



PROJECT MUSE®

---

## Against the Human Right to Water?

Michael Tiboris

Human Rights Quarterly, Volume 41, Number 4, November 2019, pp. 916-938  
(Article)

Published by Johns Hopkins University Press

DOI: <https://doi.org/10.1353/hrq.2019.0067>



➔ *For additional information about this article*

<https://muse.jhu.edu/article/735801>

## Against the Human Right to Water?

*Michael Tiboris*

### ABSTRACT

The moral intuition behind the human right to water is powerful, and the right has now been explicitly listed in international declarations, yet its normative grounding remains obscure. This is surprising given the widely incanted idea that “water is life.” This article argues that unique features of water as a resource create serious obstacles for understanding the normative foundation of the human right to water and for successfully institutionalizing and surviving practical obstacles to implementation. It concludes by considering how the right might bear on claimed abuses in places like Detroit, Michigan.

### I. INTRODUCTION: IS THERE A HUMAN RIGHT TO WATER?

The basic moral intuition behind the human right to water is deeply compelling. Water scarcity affects a large and increasing portion of the population. One in ten people globally (663 million) do not have access to safe water sources.<sup>1</sup> By 2025, the United Nations expects that 1.8 billion people will live in regions facing “absolute water scarcity,” with two-thirds

---

Michael Tiboris is a Global Water Fellow at the Chicago Council on Global Affairs’ Global Food and Agriculture Program and a Lecturer at the Harris School of Public Policy Studies at the University of Chicago. His research concerns primary resource stability as a foreign policy objective and is particularly focused on water resource policy, cooperative resource governance, agricultural development, and global justice. He holds a Ph.D. in applied ethics and political philosophy from the University of California, San Diego, and has previously held fellowships supported by the Spencer Foundation, San Diego State University’s Institute for Ethics and Public Affairs, and the American Council of Learned Societies.

1. WORLD HEALTH ORGANIZATION, UNICEF JOINT MONITORING PROGRAM, PROGRESS ON DRINKING WATER AND SANITATION, 2015 UPDATE AND MDG ASSESSMENT 4 (2015), [https://www.unicef.org/publications/index\\_82419.html#](https://www.unicef.org/publications/index_82419.html#).

of the world's population experiencing some form of water stress.<sup>2</sup> Global water consumption has been rising at double the rate that the population has been increasing.<sup>3</sup> Since the 1970s, renewable internal freshwater resources per capita have decreased more than 50 percent.<sup>4</sup> Many countries consume water—for agriculture, industry, and energy production—at rates far exceeding natural replenishment.<sup>5</sup> These conditions can drive people to use unsafe water sources, and, as a result, water-borne disease is among the greatest causes of morbidity, affecting more than 3.4 million people a year.<sup>6</sup> An estimated 2 billion people draw their drinking water from sources contaminated with human waste.<sup>7</sup> Diarrhea, the most common risk, will kill 1.2 million children this year alone.<sup>8</sup> These aspects of the “global water crisis” affect places in the developing world already suffering from poverty and violence. Women and girls are especially negatively affected, as they are traditionally responsible for water collection, an activity that is astoundingly time-intensive—enough to keep many girls out of school.<sup>9</sup> The extent of the need is massive, avoidable in many cases, and is yet another horror heaped upon people who, through no fault of their own, are already badly off. In some wealthier parts of the world, individual people use hundreds of liters of water every day while, in some of the world's poorest countries, people have to choose between using water for consumption or sanitation. There should be little disagreement that this situation is intolerable.

There are also clear references to such a right in important quasi-legal international covenants.<sup>10</sup> The UN Committee on Economic, Social and

- 
2. U. N. DEPT OF INT'L ECON. & SOC. AFF., INTERNATIONAL DECADE FOR ACTION “WATER FOR LIFE” 2005–2015, <http://www.un.org/waterforlifedecade/scarcity.shtml>; see also INTERNATIONAL DEVELOPMENT ASSOCIATION, WATER (2009), <https://www.worldbank.org/en/topic/water/overview>.
  3. UN WATER, WATER SCARCITY (n.d.), <https://www.unwater.org/water-facts/scarcity/>.
  4. Food and Agriculture Organization, AQUASTAT, “Renewable Internal Freshwater Resources Per Capita (Cubic Meters),” WORLD BANK (n.d.), <https://data.worldbank.org/indicator/ER.H2O.INTR.PC?end=2018&start=1970&view=chart>.
  5. NASA, *Study: Third of Big Groundwater Basins in Distress* (16 June 2015), <https://www.nasa.gov/jpl/grace/study-third-of-big-groundwater-basins-in-distress>.
  6. WHO, WHO WORLD WATER DAY REPORT (n.d.), [https://www.who.int/water\\_sanitation\\_health/takingcharge.html](https://www.who.int/water_sanitation_health/takingcharge.html).
  7. World Health Organization, *Drinking-Water* (14 June 2017), <https://www.who.int/news-room/fact-sheets/detail/drinking-water>.
  8. REHYDRATION PROJECT: WHAT IS DIARRHOEA AND HOW TO PREVENT IT (n.d.), <http://rehydrate.org/diarrhoea/index.html>.
  9. UN Water, *Water and Gender* (n.d.), <https://www.unwater.org/water-facts/gender/>.
  10. Peter H. Gleick, *The Human Right to Water*, 1 WATER POL'Y 487 (1998); Peter H. Gleick, *The Human Right to Water*, PAC. INST. (2007), <https://pacinst.org/publication/the-human-right-to-water/>; SALMAN M. A. SALMAN & SIOBHÁN MCINERNEY-LANKFORD, THE WORLD BANK, THE HUMAN RIGHT TO WATER: LEGAL AND POLICY DIMENSIONS (2004), <http://documents.worldbank.org/curated/en/219811468157522364/pdf/302290PAPER0Human0right0to0H20.pdf>; United Nations Development Programme (UNDP)–SIWI Water Governance Facility, *Issue Sheet: The Human Rights to Water and Sanitation and the Human Rights-Based Approach* (2016), <http://www.watergovernance.org/resources/the-human-rights-to-water-and-sanitation-and-the-human-rights-based-approach/>; INGA T. WINKLER, THE HUMAN RIGHT

Cultural Rights links the right to water with the general right to adequate standards of living: “[t]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.”<sup>11</sup> The UN General Assembly Resolution declares:

[T]he right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights. . . calls upon States and international organizations to provide financial resources, capacity-building and technology transfer, through international assistance and cooperation, in particular to developing countries, in order to scale up efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all.<sup>12</sup>

Once a human right is declared in this way, as it has been for things like shelter and basic education, the typical goal is “progressive realization” through national-level laws that work to secure the right;<sup>13</sup> that is, these human rights imply discrete obligations for, at the very least, the nation states that are party to the covenant.<sup>14</sup> Human rights declarations encourage states to take on these obligations via domestic legal changes. Importantly, however, the existence and obligatory force of the right is not contingent on the existence of these laws.<sup>15</sup> State-level laws do not create the right—they are the vehicle for the state’s obligations to “respect, protect, and [fulfill]” the right.<sup>16</sup> Nevertheless, this all suggests that, if the human right to water exists, it has fairly concrete implications for state parties.

---

TO WATER: SIGNIFICANCE, LEGAL STATUS AND IMPLICATIONS FOR WATER ALLOCATION (2014); cf. UN Convention on the Law of the Non-Navigational Uses of International Watercourses, adopted G.A. Res. 51/229, Annex, U.N. Doc. A.51/49, entered into force (17 Aug. 2014), for commentary see Ariel Litke & Dr. Alistair Rieu-Clarke, *The UN Watercourses Convention: A Milestone in the History of International Water Law*, GLOBAL WATER FORUM (2 Feb. 2015), <http://www.globalwaterforum.org/2015/02/02/the-un-watercourses-convention-a-milestone-in-the-history-of-international-water-law/>.

