poverty,¹⁹³ along with the experts who implement them.¹⁹⁴

The alternatives to liberal theory are not incorporated in post-Cold War approaches to poverty, at least on the international level,

189. As Professor Schlag notes, “ours is a world . . . where the value of freedom implies at once the downfall of the Berlin Wall and the imbibing of Pepsi.” SCHLAG, *supra* note 180, at 47; *see also* THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 381 (1999) (noting without irony that “[f]or some reason, advertising copywriters have a tremendous insight into globalization”).

190. Mark Lilla, *The Politics of God*, N.Y. TIMES MAG., Aug. 19, 2007, at 28, *available at* <http://www.nytimes.com/2007/08/19/magazine/19Religion-t.html>.

191. *See, e.g.*, NAOMI KLEIN, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* 445 (2007).

192. Judt, *supra* note 25.

193. While some postmodernists relentlessly challenge normative assumptions, *see* Pierre Schlag, *Foreword: Postmodernism and Law*, 62 U. COLO. L. REV. 439, 444–45 (1991), others concede that the processes of questioning, trashing, and deconstructing, “always do stop.” J.M. Balkin, *Tradition, Betrayal and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1627 (1990).

194. Celia Dugger, *Ending Famine, Simply By Ignoring the Experts*, N.Y. TIMES, Dec. 2, 2007, § 1, at 11 (explaining how Malawi went from famine to surplus by helping farmers buy fertilizer, contrary to the advice of the World Bank).

for structural as well as political reasons. First, the international system remains a system of sovereign states, and no major state champions any of the alternatives. Second, even if major states did champion these alternatives, their incorporation in an international system would be problematic because such incorporation would be inconsistent with their own premises.

Since the collapse of the Soviet Union and China's embrace of capitalism, no major state advocates socialism. Even if it did, global socialism assumes a post-state international order.¹⁹⁵ Moreover, while many states are arguably theocracies,¹⁹⁶ in fact none of these states focuses on post-Cold War approaches to poverty. Under religious laws, as discussed above,¹⁹⁷ the poor are not the state's responsibility. Rather, the obligation to the poor is an obligation of individuals or the community. Skeptics, those who reject the metanarratives of the liberals, radicals, and theocrats, are likely to reject the metanarrative of global poverty as well. Rather, they will ask who is raising the issue, and for what purpose, or they will fall back on notions of community or tribalism.¹⁹⁸

IV. THE POVERTY OF THEORY¹⁹⁹

Theory is impoverished in two distinct senses. First, as Marx famously explained in his critique of Hegel, "being"—material, historical conditions—creates "consciousness," and at this particular

195. The state, according to Marx, would "wither away" under communism. *See, e.g.*, ESSENTIAL WRITINGS, *supra* note 19, at 234–35 (explaining that the "withering away" formulation was actually Engel's, while Marx's was "less explicit"). Politically, global socialism would probably be summarily squashed, as its far less ambitious version, the NIEO, was squashed in the 1970s. *See infra* Part IV.A.

196. Iran is a prominent example. *See generally* Michael Slackman, *Dreams Stifled, Egypt's Young Turn to Islamic Fervor*, N.Y. TIMES, Feb. 17, 2008, at A1 (describing Islamic revival throughout the Middle East, fueled in part by lack of economic opportunity); LILLA, *supra* note 163, at 6–7 (discussing the contemporary appeal of theocracy).

197. *See supra* Part III.B.1.

198. Tribalism is typically expressed as "we can take care of our own," or perhaps a more defensive position of "we could take care of our own if you would stop stealing from us." *See, e.g.*, SINGER, *supra* note 5, at 153 (discussing the preference for taking care "of our own").

199. *See, e.g.*, E.P. THOMPSON, *THE POVERTY OF THEORY* (2004). Thompson's critique of Althusser as arcane has itself become arcane, in part, for the reasons discussed in Part III.B *supra*; *see also* POVERTY OF PHILOSOPHY, *supra* note 176 (criticizing Proudhon's PHILOSOPHY OF POVERTY for ignoring history and the actual material conditions which shape it); *cf.* SANDEL, *supra* note 18, at 24 (describing liberalism's "poverty as theory"); MOHAMMED BEDJAOU, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* 17, 23–63 (1979) (referring to the "[i]nternational order of poverty and poverty of the international order").

historical moment, a liberal international system of sovereign states has virtually erased consciousness of the alternatives to liberalism, at least on the international level. Second, theory is impoverished because liberal theory privileges state sovereignty over global poverty.

