How Should Human Rights be Conceived? *

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I.

Our current notion of human rights has evolved out of earlier notions of *natural law* and *natural rights*. We can begin to understand and analyze it by examining the continuities and discontinuities in this evolution. I will do this by focusing on the shifting constraints imposed, ideas suggested and possibilities opened and closed, by the three concepts rather than on the particular conceptions of them that have actually been worked out.[1]

All three concepts have in common that they were used to express a special class of *moral* concerns, namely ones that are among the most *weighty* of all as well as *unrestricted* and *broadly sharable*. These four common features of the three concepts constrain not the content of the select concerns, but their (potential) status and role. In regard to the first feature, it should be said that the natural-law and natural-rights idioms were also used to express the agent's liberty to pursue his own self-preservation and self-interest – as in *Hobbes*'s famous assertion that „every man has a Right to every thing; even to one anothers body."[2] Since the concept of human rights, which is at issue in this essay, has not been used in this vein, I will here leave such uses aside and focus on uses that present natural law, or the natural rights of others, as imposing moral constraints upon human conduct, practices and institutions.

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1 For more on the historical details, see esp. *Richard Tuck*: Natural Rights Theories, Cambridge, Cambridge University Press, 1979, and *Richard Tuck*: „The ‚Modern' Theory of Natural Law" in Anthony Pagden, ed.: The Languages of Political Theory in Early-Modern Europe, Cambridge, Cambridge University Press, 1987.

2 *Thomas Hobbes*: Leviathan, ed. C.B. Macpherson, Harmondsworth, Penguin, 1981 [1651]), p. 190. As Tuck stresses in his later piece, such uses were exceedingly common in the period from Grotius to Kant.

Conceiving of moral concerns as *weighty* means thinking of them as ones that ought to play an important role in our reflection and discourse about, and ought to be reflected and respected in, our social institutions and conduct.

In conceiving of moral concerns as *unrestricted*, we believe that whether persons ought to respect them does not depend on their particular epoch, culture, religion, moral tradition or philosophy.[3] Unrestricted moral concerns need not make demands on everyone. The moral imperative that rulers are to govern in the interest of the governed, for example, may be unrestricted even while it makes demands only on those in power. But, not being spatially or temporally confined, unrestricted moral concerns are still, at least potentially, relevant to persons of all times and places and therefore should be understood and appreciated by all.

This suggests the fourth feature. In conceiving of moral concerns as *broadly sharable*, one thinks of them as capable of being understood and appreciated by persons from different epochs and cultures as well as by adherents of a variety of different religions, moral traditions and philosophies. They need not be (and perhaps no moral concerns could be) accessible in this way to *all* human persons, irrespective of when and where they live(d) and irrespective of their particular culture, religion, moral tradition and philosophy (or lack thereof). But they would not be broadly sharable, if they were not detached, or at least detachable, from any particular epoch, culture, religion, moral tradition and philosophy.[4] The notions of

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[3] One might make this condition somewhat more demanding: A moral concern is unrestricted only if how wrong given violations of it are does not depend on the violators' particular epoch, culture, religion, moral tradition or philosophy. Equal violations of it are equally wrong, irrespective of whether the violators are well-educated citizens of a developed 20th century society, say, or members of a far more primitive 13th century society. One must then add that, though equally wrong, they are not equally blameworthy; the perpetration of a massacre by typical German soldiers under Nazi rule is surely more blameworthy, more clearly beyond excuse, than that of an otherwise similar massacre by typical Mongol soldiers. I will not discuss these matters further here.

[4] How expansively these five terms should be understood depends on the size and heterogeneity of the world we know. Today, a fairly expansive understanding is requisite: The time from the Renaissance to the French and American Revolutions can count as an epoch, but not the Thirty Years' War; Europe can count as a culture, but not Belgium; Christianity, and also atheism, can count as religions, but not Anglicanism; moral traditions might be utilitarianism, social contract theory, perfectionism and deontological ethics, but not the particular moral conceptions of Kant or Sidgwick; philosophies, finally, might include rationalism, empiricism, idealism, moral realism, intuitionism, but not particular variants of them. Without such an expansive understanding, sharability would not amount to very much in the present world: A moral concern could count as sharable in all five dimensions without being really broadly accessible.

That moral concerns are broadly sharable also means that understanding and appreciating them does not require mental faculties that a significant proportion of humankind does not have and cannot develop. Since sharability is a matter of degree, we can expect disagreement not only about whether particular moral concerns are accessible to particular persons (e.g. about whether human rights are accessible to the peoples of black Africa), but also about whether some given extent of accessibility is sufficient to render a particular moral concern *broadly* sharable.

being unrestricted and being broadly sharable are related in that we tend to feel more confident about conceiving of a moral concern as unrestricted when this concern is not parochial to some particular epoch, culture, religion, moral tradition or philosophy.