11. *General Comment No. 15: The Right to Water*, adopted 20 Jan. 2003, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 29th Sess., U.N. Doc. E/C.12/2002/11 (2002).
12. *The Right to Water*, UNESCO MEDIA SERVICES (12 June 2011), [http://www.unesco.org/new/en/media-services/single-view/news/the\\_right\\_to\\_water/](http://www.unesco.org/new/en/media-services/single-view/news/the_right_to_water/).
13. The Rt. Hon. Lady Justice Arden., *Water for All? Developing a Human Right to Water in National and International Law*, 65 INT’L AND COMP. L. Q. 771, 786 (2016).
14. These include obligations to respect the right (by not preventing its realization), to protect the right (by preventing third parties from preventing its realization), and “to fulfill the right” or “to facilitate enjoyment of the right, promotion of the right through education measures, and provision of the right where individuals or groups cannot realize their right due to insufficient personal means.” Erik B. Bluemel, *The Implications of Formulating a Human Right to Water*, 31 ECOLOGY L. Q. 957, 973 (2004); see also Arjun Kumar Khadka, *The Emergence of Water as a “Human Right” on the World Stage: Challenges and Opportunities*, 26 INT’L. J. OF WATER RESOURCES DEV. 37 (2010).
15. Norbert Brunner, et al., *The Human Right to Water in Law and Implementation*, 4 LAWS 413, 418 (2015), <https://www.mdpi.com/2075-471X/4/3/413/pdf>.
16. Malcolm Langford, *The United Nations Concept of Water as a Human Right: A New Paradigm for Old Problems?* 21 INT’L. J. OF WATER RESOURCES DEV. 273, 277 (2005), <https://www.jus.uio.no/ior/english/people/aca/malcolm/UN%20Concept%20on%20Right%20to%20Water.pdf>.

Despite the above, I will argue here that some intuitive accounts of the human right to water face serious obstacles both in establishing a clear normative grounding as a right and in translating that normative grounding into a workable institutional instrument for change. In Section II, I reject a common cynical view about the human right to water and define the challenge for a positive view of a human right to water. In Section III, the central focus of the article, I consider the problems with common approaches to the basic normative grounding for the human right to water.<sup>17</sup> In Section IV, I identify problems caused by trying to institutionalize the human right to water as an obligation borne by states. This obligation is different than, though frequently connected to, practical problems caused by policy implementation, which I will therefore briefly discuss in Section V. Finally, in Section VI, I point to some non-rights-based alternatives for arguing that the intolerable conditions of water poverty are a serious moral obligation that humans are failing to meet.

## II. CYNICAL AND ASPIRATIONAL VIEWS OF THE HUMAN RIGHT TO WATER

Does it matter whether the justificatory reasoning behind the human right to water is simplistic or even confused? Worrying about this might look like making hay out of a rhetorical and political invocation of “rights” by activists and global leaders at the United Nations.<sup>18</sup> The above-mentioned declarations traffic in the language of moral rights, one might argue, but not in a way that is meant to be engaged philosophically. The point of speaking this way is “issue elevation” and to harness the world’s sentimental concern in order to generate real political leverage for addressing a persistent humanitarian problem without an easy solution.<sup>19</sup> Trying to engage the philosophical basis for the human right to water is, on this reading, overwrought and misguided.<sup>20</sup>

- 
17. I will avoid arguments here that are simply skeptical of human rights generally, focusing instead on problems in conceptualizing the human right to water specifically. It is entirely possible that some of these criticisms generalize. See Richard J. Arneson, *Against Rights*, 11 PHIL. ISSUES 172 (2001); Karen Bakker, *The “Commons” Versus the “Commodity”*: *Alter-Globalization, Anti-Privatization and the Human Right to Water in the Global South*, 39 ANTIPODE 430 (2007); Onora O’Neill, *The Dark Side of Human Rights*, 81 INT’L AFF. 427 (2005). Part of the consequence of criticizing the normative grounding of individual human rights is opening the possibilities that human rights have a variety of bases and that people cannot say with certainty that problems with the grounding of a specific right are a problem for the grounding with other, or possibly all, rights. This is a different sort of argument worth exploring, but I do not pursue it here.
  18. FARHANA SULTANA & ALEX LOFTUS (ed.), *THE RIGHT TO WATER: POLITICS, GOVERNANCE AND SOCIAL STRUGGLES* (2012).
  19. As a descriptive matter, the sentimentalism described by, for example, Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES* (Susan Hurley & Stephen Shulte, eds., 1993), is not in dispute, the question is whether there are alternatives to it with normative force.
  20. *Id.*

This perspective is overly cynical. Even as a rhetorical tactic, invoking a fundamental right to water is meant to lend some kind of buck-stopping authority to people's claim to it. The motivation for making it a right, rather than just asserting that improving water access is an important international goal among others, is to suggest that people have some basic entitlement to water, which holds regardless of any collective benefits that might result from not giving it to them. "It is a human right" may then simply mean "it is an unquestionable entitlement," but even this outstrips the idea that there is no substantial moral claim being made.<sup>21</sup>

This cynical view of the human right to water also makes it hard to understand how the right is supposed to work as a legal instrument.<sup>22</sup> In real cases, where governments have competing domestic and international priorities, there must be a clear and compelling set of reasons for them to respond. Legal reasons are the most straightforward example. In India, for instance, the right to water has been defended by the court system as an implicit extension of existing constitutional rights.<sup>23</sup> However, despite the Indian court's rulings, there are still deep conflicts between state power over watercourse regulation for irrigation and a traditional, riparian system of water rights organized at the local level. Access is still very poor by international standards—more than 160 million people lack access to safe drinking water.<sup>24</sup> The High Court has ruled that this requires municipal agencies to supply water to informal slum settlements,<sup>25</sup> which cities have been hesitant to do because it encourages further permanent settlement of people in unregulated and unhealthy conditions. In places with poor water access, the issue is rarely as easy as authorities simply choosing not to expand water access when they could. Rhetorical appeals to water rights do little to resolve these systematic problems.

Rights, as they are typically understood, must carry with them some sort of duty. Without this conceptual feature, rights are just claims about what one would like to happen and, as Onora O'Neill puts it, are merely "aspirational."<sup>26</sup> The explicit policy function of the human right to water is

21. Tough-minded cynics might object to the inclusion of "moral" here, but even on the thinnest intuitive view of what "moral" means, it seems to me a justified inclusion. The point is merely that the "buck-stopping" and "unquestionable" valence of the idea of a human right is already invoking something extra-legal and more substantive than just "really important among other important things."

22. Antonio Embid Irujo, *The Right to Water*, 23 INT'L J. WATER RESOURCES DEV. 267 (2007).

23. Vrinda Narain, *Water as a Fundamental Right: A Perspective from India*, 34 VT. L. REV. 917, 920 (2010), [https://heinonline.org/HOL/Page?handle=hein.journals/vlr34&div=43&g\\_sent=1&casa\\_token=&collection=journals&t=1562009257](https://heinonline.org/HOL/Page?handle=hein.journals/vlr34&div=43&g_sent=1&casa_token=&collection=journals&t=1562009257). Perumatty Grama Panchayat v. State of Kerala, (2004) 1 KLT 731 (India).

24. *India's Water and Sanitation Crisis*, WATER.ORG (n.d.), <https://water.org/our-impact/india/>.

25. Environmental & Consumer Protection Foundation v. Delhi Administration & Others, (2012) INSC 584 (India).

26. O'Neill, *supra* note 17, at 430. Note that this use of "aspirational" is a technical term that means "a right that assigns no duties." In some cases, people call human rights

to create (or define an existing) duty, specify some party on which the duty is imposed, and provide mechanisms of enforcement and redress. Therefore, it becomes crucially important to identify who is responsible for discharging the duty (as a philosophical matter) and what to do when it conflicts with other duties and policy goals (as a practical matter).