A. Being Creates Consciousness

Being creates consciousness; that is, the actual, material means of production determines the ideology we generate to explain it.²⁰⁰ As Professor Singer notes,

One hundred and fifty years ago, Karl Marx gave a one-sentence summary of his theory of history: “The hand mill gives you society with the feudal lord; the steam mill, society with the industrial capitalist.” Today he could have added: “The jet plane, the telephone, and the Internet give you a global society with the transnational corporation and the World Economic Forum.”²⁰¹

Technology determines economic organization, in short, which in turn determines how we live and how we explain our lives. We live in a globalized world dominated by liberal markets and the free movement of capital. We live in a world in which sovereign states zealously safeguard their autonomy.

Even if the discontents were willing and able to challenge the international legal system, the industrialized states have shown that they will resist. The international legal system assures stability for sovereign states and protects the status quo. No sovereign state can impose its will on another. As a result, international law is not the law of the majority, but the law of the least common denominator. The poor states cannot compel the rich states to help them, either through trade policies or direct aid.²⁰²

200. “The ruling ideas of each age have ever been the ideas of its ruling class.” Karl Marx & Fredrick Engels, *Manifesto of the Communist Party*, in THE MARX-ENGELS READER 489 (Robert C. Tucker ed., 1978) [hereinafter READER]; KOLAKOWSKI, *supra* note 25, (“[T]here is no independent entity called ‘history,’ using mankind to attain its ends: history is simply the purposeful activity of human beings.”). See generally LICHTHEIM, *supra* note 175, at 37–40 (explaining Marx’s philosophical rupture with Hegel); FROMM, *supra* note 19, at 17 (“It is not the consciousness of men that determines their social being, but, on the contrary, their social being that determines their consciousness.”).

201. SINGER, *supra* note 5, at 10.

202. “[I]t must be emphasized that no U.N. body, nor any group of governments, has accepted the proposition that any given country is obligated to provide specific assistance to any other country. Moreover, the persistent rejection of such a claim by developed countries

The industrialized states successfully blocked the major initiative by the Third World decades ago.²⁰³ In the 1970s, the former colonies of the European powers, now newly independent states, or “Group of 77,” were able to pass resolutions in the General Assembly over the objections of the Western industrialized states because of their numbers.²⁰⁴ In the Declaration on the Establishment of a New International Economic Order (NIEO),²⁰⁵ the Nonaligned

and the failure of even the most generous of donors to locate their assistance within the context of such an obligation, would present a major obstacle to any analysis seeking to demonstrate that such an obligation has already become part of customary law.” Alston, *MDGs*, *supra* note 95, at 777. Marx was skeptical about the sovereign state: “Truly one must be destitute of all historical knowledge not to know that it is the sovereigns whom in all ages have been subject to all economic conditions, but they have never dictated laws to them. Legislation, whether political or civil, never does more than proclaim, express in words, the will of economic relations.” *ESSENTIAL WRITINGS*, *supra* note 19, at 178; *see also* LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS* 24–26 (1990) (discussing the “mythology of ‘sovereignty’”); BEDJAOU, *supra* note 199, at 152 (explaining how sovereignty was defined in international law “by its political elements, to the exclusion of the economic aspects”).

203. ANGHIE, *supra* note 17, at 245 (“[F]ew of the NIEO initiatives had an enduring impact on international law and the international economic system.”). *See generally* Barbara Crossette, *The ‘Third-World’ is Dead, but Spirits Linger*, *N.Y. TIMES*, Nov. 13, 1994, § 4, at 1 (describing the death of a “fraternal third-world” envisioned by the world leaders at the 1955 Afro-Asian Conference, as “a gathering full of post-colonial promise, with dreams of self-sufficiency, solidarity among newly independent nations and commitment to an anti-superpower international policy that became known as nonalignment”).