So much for the continuities. To learn more about how the concept of human rights constrains content, about what moral concerns lend themselves to being expressed in terms of human rights, let us now look at the discontinuities in the historical evolution. Expressing moral constraints in the natural-rights rather than the natural-law idiom involves a significant narrowing of content possibilities by bringing in the idea that the relevant moral constraints are based on moral concern for certain subjects: rightholders. By violating a natural right, one wrongs the subject whose right it is. These subjects of natural rights are viewed as sources of moral claims and thereby recognized as having a certain moral standing and value. The natural-law idiom contains no such idea: It need not involve constraints on one's conduct toward other subjects at all and, even if it does, need not involve the idea that by violating such constraints one has wronged these subjects – one may rather have wronged God, for example, or have disturbed the harmonious order of the cosmos. In ruling out these (formerly prominent) alternative ideas, the shift from natural-law to natural-rights language constitutes a secularization which facilitates the presentation of a select set of moral concerns as broadly sharable in a world that has become much larger and more heterogeneous. This secularization centers around a specific view about the *point* of the moral constraints (duties, obligations) singled out as natural: The point of respecting them is the protection of others; one's concern to honor one's moral obligations is motivated by a deeper and prior moral concern for (the interests of) others.[5]

This specification of the point of moral constraints entails a narrowing of content possibilities. The natural-law idiom lends itself to expressing any moral concerns that might apply to human persons; but not all of these concerns can be expressed equally well in the language of natural rights. Three historically prominent categories of moral concerns that are endangered by the shift in terminology are religious duties, duties toward oneself and moral constraints upon our conduct toward animals. Ascribing rights to God seems awkward, because we do not think of Him as having vital interests that are vulnerable to human encroachment. Speaking of rights against oneself or of animal rights is problematic because of the con-

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[5] *J.L. Mackie* uses the phrase „what gives point to" to single out this most important sense of priority. See his „Can There Be a Right-Based Moral Theory" in Midwest Studies in Philosophy 3, 1978, Postscript. This moral or foundational priority must be distinguished from conceptual or definitional priority, which may run the other way. As Mackie suggests, the concept of a duty may well be clearer than that of a right and it may then make sense to define rights in terms of duties. Raz proposes a useful such definition: „'x has a right' if and only if x can have rights, and other things being equal, an aspect of x's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty." See *Joseph Raz*: „On the Nature of Rights" in Mind 93, 1984, pp. 194 - 214 at 194.

nection between having rights and being entitled to claim (and to defend) one's rights as well as to protest (and sometimes to punish) the infringement of these rights.[6] We do not engage in such claiming, defending, protesting and punishing activities against ourselves; and animals seem unable to engage in them at all. In accepting this connection one need not endorse the stronger position, taken by *Hart*, that having a right presupposes the *simultaneous* ability to claim it.[7] One may instead, following *Gewirth*, find nothing odd in saying that a man who is now dead or in an irreversible coma has his rights violated when his will is overturned or when his body is kept alive against his express prior instructions. Here we can remember the man making claims before, and can imagine how he would have protested had he known about what is being done now. Similarly, one can say that maiming or killing an infant constitutes a violation of her rights, because we can once again imagine how she will protest the harms done to her, or would have done so in the future had she survived.[8] This contrasts with the case of non-human animals, which have no past or potential future ability to make claims: Here the language of rights can seem out of place.[9]

II.

The language of human rights partakes in the specification that we have found to be involved in the shift from natural law to natural rights. Beyond that, it would seem to have a fourfold significance. First, it manifestly detaches the idea of moral rights from its historical antecedents in the medieval Christian tradition, thereby underscoring the secularization implicit in the first shift from the language of laws (commandments, duties) to that of rights. This serves the continued maintenance of broad sharability and makes fully explicit the connection between a special class of moral concerns and the status of certain beings, rightholders, as subjects of moral value.

In the same vein, the shift also indicates a reorientation of the sort for which *Rawls* has recently coined the phrase „political not metaphysical."[10] The adjective „human" – unlike „natural" – does not suggest an ontological status independent

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6 This connection is explicated and defended in *Joel Feinberg*: „The Nature and Value of Rights" in The Journal of Value Inquiry 4, 1970, pp. 243-251.