These ideas set up a series of challenges for defending a human right to water. It must first avoid being merely an aspirational call for a better world by instead being based in philosophical justifications that impose definable duties for which leaders can assign responsible parties. If this can be established, the question then becomes one of political legitimacy: can these duties be appealed to in justifying existing or possible distributions of resources or power over resources? As a practical matter, this must be answered within the context of existing political arrangements: sovereign states with varying degrees of legal and financial capacity; a largely covenant-based, international legal system; and a wide set of non-state corporate actors that have a serious impact on water resource-use patterns. There is little value in asking whether a human right could be instantiated in a world that is organized in radically different ways (e.g., without states or with unlimited financial resources), so it is worth considering the practical obstacles of managing the very real trade-offs between meeting established rights' claims to water and the negative consequences of doing so, such as environmental degradation, human migration, and conflict.

### III. PROBLEMS OF BASIC GROUNDING

An intuitive view about the right to water's origin is that it is a *constituent of the right to life*.<sup>27</sup> Water is immediately necessary for life. Without it, a person will not survive more than a few days. Since everyone has a human right to life, the thought goes, everyone must have a right to the attributes necessary for its satisfaction, including at least enough water to survive.

This argument has been effectively used by activists, but there are familiar problems with it. Classic cases from the ethics of abortion suggest that the right to life does not always imply a right to what is necessary to live. A

---

"aspirational" when they mean to suggest that, as a practical matter, it will require progressive improvement over time to fully meet them. This is not the sense of "aspirational" I use in this article. Where it appears, I am referring to the O'Neill sense of the term.

27. JOHN SCANLON, ET AL., IUCN ENVIRONMENTAL LAW PROGRAMME, WATER AS A HUMAN RIGHT? 18 (2004), <https://portals.iucn.org/library/sites/library/files/documents/EPLP-051.pdf>; Bluemel, *supra* note 14, at 963; Gleick 1998, *supra* note 10, at 492; Luis E. Marín, et al., *Water As a Human Right and As an Economic Resource: An Example from Mexico*, in WATER ETHICS 115, 116 (M. Ramón Llamas, et al., eds., 2007); Sharmila L. Murthy, *A New Constitutive Commitment to Water*, 361 B.C. J. L. & SOC. JUST. 159, 160 (2016), <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1099&context=jlsj>.

fetus may require a mother's body to live, but this fact does not imply that it has a moral right to demand that the mother provide her body for the fetus's use.<sup>28</sup> Likewise, an adult's right to life does not necessarily imply that they have a right to what they need to live, particularly in cases where no one is clearly responsible for creating a life-threatening dependency. The case for a constituent right is even less intuitive for water access than for abortion because there is no obvious target for the obligation. Poor water access can result from the natural distribution of water on the planet, for which no one in particular is responsible.

If one *did* have a right to what is necessary for life, then water rights would place very large burdens on people who are not responsible and for whom it may represent a real hardship. When the natural environment has been modified or economies are involved, responsibility for scarcity is often diffusely spread over many individual actors and can be related to the behavior of the very people who face scarcity through poor farming practices. Chinese engineers have, for example, created massive water transfer projects to move water from the wet southern parts to the dry northern parts of China.<sup>29</sup> However, the costs for such actions are high and the externalities are, potentially, quite harmful. In China, many people have been forced from their homes, the natural ecosystems of the southern rivers have been fundamentally disrupted, and the water that people in the growing south rely on now has to be shared with people in the distant north. In this and similar cases, many people have the reasonable claim that they are being made worse off for a situation for which they are not responsible, regardless of whether they agree with the fact that water is essential for survival or that people have a right to life. The direct derivation of the right to water from the right to life is suspect, for both moral and practical reasons, even if water is unambiguously necessary for life.

These facts about water—that its uneven natural distribution is not caused by humans and that more even distributions are expensive in a number of ways—has had a major impact on the development of the human right to water.<sup>30</sup> Early discussions about treating water as a human right began as a

---

28. Judith Jarvis Thomson, *A Defense of Abortion*, in *BIOMEDICAL ETHICS AND THE LAW* 39 (James M. Humber & Robert F. Almeder eds., 1976).

29. Haiyan Helen Yu, *Local Institutions and Governance of the Water Commons: Experiences of IWRM from a Case Study in Rural China*, *GLOBAL WATER FORUM* (25 Jan. 2016), <http://www.globalwaterforum.org/2016/01/25/local-institutions-and-governance-of-the-water-commons-experiences-of-iwrm-from-a-case-study-in-rural-china/>; Ma Xi, Zhenzhen Xu, & Michael Spencer, *Developing a Global Water Stewardship System*, *CWR* (4 Feb. 2016), <http://chinawaterrisk.org/opinions/developing-a-global-water-stewardship-system/>.

30. KNUT BOURQUAIN, *FRESHWATER ACCESS FROM A HUMAN RIGHTS PERSPECTIVE: A CHALLENGE TO INTERNATIONAL WATER AND HUMAN RIGHTS LAW* (2008); *The Human Right to Water and Sanitation: Securing Access to Water for Basic Needs*, Swedish Water House Policy Brief Nr. 8 (G. Björklund & J. Sjödin eds., 2010), [https://www.siwi.org/wp-content/uploads/2015/09/Policy\\_Brief\\_Human\\_Rights\\_to\\_Water\\_web.pdf](https://www.siwi.org/wp-content/uploads/2015/09/Policy_Brief_Human_Rights_to_Water_web.pdf).



reaction against efforts to define it as a commodity,<sup>31</sup> which is still the way it is treated, both explicitly and implicitly, in government policies, legal codes, industry, and trade practices. It makes sense to treat it this way because water is scarce and it plays an essential role in almost every productive human activity. More to the point, this treatment is inevitable. Even in places where water itself is not priced, its provision, treatment, and disposal are costly. The value of land is tied to water access, and water is implicitly priced in the fuel required to pump it from the ground.

There are humanitarian reasons to want some limits on water's commodification. Principle 4 of the 1992 International Conference on Water and the Environment's "Dublin Statement" captures the conflicted sense that water is both an essential need but also inextricably tied to economic uses: "[w]ater has an economic value in all its competing uses and should be recognized as an economic good. Within this principle, it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price."<sup>32</sup>

Critics of neoliberalism, worried that complete commodification potentially excludes the poor from access, argued for the human right to water as a minimum guarantee to enough water necessary for survival and basic sanitation.<sup>33</sup> However, the sufficientarian sentiment here creates a very low, if largely achievable, entitlement.<sup>34</sup> This was not, certainly, what activists had in mind.

In fact, sustainable development's emergence as the dominant neoliberal response to rapidly worsening environmental conditions has ultimately led to a much more expansive sense of what the right to water should include.<sup>35</sup>

- 
31. KEN CONCA, *GOVERNING WATER: CONTENTIOUS TRANSNATIONAL POLITICS AND GLOBAL INSTITUTION BUILDING* 248 (2006); Bakker, *supra* note 17, at 436.
  32. THE DUBLIN STATEMENT ON WATER AND SUSTAINABLE DEVELOPMENT (1992), <http://www.wmo.int/pages/prog/hwrrp/documents/english/icwedece.html>.
  33. Bakker, *supra* note 17, at 444; Wouter Vandenhoe & Tamara Wielders, *Water As a Human Right—Water As an Essential Service: Does it Matter?* 26 NETH. Q. OF HUM. RTS 391, 409 (2008), <https://journals.sagepub.com/doi/pdf/10.1177/016934410802600304>; Hope Johnson, et al., *The Commodification and Exploitation of Fresh Water: Property, Human Rights and Green Criminology*, 44 INT'L. J. L., CRIME & JUST. 146 (2016); Oriol Miroso & Leila M. Harris, *Human Right to Water: Contemporary Challenges and Contours of a Global Debate*, 44 ANTIPODE 932, 934 (2012), <https://oriolmirosa.com/files/miroso-harris-2012.pdf>.
  34. Despite the frequent appeals by critics of commodification to water's essentiality for life, it is worth noting that the "right to live" argument above also tends to justify only a bare minimum allotment either by not expanding the definition of "life" or by treating human rights as very minimal entitlements.
  35. SCANLON, ET AL., *supra* note 27, at 27; William J. Cosgrove, *Public Participation to Promote Water Ethics and Transparency*, in *WATER ETHICS* 295, 299 (M. Ramón Llamas, et al., eds., 2007); Luis Veiga da Cunha, *Water: A Human Right or An Economic Resource?*, in *WATER ETHICS* 97, 98 (M. Ramón Llamas, et al., eds., 2007); Ralph P. Hall, et al., *The Human Right to Water: The Importance of Domestic and Productive Water Rights*, 20 SCI. & ENGINEERING ETHICS 849, 850 (2014), <https://link.springer.com/content/pdf/10.1007%2Fs11948-013-9499-3.pdf>.