204. “[E]very state had duties to aid all those states where people were less materially advantaged.” Craig N. Murphy, *What the Third World Wants: An Interpretation of the Development and Meaning of the New International Economic Order Ideology*, in *THE POLITICS OF INTERNATIONAL ORGANIZATIONS: PATTERNS AND INSIGHTS* 226, 228 (Paul F. Diehl ed., 1988); *see, e.g.*, Norman Girvan, *Expropriating the Expropriators: Compensation Criteria from a Third World Viewpoint*, in 3 *THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW* 149, 149–52 (1975); *see also* Roger C. Wesley, *A Compensation Framework for Expropriated Property in the Developing Countries*, in 3 *THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW* 3 (1975) (discussing compensation for purchases of natural resources by multinational firms in Third World countries); R.P. Anand, *Attitude of the Asian-African States Toward Certain Problems of International Law*, 15 *INT’L. & COMP. L. Q.* 55, 55 (1966) (discussing international law and the increasing involvement of Asian and African states).

205. U.N. Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), GAOR, Supp. No. 1, U.N. Doc. A/9556 [hereinafter *NIEO Declaration*] (May 1, 1974) (discussing the establishment of a new international economic order). *See generally* Kennedy, *supra* note 127, at 126–27 (“When it is your money, a great deal more will look confiscatory. And the NIEO was interpreted very differently in different places. To the American financial and corporate establishment, it looked confiscatory—although liberal intellectuals were likely to interpret it more modestly, as a global version of policies that had become politically acceptable in the United States during the New Deal. . . .

Movement pointed out that the developing countries constituted seventy percent of the world's population, but accounted for only thirty percent of the world's income.²⁰⁶ They argued that the industrialized states not only had a moral obligation to provide aid, but that they owed the Third World compensation for the industrialized states' prior exploitation and the benefits the industrialized states still reaped from that exploitation.

As Professor Anghie explains, a key component of the NIEO was the doctrine of permanent sovereignty over natural resources.²⁰⁷ This was the issue addressed by the arbitral tribunal in *Texaco v. Libya*.²⁰⁸ Libya, the first former colony to formally achieve independence through the U.N., evicted British and American troops in 1971.²⁰⁹ In 1974, Libya nationalized two major multinational oil companies, Texaco and California Asiatic. In a carefully reasoned decision, sole arbitrator Rene-Jean Dupuy²¹⁰ confirmed that the new states could not change the law without the consent of the developed states.²¹¹ Thus, the multinationals were entitled to compensation under an international standard, rather than Libya's national law,

In the Third World, the NIEO was often seen as the absolute minimum demanded by elemental standards of fairness.”).

206. *NIEO Declaration*, *supra* note 205, at 3.

207. ANGHIE, *supra* note 17, at 211; *see also* NICO SCHRIEVER, *SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES* 96–100 (1997). For a recent iteration, framed in response to neoliberalism rather than neocolonialism, *see* Tina Rosenberg, *The Perils of Petrocracy*, N.Y. TIMES MAG., Nov. 4, 2007, at 42 (analyzing Hugo Chavez's “oil socialism”).

208. 53 ILR 389 (1979) (award on the merits).

209. U.S. Department of State Country Reports: Libya, *available at* <http://www.state.gov/r/pa/ci/bgn/5425.htm> (last visited Mar. 13, 2009).

210. *Texaco v. Libya*, 17 I.L.R. 1 (1978).

211. For a critique of the decision, *see* ANGHIE, *supra* note 17, at 222. The question of compensation for nationalized property remained controversial. For example, in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the Supreme Court declined to rule on the validity of a Cuban expropriation of United States-owned sugar plantations, correctly observing that international law was unsettled on the issue: “There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens.” *Id.* at 428. Congress responded in 1964 by enacting the Second Hickenlooper Amendment, which explicitly overruled the *Sabbatino* case and requires courts to hear cases involving expropriations absent an executive directive to the contrary. Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 1009, 1013 (1964) (codified at 22 U.S.C. § 2370(e)(2) (1994)).