7 For this position, together with its corollary that babies have no rights, see *H.L.A. Hart*: „Are There Any Natural Rights?" in The Philosophical Review 64, 1955, pp. 175-191.

8 These and related points are made and defended more elaborately in *Alan Gewirth*: „The Basis and Content of Human Rights" in J. Roland Pennock and John W. Chapman, eds.: Nomos XXIII: Human Rights, New York, New York University Press, 1981, pp. 119-147.

9 For a more extensive discussion of the limitations of the rights idiom, see my „O'Neill on Rights and Duties" in Grazer Philosophische Studien 43, 1992, pp. 233-247.

10 *John Rawls*: „Justice as Fairness: Political not Metaphysical" in Philosophy and Public Affairs 14, 1985, pp. 223-252.

of any and all human efforts, decisions, (re)cognition. It does not rule out such a status either. Rather, it avoids these metaphysical and metaethical issues by implying nothing about them one way or the other. The potential appeal of the select moral concerns is thereby further broadened in that these concerns are made accessible also to those who reject all variants of moral realism – who believe, for instance, that the special moral status of all human beings rests on nothing more than our own profound moral commitment and determination that human beings ought to have this status.

Third, and most obvious, the shift strongly confirms that it is all and only *human beings* who give rise to the relevant moral concerns: All and only human persons have human rights and the special moral status associated therewith. The expression also suggests that human beings are equal in this regard. This view can be analyzed into two components. First: All human beings have exactly the same human rights. And second: The moral significance of human rights and human-rights violations does not vary with whose human rights are at stake; as far as human rights are concerned, all human beings matter equally.[11] Though the second component is only weakly suggested by the expression, it is, I believe, a fixed part of our current concept of human rights.

The fourth way in which the shift from natural to human rights has been significant is not suggested by the change in terminology, but seems to have contingently accompanied this change. One can approach the point through Article 17.2 of the *Universal Declaration of Human Rights*: „No one shall be arbitrarily deprived of his property." If a car is stolen, its owner has certainly been deprived of her property, and arbitrarily so. Still, we are unlikely to call this a violation of Article 17.2 or a human-rights violation. Why? Because it is *only* a car? I do not think so: The car may be its owner's most important asset; and the theft of food would not be considered a human-rights violation either, even if it were her entire reserve for the winter. An arbitrary confiscation of her car by the government, on the other hand, does strike us as a human-rights violation, even if she has several other cars left. This suggests that human-rights violations, to count as such, must be in some sense official, and that human rights thus protect persons only against violations from certain sources. Human rights can be violated by governments, certainly, and by government agencies and officials, by the general staff of an army at war and probably also by the leaders of a guerrilla movement or of a large corporation – but not by a petty criminal or by a violent husband. We can capture this idea by conceiving it to be implicit in the concept of human rights that human-rights postulates are

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[11] This second component is compatible with the view that the weight agents ought to give to the human rights of others varies with their relation to them – that agents have stronger moral reasons to secure human rights in their own country, for example, than abroad – so long as this is not seen as being due to a difference in the moral significance of these rights, impersonally considered. (I can believe that the flourishing of all children is equally important and also that I should show greater concern for the flourishing of my own children than for that of other children.)

addressed, in the first instance at least, to those who occupy positions of authority within a society (or other comparable social system).

We see here that the language of human rights involves a further narrowing of content possibilities – not on the side of the agent this time, but on the side of the recipient. Through the language of natural rights, one can demand (humanly possible) protection of persons against *any* threats to their well-being and agency; through the language of human rights, one demands protection only against certain („official") threats. This narrowing is not, however, as severe as it may seem at first: As we shall see, the language of human rights involves a demand for protection not only against official violations but, more broadly, against official disrespect, and it addresses this demand not only to officials (those whose violations of a relevant right would count as human-rights violations), but also (at least) to those whose officials they are.

Before discussing these matters further in the next section, let me sum up my explication of the concept of human rights thus far. A commitment to human rights involves one in recognizing that human persons with a past or potential future ability to engage in moral conversation and practice have certain basic needs and that these needs give rise to weighty moral concerns.[12] The object of each of these basic human needs is the object of a human right.[13] Recognizing these basic needs as giving rise to human rights involves a commitment to oppose *official disrespect* for these needs on the part of one's own society (and other comparable social systems in which one is a participant).[14]

I will now try to clarify further the modern concept of human rights by explicating the notion of official disrespect embedded in it. This explication is normative to some extent. Those who use the concept are generally not entirely clear about what they mean by it. I want to be clearer here. And my account should then be tested not so much against what people actually say about human rights as against what they would or should affirm or deny upon reflection. Though my account is normative to this extent, its objective is still to reconstruct the meaning of a widely used expression. I am asking what we mean, or ought to mean, when we speak of a human right to X. I am not here asking the more significantly normative question which candidate human rights, if any, we ought to recognize. My examples from