The United Nations now argues, for instance, that people are entitled to the water necessary for an “adequate standard of living.”<sup>36</sup> The right is not derived simply from water’s necessity for life, but it is derived from *its importance in creating opportunity for development*. This idea is a reasonable interpretation of what people hope the human right to water will support, but it comes from a different place and chafes against the commodificationist element of the Dublin Statement since, in many parts of the world, everyone cannot reasonably expect markets to provide enough high-quality water for an adequate standard of living. People are simply too poor and water-insecure, and the high cost of improvements is not an attractive investment.<sup>37</sup>

Its normative origins are different as well. Some rights-based views might argue that rights claims only kick in when the way one party uses a shared resource harms another user or their ability to perform the right. This argument will cover some cases in which water scarcity is a result of competitive uses, but it does not help in cases where scarcity is natural or where the people best positioned to help the water-poor have no significant, causal connection to their water poverty.<sup>38</sup>

Thinking of humanity’s obligation to provide water to the poor as tied to their ability to develop rather than merely to survive is an especially significant transition within human rights literature. Human rights are often divided into “civil and political” (CP) rights and “economic, social, and cultural” (ESC) rights.<sup>39</sup> The theoretical value of the distinction is not especially transparent, but it is commonly thought to mark a difference between basic rights that originate in features of humans qua being human (for CP rights) and those that respond to historically contingent patterns of exclusion (for ESC rights).<sup>40</sup> An important distinction here has to do with the relationship between the origin of the right and who is responsible for fulfilling it. CP rights are “pre-institutional” in the sense that they originate in features of people independent of the institutions that they inhabit, while ESC rights make essential reference to certain sorts of institutions, like economies and

---

36. WINKLER, *supra* note 10, at 275; Pierre Thielbörger, *Re-Conceptualizing the Human Right to Water: A Pledge for a Hybrid Approach*, 15 HUM. RTS. L. REV. 225 (2015).

37. The principle “full cost recovery” describes conditions in which the introduction of adequate water infrastructure and access is economically self-sustaining. The general consensus is that full cost recovery is unachievable in many parts of the world. Bluemel, *supra* note 14, at 962; WORLD BANK GROUP, *A WATER-SECURE WORLD FOR ALL*, at 5 (2016).

38. For a more substantial defense of the Lockean view, see CARA NINE, *GLOBAL JUSTICE AND TERRITORY* 29 (2012).

39. Thielbörger, *supra* note 36.

40. *Id.* The United Nations rightly argues against drawing a hard distinction between these legal classes of human rights and, in particular, against thinking of them as simple proxies for positive and negative rights. It is true, of course, that the right to water requires someone to do or provide something to others—a quantity of water or the means to acquire it through the construction of infrastructure or policy changes. However, the right to life may require this as well in cases of absolute deprivation, which might, for instance, be caused by forced migration across a political border.

cultural values. The language of progressive realization that sometimes accompanies ESC rights, but not CP rights, is presumably meant to suggest that these rights have to be implemented with some concern or respect for existing institutional relations.

This difference has consequences for the scope of the counterpart duty. The strength of the entitlement coming from a CP right is couched in the fact that it is pre-institutional and so holds against any institutions that might come about. The universality implied by the right's pre-institutional origin reflects the universality of its obligatory force.<sup>41</sup> The human right to water, however, straddles the differences between ESC and CP rights. Its origins and demands are intuitively economic, historical, and contingent views about what is necessary for achieving an adequate standard of living, which limits the scope of duty to groups that either caused the problem or have agreed to be responsible for it. In many places where poor water access is caused by geographic, environmental, or social conditions over which the population has effectively no control, it is, at best, pointless to assign such an obligation.<sup>42</sup> These rights cannot realistically be fulfilled without substantially broadening the scope of the obligation so that it includes people who do not have a historical connection to the causes of poor access but can do something about it.

Within the conventional human rights framework, it feels like the normative grounding for the human right to water is based on treating it as a CP right, while the scope of the obligation feels based on treating it as an ESC right. One response to this is to equivocate—perhaps, in some way, human need entails a pre-institutional CP right to sufficient water to survive. Meanwhile, post-institutional agreements create ESC rights to water and well-specified obligations for providing it. The “human right to water” might then refer to these two things lumped together without attempting to explain how they are connected. The problem with this, of course, is that the CP rights element of this pairing remains aspirational and, in the end, the human right to water as implemented will just be conventional—assigning obligations only to the parties that accept them. Such a right is considerably weaker because its authority depends on the existence of international agreements and covenants, but it is easy to understand how and who bears the obligation since it is straightforwardly contractual.

Most proponents of the human right to water, however, are unlikely to be satisfied with either an aspirational right that assigns no duties or a merely conventional right that depends explicitly on the agreement of parties.<sup>43</sup> Rather, the hope is that the right is universal, absolute, pre-institutional, and

---

41. O'Neill, *supra* note 17, at 428.

42. It may not, of course, be pointless to tell *other* people or states that they have an obligation to help fix the situation, nor is it pointless to put this in the language of rights. However, it is an open question as to whether or not the obligation to help these other parties is generated by the human rights claims of others.

43. Thielbörger, *supra* note 36.

also imposes duties broadly to change the material conditions of the world to improve water access. Among the major philosophical challenges in this hope is explaining who bears the pre-institutional duty to provide that water and why. Mathias Risse argues that the human right to water originates in the idea that humans are co-owners of the Earth, which entitles them to a pre-institutional share of its naturally occurring resources.<sup>44</sup> As he notes,

There turns out to be a conceptual link between collective ownership and human rights. In virtue of the fact that humanity collectively owns the earth, persons possess a set of natural rights that capture their status as co-owners. The existence of states puts these rights in jeopardy. A set of associative rights must ensure that states preserve these natural rights. (“Associative” rights are rights individuals have in virtue of being subject to certain political or economic structures.) These associative rights are among the membership rights in the global order, and, as such, are human rights.<sup>45</sup>

Our individual claims to a portion of the world’s water are, Risse argues, symmetrical, pre-institutional, and volumetric.<sup>46</sup> From the perspective of what each person needs for subsistence, everyone is roughly the same and so is entitled to at least that amount.<sup>47</sup> This claim is pre-institutional because it is based on the belief that the co-ownership rights to resources are based purely on the fact that everyone is human. It is only later, when historically contingent states arise, he argues, that people become potentially incapable of claiming this pre-institutional entitlement.<sup>48</sup> Thus, people have a human rights claim against the creation or behavior of those states or institutions that prevent access to their basic volumetric entitlement to adequate water.

This view ultimately solves very few of the problems endemic to arguing for a pre-institutional right to water. First, the idea that humans are co-owners of the Earth seems largely unmotivated,<sup>49</sup> a feeling originating from religious

---

44. Mathias Risse, *The Human Right to Water and Common Ownership of the Earth*, 22 J. OF POL. PHIL. 178, 182 (2014).

45. *Id.*

46. *Id.* at 187.