notwithstanding the Charter of Economic Rights and Duties of States.²¹²

Nor were the less developed countries entitled to assistance from the industrialized states under international human rights law. The Economic Covenant was drafted during the tumultuous 1960s. Even as a range of state obligations was carefully calibrated,²¹³ it was becoming increasingly clear that although poverty was always *within* states, many of its causes lay beyond state borders. Global poverty was structural. Again, however, the wealthy states adamantly refused to assume any but the most minimal obligation.²¹⁴ As a result, although the Economic Covenant is an international instrument, like the South African Constitution it focuses on justice claims *within* states.²¹⁵ Thus, while the notion of poverty as injustice has had a major influence on post-Cold War approaches to poverty, the application of Paine's arguments to relations *between* states, rather than between the individual and the state, has been firmly rejected by the developed states.²¹⁶ The Economic Covenant does not address justice between states.

The liberal international system of sovereign states does not recognize the justice claims of the least developed countries. Rather, the "consciousness" is that globalization and free markets are in fact

212. See G.A. Res. 3281, GAOR 2d Comm., 29th Sess., U.N. Doc. A/9946 (1975) (adopting the Charter of Economic Rights and Duties of States); BEDJAOUI, *supra* note 199, at 173 (explaining why the international law requirement of "fair and prompt" compensation was unfair to the Third World). See generally Burns H. Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth*, in *INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS* 519, 546 (Charlotte Ku & Paul F. Diehls eds., 1998) (concluding that "[t]he great challenge lies less in 'proving' the rightness or wrongness of the competing special claims (and values) involved, but in formulating, clarifying, and applying policies that will simultaneously satisfy developmental goals and attract beneficial private capital and technology").

213. See, e.g., Asbjorn Eide, *Economic, Social, and Cultural Rights as Human Rights*, in *ECONOMIC, SOCIAL, AND, CULTURAL RIGHTS* 23–25 (Asbjorn Eide et al. eds., 2001).

214. See *supra* note 202. The United States has persistently rejected any notion that it has any obligation under international human rights law to provide aid to poor states. Alston, *MDGs*, *supra* note 95, at 776.

215. *But see* Alston, *MDGs*, *supra* note 95, at 776 (arguing that Article 2(1) of the Economic Covenant, requiring states "to take steps, individually and through international assistance and co-operation," imposes an obligation on wealthy countries to "support those countries lacking the resources necessary to satisfy the economic and social rights of their own citizens").

216. See *supra* Part III.B.1. It has also been rejected by liberal theorists, including John Rawls. See *supra* note 58.

lifting millions out of poverty.²¹⁷ As Jan Jenson and Boaventura de Sousa Santos explain,

[m]ost frequently, the story of globalization is that of the winners, as told by the winners. The victory of their vision of the future is recounted as an inevitability. In the last two decades globalizations follow—to hear the victors tell it—not only from heavy tendencies of economic structures but also from the lucky escape from misguided political vision which sought to achieve social justice and equality via state act and mobilization of the economically and socially disadvantaged after 1945.²¹⁸

There are, of course, counterstories.²¹⁹ But their emergence validates the liberal account by suggesting that even those who do not yet benefit from liberal market policies will be brought center-stage by U.N. fact-finders and a liberal press. They will not be forgotten.

B. “*All That Is Solid Melts into Air*”

As explained in the previous section, theory is impoverished because it is necessarily the product of the period in which it is produced. We are living in a time of liberal hegemony, at least on the international level. The resultant theory lacks the muscle to effectively address global poverty.

Liberal regimes have made the poor a priority when material conditions are so dire,²²⁰ or competing political movements so strong,²²¹ that the state itself is at risk. A vigorous liberalism, some argue, can and should address global poverty. The risks, they contend, are certainly equal to those that have spurred action before. But the industrialized states which could effectively address global poverty through the elimination of subsidies by the WTO member states,²²² for example, are not themselves at risk. Rather, liberal