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[12] The switch in idiom from „interests" to „needs" is meant merely to flag the idea that only the most important interests of human beings should be seen as giving rise to human rights. The switch is not supposed to prejudge any substantive questions about how human rights should be specified: Basic needs, just like interests, could still be conceived in a person-relative way (so that what a person's basic needs are depends in part on some of her personal characteristics such as gender or handicaps) or even in subjective terms (so that what a person's basic needs are depends in part on some of her goals, desires or preferences).

[13] I intend the word „object" here in a broad sense so as not to prejudge any substantive issues. The object of a right is whatever the right is a right to. Such objects might be freedoms-from, freedoms-to, as well as physical security or an adequate food supply.

[14] I shall drop the bracketed addition from now on; but see note 20 below.

the *Universal Declaration* should be taken in this spirit. I am not presupposing that the human rights I discuss exist or ought to be recognized. I am merely asking what the assertion of a particular human right should reasonably be taken to *mean*.

III.

The central instances of official disrespect are human-rights violations, and, in our world, the central instances of official agents are governments. Official disrespect for human rights is then paradigmatically exemplified by a government violating rights that are on the list of human rights. Governments may do so by creating or maintaining (unjust) laws that permit or require human-rights violations or they may do so „under the color of law," i.e. by perversely construing existing legislation as licensing human-rights-violating policies. Both these cases are amply illustrated by the Nazi period.

These paradigm cases of official disrespect bring out most clearly why, as is widely felt, there is something especially hideous, outrageous and intolerable about official disrespect, why official moral wrongs are worse than otherwise similar „private" moral wrongs, quite apart from the fact that they often harm more persons, or harm them more severely, than private wrongs. This feeling can be accounted for as follows: Official moral wrongs masquerade under the name of law and justice and they are generally committed quite openly for all to see: laid down in statutes and regulations, called for by orders and verdicts, and adorned with official seals, stamps and signatures. Such wrongs do not merely deprive their victims of the objects of their rights but attack those very rights themselves; they do not merely subvert what is right, but the very idea of right and justice. This conjecture explains, I think, why so many people feel more personally affronted by human-rights violations than by equivalent ordinary crimes, and also feel personally responsible in regard to them – why they see human rights as everyone's concern and feel implicated in, and experience shame on account of, what their government and its officials do in their name.

With these thoughts in mind, let us look at cases in the vicinity of the central ones. One obvious way of expanding beyond the paradigm is by broadening the definition of „government" so as to include not merely the highest officials in the three branches, but also the lower echelons of authority, including all the various functional and regional subunits of the three branches down to the smallest and lowest agencies and officials. Here it emerges that moral wrongs committed by an official fit the better under the label of „human-rights violation" the more closely they are related to his job and the more tolerated or encouraged they are throughout officialdom. A murder committed by a mailman, even if on duty, would hardly count as a human-rights violation, but torture administered by a policeman to a suspect would count, unless it is a truly isolated incident of conduct that is strongly discouraged within the police force and severely punished when discovered.

More interesting cases are the following: A government may, for the time being, refrain from ordering or authorizing human-rights violations, and effectively prevent violations on the part of its various agencies and officials, but reserve for itself the legal power to order or authorize such violations at any time at its sole discretion. Conversely, a government may legally bind itself never to violate human rights and yet do nothing or very little to ensure that its various agencies and officers abide by this official prohibition. The government may also – while legally committing itself not to violate human rights and effectively enforcing this commitment against its own agencies and officials – fail to make such violations illegal for some or all of the persons and associations under its jurisdiction. Or it may pass or maintain the appropriate legislation but then do nothing or very little to enforce it. In view of this plurality of cases, how shall we explicate the idea of official disrespect for human rights?

To make these issues more concrete, let us focus on Article 19 of the *Universal Declaration*: „Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." We may suppose that we know precisely what the right here postulated is a right to: what sorts of conduct it protects in what particular contexts and circumstances. Let us also suppose that we know precisely what does and does not constitute interference with such protected conduct and hence a violation of the postulated right on the part of individual and collective agents. How do we get from this knowledge to a measure for official disrespect: to a way of assessing a society's human-rights record in regard to Article 19? The answer to this question, as we have seen, cannot be that we must simply count violations (weighted for severity, perhaps), as this would gloss over the important issue of the more or less official character of these violations.