47. “[T]he earth originally belongs to humankind collectively, in the sense that all humans, no matter when and where they are born, must have some sort of symmetrical claim to them.” Mathias Risse, *Common Ownership of the Earth As a Non-Parochial Standpoint: A Contingent Derivation of Human Rights*, 17 EUR. J. OF PHIL. 277, 285 (2009).

48. *Id.* at 294.

49. It was also a foundational argument for historical colonial expansion, used to claim that native populations had no right to keep settlers out. Risse acknowledges this, saying somewhat lamely that it does not imply that colonizers can steal resources from natives during their colonization. *Id.* at 281. One of the implications of his view, however, is that people should not be prohibited from crossing political borders to fulfill their entitlement to a share of the Earth’s resources. This is surely more attractive when we imagine desperately poor people without water crossing borders, but the argument also supports crossing borders for other, perhaps non-life threatening resources. Suppose a poor population could achieve a better standard of living by crossing to a neighboring country to mine phosphorus to sell. It might also be an argument for annexation in cases where a water-poor population could be incorporated into a more water-rich state, perhaps against their will.

convictions that the world is a gift to the collective human species from a deity who intends humans to receive a portion of this gift's resources as a personal property right, which humans may then use roughly as they like up to the point of outright wasting them. Risse hopes to offer a secular version of this view based on two points: "first, the resources of the earth are valuable and necessary for human activities to unfold; and second, those resources have come into existence without human interference."<sup>50</sup> These points may be, as Risse says, strong enough to resist an absolute intergenerational right to ownership of resources based on "first occupancy," but they are nowhere near strong enough to explain the positive entitlement in the first place for people who happen to find themselves without.<sup>51</sup> It is also unclear why co-ownership is best understood in terms of proportional divvying up of the world's stuff. Perhaps a better model would be fiduciary—as if humans owned a piece of property together that they hoped would retain its value now and for the future. Co-owners might be much more concerned with careful use and improvement of the shared property rather than breaking it down into proportional resources piles. Different ways of thinking about common property are available. At times, Risse's phrasing suggests that the argument is simply conditional—if we presume co-ownership of the Earth's resources, what follows? Much of the strength of the co-ownership claim comes from the idea that water is essential to life, so humans have strong individual claims to what they need to survive. This idea, however, is available regardless of whether it is hitched to the idea of fundamental rights.

The biggest worry about such an account is still that it risks being merely aspirational. Suppose humans do have a pre-institutional, co-ownership right to a symmetrical portion of the world's water: to whom does this assign a *pre-institutional* duty to supply that portion if I do not have it? If I have a symmetrical right to an allotment, which I may get (and more) through luck, what is my responsibility for providing a physical portion of water to those who, through bad luck, have none? There may be reasons for caring and doing something, but they do not seem to sprout from this pre-institutional entitlement. At best, it prohibits the creation of institutions that deny me access to their allotment, if they can get it.

The purely negative pre-institutional right can, however, have some pretty drastic consequences. As Risse notes, it probably prohibits countries from blocking migration into their borders from more water-poor, neighboring states.<sup>52</sup> The limits of this are unclear. Does it also permit (or require) water-rich nations to forcibly annex or move populations from water-poor states into their territory? In some cases, it might be possible to move water to a population or otherwise alter the environment with the right technology, but

---

50. *Id.* at 285.

51. *Id.*

52. Risse, *supra* note 44, at 196.

the costs of this on others are quite high and are extracted from environmental damage and forced dislocation of populations. Perhaps these are costs that people ought to pay, no matter how high, given water's pre-institutional essentiality and the stipulated lack of fault in being water-poor. Even so, the immediacy of the need and the fact that water is non-substitutable cause problems. People could not, for instance, simply compensate others in a different way for not getting their entitlement because these people would have no one to pay to bring them water or build infrastructure. The burden is very high and has to be borne by someone, but the pre-institutional right does not explain who this is or what, if any, limits there are on the duty.

This is approaching what Risse calls an objection from right-libertarianism: the idea that no one could believe that children born, through no fault of their own, in one part of the world without water have a claim on water that is reclaimed by labor in another part of the world.<sup>53</sup> Common ownership, he argues, "does not grant each and every individual claims to each and every object. . . . That our baby has claims to resources on a par with Smith's is consistent with him/her not having claims on Smith to vacate *that* land."<sup>54</sup> However, the burden to either provide or vacate has to fall on *someone*, and, because people have presumably developed the resources on which the baby has a claim, that person will require others to give some portion of their labor energy in providing it. Perhaps they ought to, but the argument for this is unlikely to run through property-rights claims by the baby. Risse's reasoning here seems acrobatic largely because he is trying to explain the redistributive entitlement within a framework of universal pre-institutional rights. It is clearly coherent for the baby to have some kind of claim, just not a property rights-based one, which gets even more difficult if one recognizes that groups may have competing forms of disadvantage in which the trade-offs are more heterogeneous, i.e., not limited to exchanges of land or water, but with forms of such elements or of self-determined claims tied to these exchanges. Indigenous groups, for example, have lodged complaints about the implementation of human rights claims to resources on the grounds that, while they may improve urban access—for example, by making infrastructure development a moral imperative—this can discount their historical claim to the resource, a claim which may require refraining from large-scale development.<sup>55</sup>

To avoid leaving the human right to water dangling as merely aspirational, Risse argues that we assign responsibility for provision through a set of secondary "associative rights" arising from "membership rights in the global

---

53. *Id.* at 190.

54. *Id.*

55. Lucero Radonic, *Through the Aqueduct and the Courts: An Analysis of the Human Right to Water and Indigenous Water Rights in Northwestern Mexico*, 84 *GEOFORUM* 151, 157 (2017).

order.”<sup>56</sup> The status of this “global order” is important for his argument, and it seems to shift between pre-institutional and post-institutional.<sup>57</sup> In order for the human right to water to avoid being aspirational, it must assign someone pre-institutional duties to provide water to those who do not have it. If the global order is pre-institutional, then maybe it is responsible. At times, Risse suggests that it is pre-institutional—a consequence of our co-ownership.<sup>58</sup> However, this is pretty thin broth. It is unclear why our co-ownership requires that I do anything as a co-owner to ensure another’s enjoyment of the thing we co-own. Suppose we are co-owners of a car, but the other person lives a thousand miles away from where the car is parked in my driveway. Does this obligate me or anyone else to move the car back to the other person so that they can use it to go to the hospital?

At other times, Risse suggests that the global order is post-institutional: a “system of states that covers most of the land of the earth, as well as the network of organizations that provides for ‘global governance.’”<sup>59</sup> As examples of its elements, Risse offers the United Nations, International Monetary Fund, World Bank, and collected national governments. This kind of global order might be obligated to do something about poor access, but the reasons for this have to do with post-institutional agreements. The obligation is thus limited in its power to the parties and nature of that agreement, which explains the obligation, but it still leaves the pre-institutional right as aspirational and appears to be sliding between conceptions of rights in a way that is, unfortunately, quite common in the human rights literature.

The reality is that much of what Risse hopes to accomplish—a strong claim on sufficient water resources that is universal and recognizes the fact that water access is a natural phenomenon<sup>60</sup>—is readily available through a combination of conventional rights and arguments for the direct importance of helping people who, through no fault of their own, are badly off. The casualty of this approach, though, is the hope of a simple, consistent, pre-institutional account of the human right to water.

#### IV. PROBLEMS OF INSTITUTIONALIZING A UNIVERSAL HUMAN RIGHT TO WATER AT THE STATE LEVEL

Even if people had a strong, shared justification for an international human right to water, it would face problems as one thinks about how it could be

---

56. Risse, *supra* note 44, at 182.

57. Locke considers and rejects a similar approach in JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT* (Chapter II, § 28–29) (Andrew Bailey et al. eds., 2015); NINE, *supra* note 38, at 159.