217. See, e.g., SACHS *supra* note 2, at 26–50.

218. GLOBALIZING INSTITUTIONS, *supra* note 124, at 12.

219. See, e.g., authorities cited *supra* notes 2–7 & 17.

220. See generally SUNSTEIN, *supra* note 89.

221. See authorities cited *supra* note 110 (describing Bismarck’s social welfare initiatives).

222. As Eleanor Fox has observed, elimination of subsidies by the WTO Member States would be the single most effective and far-reaching measure to improve human welfare in the developing world. Eleanor M. Fox, *Globalization and Human Rights: Looking Out for the Welfare of the Worst Off*, 35 N.Y.U. J. INT’L L. & POL. 201, 211 (2002) (“The human costs of unfair trade are immense. If Africa, East Asia, South Asia, and Latin America were each to

hegemony has produced a complacent liberalism that lacks any real sense of urgency about the poor. Indeed, the very success of liberalism has eliminated the competition that has historically motivated liberalism to address poverty. Liberal hegemony, in short, has produced a flabby liberalism, ironically confirming one of its own central tenets. But liberalism's inability to address poverty may not be a problem for liberals, confirming a central tenet of the discontents.²²³

While there may be little unified opposition,²²⁴ liberalism faces multiple challenges to its approaches to poverty. These are not monolithic; rather, these challenges reflect a wide range of sources and motivations. Some nation-states remain committed to their own versions of radicalism: theocracy and skepticism. While a liberal international system seeks to accommodate their various intrastate poverty initiatives,²²⁵ this can become strained, as Hamas has

increase their share of world exports by one percent, the resulting gains in income could lift 128 million people out of poverty’ If the nations of the WTO were to adopt one and only one human welfare measure, elimination of [subsidies and trade barriers] should be the measure.”) (quoting OXFAM INTERNATIONAL, RIGGED RULES AND DOUBLE STANDARDS: TRADE, GLOBALISATION, AND THE FIGHT AGAINST POVERTY 5 (2002), available at http://www.maketradeair.com/assets/english/report_english.pdf). *But see* MILLENNIUM DEVELOPMENT GOALS REPORT, *supra* note 93, at 29 (noting that the elimination of trade barriers for certain products has benefited some less developed countries at the expense of others).

223. Upendra Baxi, *Voices of Suffering and the Future of Human Rights*, 8 *TRANSNAT'L L. & CONTEMP. PROBS.* 125, 163–64 (1998) (“[T]he paradigm of the Universal Declaration of Human Rights is being steadily supplanted by a trade-related, market-friendly, human rights paradigm [This] insists . . . upon the promotion and protection of the collective rights of global capital in ways that justify corporate well-being and dignity over that of human persons.”).

224. As Professor Estreicher cogently notes, “Given the decline of working class militancy across the globe, and the stubborn, persistent reality that a good portion of the working class . . . votes contrary to its predestined interests as carriers of necessary social overhaul, class as an explanatory vehicle of central importance today attracts few adherents.” Estreicher, *supra* note 42, at 50. *But see* Judt, *supra* note 25, at 9 (“What Marx’s nineteenth century contemporaries called the ‘Social Question’—how to address and overcome huge disparities of wealth and poverty, and shameful inequalities of health, education and opportunity—may have been answered in the West (though the gulf between poor and rich, which seemed once to be steadily closing, has for some years been opening again, in Britain and above all in the U.S.). But the Social Question is back on the international agenda with a vengeance. What appears to its prosperous beneficiaries as worldwide economic growth . . . is increasingly perceived and resented by millions of others as the redistribution of global wealth for the benefit of a handful of corporations and holders of capital.”). *Cf.* NIEO Declaration, *supra* note 205.

225. *See, e.g.*, MILLENNIUM DEVELOPMENT GOALS REPORT, *supra* note 93.

shown.²²⁶ Non-state actors, from the unaffiliated bandits who prey on relief convoy planes to the growing number of foreign militants gravitating to Afghanistan and other global hotspots,²²⁷ whether ideological or opportunistic, similarly undermine anti-poverty initiatives.