Making the law alone the decisive yardstick for a society's human-rights record is implausible: Societies may be officially committed to Article 19, may even incorporate an appropriate right to freedom of expression into their constitutions, and their government officials may nevertheless violate this legal right frequently and with impunity – a possibility sadly illustrated by all too many showcase constitutions around the world. We can hardly celebrate such societies for their respect for human rights.

A more plausible proposal would have us focus on the extent to which the government, including its various agencies and officials, is actually interfering with protected conduct. We can infer that this idea has had some currency and appeal, I believe, from the upsurge in organized „private" violence we have seen in the 1980's: the proliferation of death squads in numerous authoritarian societies of Latin America and of „outraged citizens" in various Communist societies, for example. But currency is not plausibility; and we should certainly not settle for an understanding of „official disrespect for human rights" that provides an incentive

to governments to have their peaceful opponents killed by private government supporters rather than by the police. To make the proposal plausible, we must then go beyond the idea of „the government actually interfering." If protected conduct is interfered with with impunity by persons organized or encouraged by the government, then these interferences must be imputed to the government, must count as indicative of official disrespect.

This modification may not go far enough. Death squads and „outraged citizens" may engage in their bloody activities even without open or tacit government encouragement. Rich landowners may organize bands of thugs, for example, who prevent – through disruption, intimidation and violence – the expression of any political views that champion the interests of poor, landless peasants and migrant farm workers. Veterans of the revolution may organize in similar ways to suppress anti-communist propaganda. The government need not organize or encourage such activities – it merely stands idly by: fails to enact laws that proscribe such conduct or, if such laws are on the books, fails to enforce them effectively. (In such a scenario, government officials may even regret the activities and feel embarrassed by them. They nevertheless do not act because they fear that any measures to protect the rights of an unpopular group would diminish their own popularity. The parallel to foreigners' rights to physical security in Germany comes to mind.) We should consider such cases, as well, to exemplify official disrespect: Some persons are deprived of their freedom of expression and there is no official response, or at most a token response, to the deprivations.

Even this account is still not quite broad enough. An (almost) complete absence of interferences with protected conduct in some society may be due to the fact that people know only too well what sorts of opinions cannot be publicly expressed without serious risk of violent interference or punitive measures against oneself or one's family. They know what would happen to them if they spoke up, and they also know that their „protected" conduct would not be effectively protected in fact. Formerly defiant, they are now intimidated and demoralized. This change goes along with a dramatic decline in the frequency of actual interferences – yet surely we cannot say that the society's human-rights record has dramatically improved. This scenario, too, exemplifies official disrespect of the human right, even if this right is (in the unrealistic limiting case) never violated. It thereby presents in a most clearcut way the need to detach the notion of official disrespect from that of violations. What is relevant to a society's record in regard to, or to its degree of official disrespect for, a given human right is then (a) a proper subset of the occurring violations of this right (namely the „official" or „human-rights" violations) and (b) various facts about the government's and also the people's attitude (commitment and disposition) toward the right and *all* its occurring violations. Unofficial violations of a right that is on the list of human rights do not constitute human-rights violations; but official indifference toward such private violations does constitute official disrespect.

If official disrespect of this last kind is to be avoided, a society must ensure that persons are, and feel, secure in regard to the objects of their human rights. In considering what this entails, we will tend to look, once again, to the government first and foremost: to how the concern for these objects is incorporated into the law and constitution[15] and to the extent to which the government is disposed to suppress and punish (official and private) violations and makes this disposition known through word and deed.

But it makes sense to think more broadly here. What is needed to make the object of a right truly secure is a vigilant citizenry that is deeply committed to this right and disposed to fight for its political realization. (This does not mean that every last citizen must have this commitment and disposition – a minority may suffice, so long as it is clearly preponderant among those citizens who are actively engaged in the political life of their society.) A commitment by the citizenry is more reliable than one by the government, which, after all, may undergo a radical change in personnel from one day to the next. It tends to foster this commitment by the government – especially in democratic societies, which tend to produce the strongest incentives for government officials to be responsive to the people. And it also tends to preclude cases where impotence, not indifference, makes a government stand idly by when organized groups of its citizens violate the rights of others. Such cases, too, exemplify official disrespect when the people, who bear the ultimate responsibility for what happens on their society's territory, do not care enough about the objects of human rights to enable, encourage and (if need be) replace or reorganize their government so as to safeguard secure access to these objects for all.