58. Risse, *supra* note 44.

59. *Id.* at 191.

60. Risse, *supra* note 47.

institutionalized—i.e., in how it moves from a collective obligation of human agents as such to particular, especially legal, obligations for national governments.<sup>61</sup>

The general approach of the United Nations to the right to water is to treat it as an obligation that falls on national (“state”) governments. The obligations of states are to ensure respect and fulfillment of the human right as established by shared international covenants. The goal of this is to make safe water a legal entitlement rather than a matter of charity, and states seem like the natural agent for implementing such policies. Typically, this means enacting laws and policies that detach the price and availability of water from market forces that strive for “full cost recovery.”<sup>62</sup> For example, laws might set minimum entitlements to water and sanitation financed by taxes; regulatory policies might restrict water uses that either consume or pollute water in ways that reduce access for the poor; states might make changes to the way water is treated within domestic property rights law, the texture of which varies substantially throughout the world (and sometimes even within a single nation); or laws may simply raise money, typically debt, to build infrastructure.

One general problem with devolving responsibility for the human right to water to states is that human rights identified as pre-institutional have a very different origin and, thus, scope than rights established at the state level.<sup>63</sup> The United Nations recognizes this implicitly, only requiring states to “respect,” “protect,” and “fulfill” the entitlements established separately by the pre-institutional right.<sup>64</sup> State laws do not *create* the rights—they give them political substance and enforce them. Even if people failed to give a convincing, pre-institutional, philosophical account of water as a human right, state-level laws and policy could create parallel legal rights with real, practical force. However, the authority of these rights stops at the same place as the authority of the state—its national and legal borders. If the problem is entirely found within the borders of the states, then this only produces functionally similar results as a pre-institutional human right. Water resources are, however, an internationally shared resource nearly everywhere. Internationally, there are at least “276. . . river and lake basins” and “274 underground freshwater basins,”<sup>65</sup> and 145 countries share major sources of surface water.<sup>66</sup> Control over these sources is profoundly mediated by

---

61. UNDP-SIWI Water Governance Facility, *supra* note 10, at 2.

62. Bluemel, *supra* note 14, at 962.

63. Benjamin Mason Meier, et al., *Implementing an Evolving Human Right Through Water and Sanitation Policy*, 15 WATER POLICY 116, 118 (2013).

64. *Id.* at 120.

65. BRAHMA CHELLANEY, WATER, PEACE, AND WAR: CONFRONTING THE GLOBAL WATER CRISIS, at 37 (2013); see also TRANSBOUNDARY FRESHWATER DISPUTE DATABASE, NACSE, <http://gis.nacse.org/tfdd/index.php>.

66. UN WATER, TRANSBOUNDARY WATERS (n.d.), <https://www.unwater.org/water-facts/transboundary-waters/>.



geographic position, seasonality, relative levels of economic development, infrastructure development, and attributes as simple as direction of flow or rainfall averages.

The basic problem here, identified by O'Neill and others, is that if the business end of human rights can only become a reality through action by state-level laws, then human rights only successfully generate obligations when the states are in a position to realize those obligations; when they are not—because they are too weak, uninterested, or because domestic policy is not enough—human rights remain aspirational.<sup>67</sup> People can, of course, get around this problem in lots of ways (e.g., transboundary agreements and unilateral policy changes in upstream riparian states that improve conditions for downstream neighbors), but these ways do not have any essential connection to human rights. As I will argue below, the answer to this problem might be a shrug, but it would mark a departure from what is implied by UN definitions of the human right to water. It accepts the idea that there are universal obligations to improve water access but that these are unrelated to universal human rights.

As a practical matter, achieving the *goals* of a human right to water may not be best accomplished by establishing a right at the state level. The inclusion of a right to water within a state constitution may help motivate changes to law, policy, and the economy to bring about better access, but evidence for the relationship between these things is mixed. South Africa's 1996 constitution includes an explicit right to adequate water, for instance.<sup>68</sup> It does not obligate the state to provide water for free, but, in practice, it has meant providing an entitlement to a basic minimum and progressive pricing.<sup>69</sup> Other places with explicit state-level rights to basic water have had much less success. In India, where the right to water is recognized as a derived constitutional right, more than half of the population does not have access to drinking water in their home.<sup>70</sup> Obviously, the presence of a right on the books is inadequate in achieving access, and it shows that having such legal rights is only potentially an effective mechanism for improving access. However, in places where a constitutional right faces serious conflicts with an existing thicket of legal rights and economic policies, more progress might be made by thinking about how to incentivize industry and agriculture to use water differently. Other international agreements, such as the Sustainable Development Goals,<sup>71</sup> make little reference to the establishment of state-level rights.

---

67. O'Neill, *supra* note 17, at 434.

68. Narain, *supra* note 23, at 923; Arden, *supra* note 13, at 776.

69. Arden, *supra* note 13, at 777.

70. Pedro Martínez-Santos, *Does 91% of the World's Population Really Have "Sustainable Access to Safe Drinking Water"?* 33 INT'L J. OF WATER RESOURCES DEV. 1, 10 (2017).

71. UN Department of Economic and Social Affairs, *Transforming Our World: The 2030 Agenda for Sustainable Development*, SUSTAINABLE DEVELOPMENT GOALS: KNOWLEDGE PLATFORM (25 Sept. 2015), <https://sustainabledevelopment.un.org/post2015/transformingourworld>.

A somewhat different criticism of assigning executive authority for the human right to water to states reflects the significant changes in how water is controlled and consumed within an increasingly globalized economy.<sup>72</sup> The traditional responsibility for water management has always fallen to national governments, which typically legally control water resources and are the only entities capable of building large-scale water infrastructure. This has changed as international corporate entities and industries, which source and consume vast quantities of water, build to manufacturing capacity as well as primary infrastructure, around the planet to benefit their production needs. British Petroleum, for example, has located a full half of its “major operations” in places where fresh water availability is identified as “stressed or scarce.”<sup>73</sup> The reason for this, obviously, is not the availability of supply, as correlations exist between generally weak regulations and relatively resource-rich places with poor people.<sup>74</sup> High-tech industries, especially electronic hardware manufacturers, use tremendous volumes of water. A proposed Foxconn factory, set to make LCD television screens in Wisconsin, would use up to 7 million gallons of water every single day, with much of it ending up heavily polluted.<sup>75</sup>

Corporations are non-traditional targets for realization of the human right to water, and their transnational status makes them difficult entities to control within the typical mechanisms of national laws.<sup>76</sup> Reasonable worries about the effects of globalization and insufficiently regulated consumption and contamination by international industry have encouraged developing conceptual connections between anti-corporatism and anti-privatization and then further positive connections between human rights and stronger state-level control of resources.<sup>77</sup> Given the general inapplicability of human rights to this major class of water consumers, responsibility seems to fall on state governments to control international business. This proves to

---

72. Tim Hayward, *A Global Right of Water*, 40 *MIDWEST STUD. IN PHIL.* 217, 229 (2016); O’Neill, *supra* note 17, at 436.

73. British Petroleum, *Water*, BP, <https://www.bp.com/en/global/corporate/sustainability/environment/water.html>.

74. Leif Wenar, *Property Rights and the Resource Curse*, 36 *PHIL. & PUB. AFF.* 2, 3 (2008).

75. Susan Cosier, *The Impact a Wisconsin LCD Plant May Have on the Great Lakes Is Not Crystal Clear*, NRDC (13 Apr. 2018), <https://www.nrdc.org/stories/impact-wisconsin-lcd-plant-may-have-great-lakes-not-crystal-clear>.

76. Carlos Manuel Vázquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 *COLUM. J. TRANSNAT’L L.*, 927, 941 (2005). There are some exceptions, but they tend to be related to “war crimes, crimes against humanity, and forced labor.” *Id.* at 927. Effects on water access are, at best, regulated indirectly by international law. Owen McIntyre, *The Human Right to Water As a Creature of Global Administrative Law*, 37 *WATER INT’L.* 654, 660 (2012).