These initiatives may also be threatened by competing initiatives from China. Desperate for oil and other natural resources, China has entered into a series of trade agreements that offer African states generous terms without requiring them to meet human rights standards or MDG benchmarks. This directly competes with Western initiatives, making the latter much less appealing. Dealing with China, which does not have an imperial legacy to overcome in Africa, may well be more palatable to sovereign states as well as to their people.²²⁸

Whether these threats will deepen the international commitment to global poverty remains an open question, but they have not done so yet. This is not surprising. The liberal models for addressing poverty described in Part II face little real competition. Hugo Chavez has declared a socialist resurgence in Venezuela.²²⁹ The religious group Hamas in Gaza provided aid when the Palestinian Authority's troubled links to the West failed. The President of Iran has urged the West to convert.²³⁰ But there is no major ideology competing with liberalism. Rather, those who challenge the liberal paradigm are co-opted and integrated into the market. This is the cultural logic of late capitalism.²³¹

Even if the political will were to materialize, it is unclear whether the international system could assure the long-term commitment,

226. See, e.g., Steven Erlanger, *In Gaza, Hamas's Fiery Insults to Jews Complicate Peace Effort*, N.Y. TIMES, Apr. 1, 2008, at A1.

227. See, e.g., David Rohde, *Foreign Fighters of Harsher Bent Bolster Taliban*, N.Y. TIMES, Oct. 30, 2007, at A1.

228. See, e.g., IAN TAYLOR, CHINA AND AFRICA: ENGAGEMENT AND COMPROMISE (2006); AP, *EU Declines to Take on China over Africa Loans, Human Rights*, INT'L HERALD TRIB., June 28, 2007 ("China is Africa's third biggest trading partner."); see also Somini Sengupta, *Take Aid from China and Take a Pass on Human Rights*, N.Y. TIMES, Mar. 9, 2008, at WK3 (describing Sri Lanka's recent acceptance of aid).

229. See Rosenberg, *supra* note 207 (analyzing Hugo Chavez's "oil socialism").

230. See *supra* Part III.B.1.

231. Environmentalists, for example, support their work by selling glossy calendars and a full catalog of products which announce their buyers' good intentions, even if they are manufactured under less than sustainable conditions. FREDRIC JAMESON, POSTMODERNISM, OR THE CULTURAL LOGIC OF LATE CAPITALISM (1991).

and long-term stability, necessary to make a real difference. Marx explained how capitalism depends upon

constantly revolutionizing the instruments of production, and thereby the relations of production, and with them the whole relations of society. . . . All fixed, fast-frozen relations, with their train of ancient and venerable prejudices and opinions, are swept away, all new-formed ones become antiquated before they can ossify. All that is solid melts into air²³²

Capital has flowed freely for most of Western history, but the end of the Cold War and developments in finance and technology combined to qualitatively change the game during the past fifteen years.²³³ Some poor people undoubtedly benefit. In an age of privatization, some argue that venture philanthropists like Bill Gates and Warren Buffet may well succeed where states, or states alone, have failed.²³⁴ The idea that the extremely well-off should give some of their wealth to the needy has become part of the *zeitgeist*, the air we breathe and the coffee we drink.²³⁵ Just as conspicuous consumption became a status symbol in Thorstein Veblen's day,²³⁶ conspicuous philanthropy has become a status symbol in ours.²³⁷

232. Karl Marx & Friedrich Engels, *Manifesto of the Communist Party*, in BASIC WRITINGS ON POLITICS AND PHILOSOPHY: KARL MARX & FRIEDRICH ENGELS 1, 10 (Lewis S. Feuer ed., 1959).

233. SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION 40 (1996) ("Securitization and the ascendance of finance generally have further stimulated the global circulation of capital and the search for investment opportunities worldwide"); see also Peter J. Spiro, *New Players on the International Stage*, 2 HOFSTRA L. & POL'Y SYMP. 19, 21-22 (1997) (describing the revolution in global communications and its impact on financial systems).

234. See generally LAURA A. DICKINSON, *OUTSOURCING WAR AND PEACE* (2007). Enlightened self-interest may also lead to support. In Mozambique, for example, absenteeism and fatalities among workers led one of the world's biggest aluminum producers to join with other business and three governments to combat malaria. Sharon LaFraniere, *Business Joins African Effort to Cut Malaria*, N.Y. TIMES, June 29, 2006, at A1.