While the government may then be the primary guardian of human rights and the prime measure of official disrespect, the people are their ultimate guardian on which their fulfillment crucially depends. It is said that peoples have the governments they deserve. This is true at least in one direction: It is rare for a people to have a much better government than it deserves for very long. And the sustained flourishing of respect for human rights depends then only in the first instance on a society's government: on its laws, constitution and political system as well as the attitudes of its politicians, judges and police. More deeply, it depends on the character of its people and thus also on its culture, education system and income distribution.

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[15] In the case of most human rights, (re)organizing a society so that all have secure access to its object will require that there be a legal right identical in content: It is hard to imagine a society under modern conditions whose members are secure in their property or have secure access to freedom of expression even while no legal right thereto exists. In a few cases, a legal right may not be necessary. We can envision, for example, a society in which all have secure access to minimally adequate nutrition even without a legal right thereto. While a corresponding legal right may be necessary in some cases and unnecessary in others, such a legal right will in all cases be insufficient for maintaining secure access to the object of the human right to which it corresponds: A legal right may always be ineffective. (I assume that there is no human right whose sole object is that there be some legal right on the books.)

Let me reinforce these points in another context involving Article 5 of the *Universal Declaration*: „No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." In a good many countries, domestic servants, some indentured or virtual slaves, do not enjoy the object of this human right. In some of these societies, inhuman or degrading treatment of domestic servants by their employers is perfectly legal. In others, certain legal prohibitions are in place but ineffective: Most of the servants, often illiterate, are ignorant of their legal rights, convictions for mistreatment are extremely difficult if not impossible to obtain, punishments are negligible. Moreover, servants are also often forced to endure illegal conduct on account of economic necessity: They do not dare file complaints against their employers for fear of being fired. This fear is both justified and substantial, because they have only minimal financial reserves, there is a general oversupply of servants and/or they have reason to believe that their present employer would refuse to issue them the positive reference requisite to find new employment.

In this case, as well, the conditions described would seem to constitute a flaw in the societies' human-rights record. This flaw may be corrected through actively enforced legislation, but it may also be attacked, probably more effectively, through other measures, such as a literacy campaign, efforts to educate citizens about existing legislation and to create a culture of equal citizenship, the introduction or improvement of unemployment benefits, economic policies designed to expand educational and employment opportunities for the poor and so forth.

This conclusion may provoke the accusation that I have taken some of the „good" (civil) rights of the *Universal Declaration* and, by perverse reasoning, twisted them into their opposite: social and economic pseudo-rights. Yet another social democrat dressed in liberal's clothing. This accusation is not, I admit, far off the mark – though it must be shown, of course, where and how my argument goes wrong. I shall not worry about this accusation further, and proceed instead to a more straightforward explication of my understanding of the concept of human rights.

IV.

On the face of it, the concept of rights – and hence more specifically the notion of human rights – suggests an interactional understanding, according to which each such right entails certain directly corresponding duties.[16] This picture leads

[16] I have in mind here the general picture presented in *W.N. Hohfeld*: Fundamental Legal Conceptions, New Haven, Yale University Press, 1919. We find this picture used to explicate the notion of human rights in *Carl Wellman*: „A New Conception of Human Rights" in E. Kamenka and A.S. Tay (eds.): Human Rights, New York, St. Martin's Press, 1968. See also *Carl Wellman*: A Theory of Rights: Persons Under Laws, Institutions, and Morals, Totowa, Rowman and Allanheld, 1985.

into a familiar dispute about the character of these duties. On a minimalist account they must be purely negative (to refrain from violating the right in question); and some purported human rights – such as those postulated in Articles 22 - 29 of the *Universal Declaration* (rights to social security, work, rest and leisure, an adequate standard of living, education, culture, etc.) – must then be rejected as of the wrong form. On a maximalist account each human right entails both negative duties (to avoid) and positive duties (to protect and to help); and there is then nothing wrong with social, economic and cultural rights. According to the minimalist, human rights require only self-restraint; for the maximalist, by contrast, they require efforts to fulfill everyone's human rights anywhere on earth.[17]

I have been trying to transcend the terms of this debate in favor of an institutional understanding of human rights: By postulating a person P's right to X as a *human* right we are asserting that P's society ought to be (re)organized in such a way that P has secure access to X and, in particular, so that P is secure against being denied X or deprived of X officially: by the government or its agents or officials.[18] Avoidable insecurity of access (beyond certain reasonably attainable thresholds) constitutes official disrespect and tarnishes the society's human-rights record – significantly more so if it is due to official denial or deprivation, i.e. to human-rights violations.[19] Human rights are then moral claims upon the organiza-

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[17] "A human right, then, will be a right whose beneficiaries are all humans and whose obligors are all humans in a position to effect the right" – *David Luban*: „Just War and Human Rights" in Charles Beitz et al., eds.: International Ethics, Princeton, Princeton University Press, 1985, p. 209. A comprehensive maximalist account is developed in *Henry Shue*: Basic Rights, Princeton, Princeton University Press, 1980).