77. Andrea K. Gerlak, *Human Rights and Privatization of Water in the European Union and Beyond*, 13 *INT’L STUD. REV.* 529, 529 (2011); Sharmila L. Murthy, *The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy Over-Privatization*, 31 *BERKELEY J. INT’L L.* 89, 95 (2013).

be especially difficult in cases where water insecurity is driven by poverty.<sup>78</sup> The need to develop is mostly opposed to sustainability in the short term, even if, conceptually, “sustainable development” is an attractive, if largely unachievable, ideal.<sup>79</sup>

Conceptual confusion is one of the results of recognizing that control of water resources by multinational corporations is a serious threat to water security. The human right to water has become conceptually aligned with public, sometimes democratic, control of resources.<sup>80</sup> This connection is not essential, of course. It is familiar to those of us living in contemporary capitalist democracies in which commodification and private ownership of basic human necessities is consistent with human rights so long as there is some sort of basic entitlement for people who are entirely unable to afford those needs. However, when economic development of resources—which, as a practical matter in poor places, is heavily conducted by attracting multinational industry and investment—is set up as opposed to public control, poor nations are deprived of more or less the only pathway toward greater water security.

## V. PROBLEMS OF PRACTICAL IMPLEMENTATION

The above has focused on whether the idea of a non-aspirational human right to water is philosophically defensible in the abstract and, if it is, whether the main institutional mechanism of state enforcement is really connected to human rights at all. My answer to this has been that the idea has some deep conceptual problems and elisions, some of which are unique to the idea of a human right to water. Moreover, the main mechanism of institutionalizing this right by creating obligations for states to ensure that the goals of water security are met for their own citizens faces some serious obstacles. In this section, I will highlight a few further practical obstacles to implementation that are caused by physical and contingent political problems with improving water access. These deserve separate consideration because they present obstacles entirely independent of whether people have a defensible normative account of the human right to water and the transfer of this obligation to states.

---

78. Caroline A. Sullivan, *Poverty and the Ethics of Water Development*, in *WATER ETHICS* 129, 141 (M. Ramón Llamas, et al., eds., 2007).

79. Olga Adhikari, *Sustainable Development and Its Challenges in Developing Countries*, INTERNATIONAL YOUNG NATUREFRIENDS (15 Aug. 2018), <http://www.iynf.org/2018/08/a-guide-to-sustainable-development-and-its-challenges-in-developing-countries/>.

80. VANDANA SHIVA, *WATER WARS: PRIVATIZATION, POLLUTION, AND PROFIT*, at 53 (2002); MAUDE BARLOW, *BLUE COVENANT: THE GLOBAL WATER CRISIS AND THE COMING BATTLE FOR THE RIGHT TO WATER* 161 (2009).

Tim Hayward argues that “[a] distinctive feature of environmental rights is that their fulfillment is normally dependent on ecological restraint of some kind. In the case of water, a right of universal human enjoyment of a sufficient minimum is contingent on constraining aggregate human demand on the resource.”<sup>81</sup> This idea seems plausible in the case of carbon emissions and their contribution to climate change. The consequences of higher amounts of CO<sub>2</sub> in the atmosphere are shared globally, regardless of where the emissions are produced, as the planet warms as a whole. However, Hayward’s idea seems generally incorrect in the case of water resources, at least at the global level. The main reason for this is that water consumption is a local phenomenon and rates of water efficiency in the way that one country consumes its water resources have little effect on the way that water is consumed in far-away places. I cannot, by taking shorter showers or even by supporting a national policy of water consumption in the United States, increase water access in Yemen. Any surplus water produced cannot be easily moved to the distant places that need it.

While direct forms of ecological constraint in water use would not improve the prospects for achieving universal minimum allotment, demand management can be a strategy for improving access at the local level within a geographically close population. This depends, of course, on a case with a sufficient, aggregate supply (where excessive demand is driving poor access), which will not be relevant in the majority of cases (where the main obstacles to water security are either absolute physical scarcity or lack of sufficient infrastructure). There is some evidence that a carefully-orchestrated, international commodities trade system, one which monitors water inputs to products and considers the water-related opportunity costs of producing them in one place rather than another, creates net global water savings.<sup>82</sup> However, this depends on the existence of measurement, regulation, and market systems that do not exist and are a long way from existing. Even if they did, the individual person’s contribution to distant consumption patterns is heavily mediated in ways that individual carbon footprints are not. My daily decision to eat less meat, for example, has little effect on water consumption in far-off places that produce feed grain for export, though collective behavioral changes might have more effect over the long term.

The prospects for collective demand management and increasing supply are best at the local level. Here, the greatest worry is that intensive development of shared water resources will have negative consequences politically and environmentally. Most watersheds overlap political boundaries, so increased extraction of water resources to meet a population’s development needs potentially runs the risk of decreasing the prospects for

---

81. Hayward, *supra* note 72, at 218.

82. ARJEN Y. HOEKSTRA & ASHOK K. CHAPAGAIN, *GLOBALIZATION OF WATER: SHARING THE PLANET’S FRESHWATER RESOURCES* (2008).

neighboring populations that share the resource. The human right to water and its institutionalization at the state level potentially makes this problem worse if it is seen as granting special fundamental moral authority to states for increasing their consumption of a shared resource.

Environmental damage is also a serious concern. Improving water access means producing more water, improving sanitation, or both. Producing more water means extracting finite resources from the environment through groundwater pumping, containing and diverting surface sources through dams and inter-basin transfers, or reclaiming seawater through desalination. The third option is largely out of the question for poor countries because the technology and energy costs are extremely high. Groundwater pumping and damming have significant negative environmental costs, which might be costs worth paying, but it has to be noted that these methods are likely endemic to meeting the demands of a universal human right to sufficient clean water. Improving sanitation also contributes to meeting people's water needs because it prevents clean water resources from becoming contaminated and is then unavailable for use. Sanitation infrastructure is, on a large scale, very carbon-intensive. Again, these are not arguments against providing people with basic water access or against the justification for a human right to water, but they do rate among the practical costs of realizing that right. Framing water entitlements as universal human rights puts us in a position of having to accept these costs because, if human rights mean anything at all, they are meant to be absolute. They are not tradable against other serious concerns like environmental damage or economic stability.

## VI. WATER JUSTICE

Between 2014 and 2016 alone, the Detroit Water and Sewerage Department (DWSD) in Michigan conducted more than 83,000 residential water shut-offs for delinquent payments, and the vast majority of the residents affected were low-income.<sup>83</sup> The shut-offs were and are part of an attempt to reverse the critical financial conditions of the DWSD.<sup>84</sup> While shut-offs are the visible fist of the municipal water market, Detroit water rates themselves have risen 120 percent in the last decade.<sup>85</sup> Some of this financial crisis is caused by

---

83. Drew Philp, *No Water for Poor People: The Nine Americans Who Risked Jail to Seek Justice*, THE GUARDIAN (20 Jul. 2017), <https://www.theguardian.com/us-news/2017/jul/20/detroit-water-shutoffs-marian-kramer-bill-wylie-kellermann>. There were also 32,000 shut-offs between 2003 and 2004. JASON AMIRHADJI, ET AL., TAPPED OUT: THREATS TO THE HUMAN RIGHT TO WATER IN THE URBAN UNITED STATES, at 28–29 (Geo. L. Hum. Rts. Inst., 2013); see also Carolina L. Balazs & Isha Ray, *The Drinking Water Disparities Framework: On the Origins and Persistence of Inequities in Exposure*, 104 AM. J. OF PUB. HEALTH (2014).