235. See, e.g., Starbucks Ad, *We All Have Something in Common*, N.Y. TIMES, Aug. 27, 2006, at N17 (describing Starbucks clean water campaign to raise \$10 million, partnering with "non-governmental organizations to bring clean water, improved sanitation, and hygiene education to villages in need. What's amazing is that once these basic needs are fulfilled, opportunities for education, agriculture, and commerce emerge—children go to school, women start businesses, and the whole community begins to look forward to the future, which, it should be said, is another thing we all have in common").

236. THORSTEIN VELEN, *THE THEORY OF THE LEISURE CLASS* 36 (1899).

237. See Andy Serwer, *The Legend of Robin Hood*, FORTUNE, Sept. 18, 2006, at 102 (explaining "[h]ow the leaders of the hedge fund world have banded together to fight poverty—taking gobs of money from the rich . . . and making philanthropy cool among the

Rich celebrities like Angelina Jolie,²³⁸ along with venture philanthropists like Gates and Buffet,²³⁹ may be the best hope for those now living on less than a dollar a day.²⁴⁰ The almost sixty-five billion dollars pledged by Buffet and Gates²⁴¹ dwarf the contributions of many donor states,²⁴² and they do not come with the same strings.²⁴³

Private charity may well be more effective than public rights, especially if the former means billions of dollars and the latter means empty promises. But while popular culture can be a force for good,²⁴⁴ it is not a particularly dependable force. And no one is more vulnerable to shifting mores than the poor.²⁴⁵

business elite"). *But see* Jim Dwyer, *Out of Sight, Till Now, and Giving Away Billions*, N.Y. TIMES, Sept. 26, 2007, at B1 (describing how Chuck Feeney, who made billions from duty-free airport shops, has given \$4 billion to projects ranging from AIDS clinics in South Africa to plastic surgery for children with facial deformities in the Philippines; and \$600 million to his alma mater, Cornell). Feeney suggested that he went public to inspire other billionaires to discover the pleasures of philanthropy. *Id.*

238. Stanley, *supra* note 15 ("Even more than Bill Gates or Bono [Angelina Jolie] signals a shift in mores among the hyper-rich.").

239. Donald G. McNeil, Jr., & Rick Lyman, *Buffet's Billions Will Aid Fight Against Disease*, N.Y. TIMES, June 27, 2006, at A1; *see also*, Jessi Hempel, *Acumen's New Model for Third-World Aid*, BUS. WK., Nov. 10, 2006, at 14 (describing projects of non-profit venture capital firm, Acumen).

240. *Oxfam Faults Responses*, *supra* note 3 ("Nearly half of Africans live on less than a dollar a day.").

241. Peter Singer, *What Should a Billionaire Give - And What Should You?* N.Y. TIMES MAG., Dec. 17, 2006, at 58, 60. Adjusted for inflation, the contributions of Gates and Buffet are each "more than double the lifetime total [of Carnegie and Rockefeller combined]." *Id.*

242. *See supra* note 93.

243. Professor Singer observes, "Unconstrained by diplomatic considerations or the desire to swing votes at the United Nations, private donors can more easily avoid dealing with corrupt or wasteful governments. They can go directly into the field, working with local villages and grass-roots organizations." Singer, *What Should a Billionaire Give*, *supra* note 241, at 62.

244. Some are criticized. *See, e.g.*, Christopher Dickey, *Angelina Jolie: A Rebel with a Cause*, NEWSWEEK, Mar. 26, 2007 (asking Jolie, "Do you worry about people who say this is celebrity tourism?" Jolie responded, "I don't know if anybody saying that has spent the last six years of their life going to over 30 camps and really spending time with these people. I can't care").

245. *See generally* POGGE, *supra* note 5.

V. CONCLUSION

Take a sad song, and make it better . . .

—LENNON & MCCARTNEY²⁴⁶

This Article has shown that theory can illuminate post-Cold War approaches to poverty. Part II explained why theory is both crucial and problematic. Theory is crucial because there is no single, unified legal system addressing global poverty and theory makes it possible to map the relationships between multiple international and domestic laws. At the same time, theory is problematic in this context because of the limitations of liberal theory and the reality of liberal hegemony.