[18] By counting official denials and deprivations more heavily than otherwise equivalent private ones, I am abandoning a position I have defended in the past, the position namely that social institutions should be assessed from a broadly consequentialist prospective-participant perspective (such as Rawls's original position, for example). Prospective participants do not care whether the objects of their human rights are at risk on account of the government or on account of private agents. Hence they would, other things equal, allow the two kinds of risk an equal impact upon the moral assessment of social institutions. I now hold that the injustice of a society is significantly greater if, other things equal, insecure access to the objects of human rights is due to the risk of human-rights violations, i.e. the risk of being denied X or deprived of X officially. Even though a significant risk of being executed for my expressed political beliefs is no worse for me than an otherwise equal risk of being killed by an assassin for the same reason, the former signifies a greater injustice in the relevant social order, a worse human-rights record on the part of the society in question. A fuller recantation of my earlier hypothetical-contract thinking will appear in „Three Problems with Contractarian-Consequentialist Ways of Assessing Social Institutions" in Social Philosophy and Policy 12/2, 1995. Cp. also *supra*: the second paragraph of Section III.

[19] Insisting on the relevance of insecure access is not new. The *Universal Declaration* itself proclaims (§ 28) that „everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized." The Inter-American Court of Human Rights held Honduras responsible for crimes of „disappearing" persons (e.g. in *Velasquez*; July 29, 1988; series C, number 4), even without finding that government officials were involved in these crimes, which were nevertheless imputed to the government

tion of one's society. However, since citizens are collectively responsible for their society's organization and its resulting human-rights record, human rights ultimately make demands upon (especially the more privileged) citizens. Persons are responsible for official disrespect for human rights within any social system in which they are significant participants.

In proposing this institutional understanding, I reject its interactional alternatives: I deny, for instance, that postulating that P has a human right to X is tantamount to the assertion that some or all individual and collective human agents have a moral duty – in addition to any legal duties they may have in their society – not to deny X to P or deprive her of X. In rejecting this alternative account, I am not denying that the postulate of a human right to X suggests or even implies this assertion. It is hard to see how one can, on the one hand, be committed to the claim that societies, for the sake of the persons living in them, ought to be organized so that these persons need not endure inhuman or degrading treatment and yet, on the other hand, not consider it morally wrong for persons to treat others in inhuman or degrading ways. A commitment to human rights will go along with interactional moral commitments; but this is no reason to identify the former with the latter.

On my understanding, too, human rights (conceptually) entail moral duties – but these are not corresponding duties in any simple way: The human right not to be subjected to cruel or degrading treatment gives me a duty to help ensure that those living in my society need not endure such treatment. Depending on context, this duty may, as we have seen, generate obligations to advocate and support programs to improve literacy and unemployment benefits when such programs are necessary to secure the object of this human right for a class of my compatriots (domestic servants).

Through reconceiving human rights in this way, the familiar dispute is transformed. For one thing, the institutional understanding makes available a plausible intermediate position between two interactional extremes: Responsibility for a person's human rights falls on all and only those who participate with this person in the same social system. It is their responsibility, collectively, to structure this system so that all its participants have secure access to the objects of their human rights. In our world, national societies are the paradigmatic example of relevant social systems, and the responsibility for the fulfillment of your human rights falls

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on the ground that it had failed to exercise due diligence to prevent and to respond to the crimes.

What is new about my understanding is that it links rights fulfillment with insecurity *rather than* violation: Even while P never ceases fully to enjoy X, her access to X may be insecure – as when persons relevantly like her (vocal government opponents, Jews) are beaten or threatened. On my understanding, P's human right to X is *not* fulfilled in this case (though it would be fulfilled in the converse case, where she does not enjoy X temporarily due to a crime, say, in a society that is very effective in preventing crimes of the relevant type). The other novelty is that I understand human rights as making claims not merely on the government but on the structure of the society and ultimately on all its members.

then upon your government and your fellow citizens.[20] The institutional understanding thus occupies an appealing middle ground: It goes beyond (minimalist interactional) libertarianism, which disconnects us from any deprivations that we do not directly bring about without falling into a (maximalist interactional) utilitarianism of rights à la Shue, which holds each of us responsible for all deprivations whatever, regardless of the nature of our causal relation to them.[21]