84. Murthy, *supra* note 27, at 166.

85. *Id.* at 165.

physical changes in water infrastructure and demographics; the population of urban Detroit has fled to wealthier suburbs as the water infrastructure system has aged, leaving the city with fewer, poorer people to pay for a decaying, over-large water system. Detroit, like many cities, has consistently transferred collected water rates to pay for other essential services and pension commitments. Frequently, water utilities are the only reliable income for cities and are so essential that people will reliably pay for them, which makes them attractive targets for administrative funds poaching.<sup>86</sup>

The effect of the shut-offs creates a situation for tens of thousands of low-income residents that closely resembles conditions of water insecurity in the developing world. People without water running to their homes must purchase water in containers to use for cooking and cleaning and must find other locations with working toilets and showers. The main difference, however, is that this is a true denial of access to a minimally sufficient supply. Unlike other basic needs, there is no mandatory federal guideline in the United States requiring water to be affordable for individuals or a federal assistance program for people who cannot pay their water bills.<sup>87</sup> In addition, because there is very little informal, water-gathering infrastructure in the United States (e.g., publicly accessible wells or secondary private bulk water service providers specifically serving people without regular connections), the shut-offs approach a direct political denial of access in a way that is uncommon globally. The sad irony here is that, on the most intuitive views of the human right to water outlined above, Detroit's water shut-offs are much closer to a human rights violation than the much more common failures of poor governments to expand water access to their poor populations: the latter are failures to provide services that are heavily mediated by physical scarcity, lack of infrastructure, and weak governance, and the former are denials of a basic minimum in a place with some of the richest available freshwater resources in the world.

It is likely that the language of human rights will continue to dominate discussions of basic water entitlement, but it gives little normative guidance for orchestrating policy. Despite the fact that the case of Detroit seems to fit the particulars of a human rights violation, it feels far from plausible that it would be treated this way, which lends credence to the perception that human rights tend to be used cynically as a vehicle for the developed world to impose itself selectively upon less developed nations.<sup>88</sup> If the goal,

---

86. Donal O'Leary, *Corruption and Transparency in the Water Sector*, in *WATER ETHICS* 273, 274 (M. Ramón Llamas, et al., eds., 2007); Peter J. Hammer, *The Flint Water Crisis, KWA and Strategic-Structural Racism, Testimony Submitted to the Michigan Civil Rights Commission, Hearings on the Flint Water Crisis* 918 July 2016), [https://www.michigan.gov/documents/mdcr/Hammer\\_Peter\\_Flint\\_water\\_and\\_strategic-structural\\_racism\\_final\\_552225\\_7.pdf](https://www.michigan.gov/documents/mdcr/Hammer_Peter_Flint_water_and_strategic-structural_racism_final_552225_7.pdf).

87. Murthy, *supra* note 27, at 211.

88. Madeline Baer & Andrea Gerlak, *Implementing the Human Right to Water and Sanitation: A Study of Global and Local Discourses*, 36 *THIRD WORLD Q.* 1527, 1528 (2015).

however, is the simpler one of finding principled reasons for governments, and especially people in wealthier nations, to contribute to greater water access, the normative options are more diverse.

Non-rights-based views, particularly consequentialist ones, offer the most obvious alternative to the above approach. Water poverty is an objectively bad condition for a person to be in, and those who can do something about it are culpable for failing to do so. The practical demands imposed by accepting this failure are intense, and they include worries about cost as well as the degree to which this failure would require massive transfers of wealth to the developing world to achieve important, but incrementally small, benefits. Because initial water infrastructure construction and continual management is so expensive, the cost to bring people a small distance toward water security will be very high indeed. If the cost is too high and paying it substantially reduces hopeful prospects for many others, it might justify denying people survival in the name of aggregate utility. I am skeptical of the idea that we could justify killing someone to give everyone a non-life-saving sip of water, unless the number of people getting the sip is large enough that my intuitions give out entirely. However, bringing this up misses the point because rights claims have the same problem. People might find themselves in a situation where they must deny a lone rancher's right to basic water access to re-route water into a city struggling to meet its sanitation needs. Hard trade-offs are a problem for every view.

One reason why critics of consequentialism are more quick to point this out is that they assume, wrongly, that utilitarianism is limited to single metrics of well-being that are subjectively defined. With this assumption, then trade-offs between large numbers of small, subjectively experienced goods directly outweigh even large—life-threatening—goods if the aggregative benefit is high enough. However, this presumes consequentialists are committed to both thinking that “utility” is a unified thing and that it ought to be understood subjectively. Consequentialists ought to deny both of these things. I will include more below about what the pluralist conception of valuable outcomes involves. The objectivism bit—whatever difficulties there are in defining objective values—is not so hard in the case of basic resource requirements, which is why the UN declarations are so powerful in the first place.

None of this suggests that rights are not important considerations in our moral theory, just that they are not *foundational* principles and that the value they have lies in their practical ability to encourage greater access to good lives for the global poor. I agree with Richard Arneson here: “I suspect that rights tend to enter our thought as a freight locomotive bearing many cars laden with important moral goods. We care about whether or not the freight train arrives, but we should care about the arrival of the locomotive

only if it pulls cargo.”<sup>89</sup> This is not a complete argument, but one can still feel its force: rights are important tools for securing the well-being people deserve simply because their suffering matters morally. Access to water is a major mechanism of this, and people have a strong reason, since well-being matters, to give others at least what they need to survive (since not doing this is often intolerably bad), then, after that point, people can weigh the relative benefits of provision for less urgent needs (cultural, economic, etc.).

An alternate, half-way view for water justice is egalitarian. Part of it is embedded in Risse’s argument for universal, pre-intuitional rights. The Earth’s water is a naturally occurring resource that, as individuals, everyone needs to use in roughly the same way and that amounts to meet everyone’s basic needs. With respect to at least this quantity of water, the bad, brute luck of being born into water poverty should not determine whether a person is entitled to basic water access. Moreover, the duty to do something about this falls collectively on people who are lucky enough to be born into water wealth because they deserve their excess share no more than the water-poor deserve their deficit. This view is attractive for explaining, in simple terms, both why people are entitled to at least basic access and who is responsible for doing something about it. It does not appeal essentially to rights but simply to the intuitive unfairness of bad, brute luck. Causal differences in the sources of luck might have something to do with the differences and similarities between rights violations in cases where exclusion results from the bad luck of being born into the wrong end of a deeply unfair economy as opposed to the unfairness of being born into a naturally arid geography.

There seems to me to be no question that the deepest strength of the human right to water lies in its rhetorical power as an idea. A merely aspirational account of the human right to water remains, for some, a useful one when it gives a voice to people who are so badly off that they cannot regularly secure one of the most basic needs for human survival.<sup>90</sup> The difficulties and alternatives discussed here do not collectively suggest dismissing the human right to water or the advocacy attached to it. However, they do suggest that, when the practical activity of policy-making and international development become involved, the right to water and its advocacy will need to quietly shift to other principles that can offer more robust support for the massive wealth and technical transfers, which are necessary simply to prevent millions of easily avoidable deaths every year.<sup>91</sup> Airy philosophical attempts to build a human right to water that is both normatively grounded and can precipitate into even basically workable policy guidelines seem out of reach.

---

89. Arneson, *supra* note 17, at 187–88.

90. Leila M. Harris, et al., *Revisiting the Human Right to Water from an Environmental Justice Lens*, 3 POL., GROUPS, AND IDENTITIES 660, 662 (2015).

91. Pedi Obani & Joyeeta Gupta, *Legal Pluralism in the Area of Human Rights: Water and Sanitation*, 11 CURRENT OPINION IN ENVTL. SUSTAINABILITY, 63, 64 (2014); Pedi Obani & Joyeeta Gupta, *The Human Right to Water and Sanitation: Reflections on Making the System Effective*, in THE GLOBAL WATER SYSTEM IN THE ANTHROPOCENE: CHALLENGES FOR SCIENCE AND GOVERNANCE 385, 394 (Anik Bhaduri, et al., eds., 2014).