Part III, *Theories of Poverty*, described the three basic conceptions that drive liberal approaches to poverty: justice, morality, and utility. It explained how these conceptions add up and how they fall short. It then set out the critiques of liberalism's discontents and explained why these views are conspicuously absent from post-Cold War approaches to poverty, at least on the international level.

Part IV, *The Poverty of Theory*, focused on the limits of theory itself. It revisited Marx's basic insight that "being creates consciousness" and applied it to the post-Cold War order. It concluded that the liberal international system of sovereign states has neither the legal muscle to effectively address global poverty nor the political will to develop it. This does not mean, of course, that the political will cannot be fostered.²⁴⁷ Nor does it mean that the liberal international system cannot improve the lives of millions of the world's poor.²⁴⁸ Whether this would offset the costs of globalization

246. THE BEATLES, *Hey Jude*, on HEY JUDE (Apple Records 1968).

247. See, e.g., POGGE, *supra* note 5, at 26 (noting that the "best hope" for the global poor "may be our moral reflection"). Sen explains, "[T]he ethical force of human rights is made more powerful in practice through giving it a high profile social recognition and an acknowledged status, even when no enforcement is instituted." Sen, *The Limits of Law*, *supra* note 83, at 2919.

248. According to Pogge, a meaningful reduction of global poverty could be accomplished through just "1.2 percent of the aggregate annual gross national incomes of the high-income economies." POGGE, *supra* note 5, at 7. The efforts to do so require an article of their own to catalog. Their range is staggering. See, e.g., Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 504–05 (2007) (urging the adoption of baseline labor rights so as to "facilitate the free movement of people while preventing the erosion of working conditions in the countries that receive them"); Trachtman, *supra* note 58, at 482 (identifying opening markets and domestic reform as two main areas of international trade which could improve the position of poor people); Roben Farzad, *Can Greed Save Africa?* BUS. WK., Dec.

is an open question.²⁴⁹ The Beatles are agnostic.²⁵⁰ So was Marx.²⁵¹ In my view, the notion that global poverty can be constructively addressed through markets, along with donor states and Bono, is as defensible (or not) as the notion that Beatles' lyrics might be of some value here.

10, 2007, at 46 (suggesting that “[f]earless investing is succeeding where aid often hasn’t”); Ophelia Dahl, as told to Glen Rifkin, *Imagine Big, Start Small*, N.Y. TIMES, June 11, 2006, at 3.9 (describing the origins of Partners in Health, a non-profit organization that finances community based health projects in seven countries and employs 4,000 people). The effectiveness of these efforts varies. “Cause marketing,” for example, has been criticized by some activists who claim that the primary beneficiaries are businesses. Nixon, *supra* note 15 (noting that Red companies “collectively spent as much as \$100 million in advertising and raised only \$18 million”).

249. See SINGER, *supra* note 5, at 89; French, *supra* note 156 (noting that the World Bank’s estimate of poverty in China has recently been tripled following the recent adoption of a new standard focusing on “purchasing power parity”); see also EDITORIAL, *Africa’s Chance*, N.Y. TIMES, Nov. 2, 2007, at A26 (noting that growth in sub-Saharan Africa will likely exceed five percent this year, for the fifth year in a row); Elisabeth Rosenthal, *World Food Supply is Shrinking, U.N. Agency Warns*, N.Y. TIMES, Dec. 18, 2007, at C5 (noting that, according to the U.N., “the world food supply is dwindling rapidly and food prices are soaring to historic levels”).

250. Compare THE BEATLES, *We Can Work It Out*, on YESTERDAY . . . AND TODAY (Capital Records 1966) with John Lennon, *Across the Universe*, on LET IT BE (Apple 1970) (“Nothing’s gonna change my world.”).

251. Compare Marx, *On the Question Free Trade*, *supra* note 177, at 221 (“To sum up, what is free trade under the present condition of society? It is freedom of capital.”), with *id.* at 224 (“But, in general, the protective system of our day is conservative, while the free trade system is destructive. It breaks up old nationalities and pushes the antagonism of the proletariat and the bourgeoisie to the extreme point. In a word, the free trade system hastens the social revolution. It is in this revolutionary sense alone, gentleman, that I vote in favor of free trade.”).