But this is not all. The most remarkable feature of this institutional understanding is that it goes beyond minimalist libertarianism without denying its central tenet: that human rights entail only negative duties. The normative force of another's human right for you is that you must not participate in, and thereby help to uphold and to impose upon her, social institutions under which she does not have secure access to the object of her human right. You would be violating this duty, if you lived in a society in which such access is not secure (in which blacks are enslaved, women disenfranchised or servants mistreated, for example) and just went about your own business. Even if you owned no slaves and employed no servants yourself, you would still share responsibility: by contributing your labor to the society's economy, your taxes to its governments and so forth. You might honor your negative duty, perhaps, through becoming a hermit or an emigrant, but you could honor it more plausibly by working with others toward establishing secure access through institutional reform, if this is possible.[22]

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20 Still, the institutional understanding leaves room for the possibility that, even in peacetime, we share responsibility for human-rights fulfillment abroad. (Such responsibility is a given for the interactional maximalist and impossible for the interactional minimalist.) We have such responsibility if we are (privileged) participants in a transnational scheme of social institutions – including perhaps the territorial state with eminent domain over land and resources, the network of international law and diplomacy, international commodity markets, etc. – under which some persons are regularly, predictably and avoidably denied secure access to the objects of their human rights. I have myself tried to show that this empirical condition is satisfied in Realizing Rawls, Ithaca, Cornell University Press, 1989, Chapter 6; „Cosmopolitanism and Sovereignty" in Ethics 103/1, 1992, pp. 48 - 75; and „An Egalitarian Law of Peoples" in Philosophy and Public Affairs 23/3, 1994, pp. 195 - 224.

21 The expression „utilitarianism of rights" is from *Robert Nozick*: Anarchy, State, and Utopia, New York, Basic Books, 1974, p. 28. It fits rights-based consequentialist views that apply directly to agents – be they of the ideal or real, of the act, rule or motive variety. There are also other variants of consequentialism such as Bentham's utilitarianism, which applies to social institutions, and so there could be a utilitarianism of rights of the institutional sort. One way in which such a position would differ from what I advocate here is clarified by note 18.

22 If we are, as I believe (see note 20), privileged participants in an international institutional order, then we may have a human-rights-based duty to work for its reform: toward a different global structure that would reduce or eliminate the incidence of wars and of severe poverty, both of which tend to produce human-rights violations and insecure access on a massive scale.

V.

If the libertarian constraint (rights entail only negative duties) is incorporated in this way, then it does not have the usual strong implications for what human rights there can be and also does not favor one side in the long-running dispute about whether the full list of human rights should contain only civil and political rights or should include social, economic and cultural rights as well.[23] Once we accept an institutional understanding of human rights, we can no longer reject social, economic and cultural rights on the ground that, insofar as they have any concrete moral significance at all, they impose limitless positive duties: require every person to become a soldier in the global struggle to secure the objects of these rights for human beings everywhere, irrespective of any and all relations between recruits and beneficiaries.[24] On my institutional understanding, human rights generate (only negative) moral duties through the following two claims:

1. A social order under which some or all participants avoidably lack secure access to the objects of some human rights – especially through official denial or deprivation – is to that extent unjust.
2. Persons share a collective responsibility for the justice of any social order in which they participate; they must not simply cooperate in imposing an unjust social order without attempting to reform it toward greater justice.[25]

A human right to the necessities of subsistence (as laid down, for example, in Article 25 of the *Universal Declaration*) becomes rather more plausible when construed along these lines. On the institutional (unlike the maximalist interactional) account, it involves no duty on everyone to help supply such necessities to those who would otherwise be without them. It rather involves a duty on citizens to ensure that the social order they collectively and coercively impose upon each of themselves is one under which each has secure access to these necessities, insofar as this is feasible. In its essentials, this moral position is one that, surprisingly per-

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23 This debate has occupied the United Nations since its founding, pitting the developed Western states first against the socialist states of the Soviet block and later against the newly independent states of the Third World.

24 In any case, the institutional understanding greatly reduces the practical importance of this dispute about what human rights there can be: As I have shown in the context of Article 5, establishing secure access to the objects of narrowly conceived civil rights may well involve us in creating and upholding social institutions that – through unemployment benefits and/or by fostering literacy, legal education and a culture of equal citizenship – would preclude extreme social and economic deprivation and dependency. Thus, even a narrow list of (exclusively civil and political) human rights might have many of the same practical implications as a broader one would have.

25 The degree of a person's responsibility for injustice must plausibly depend on the means at her disposal and perhaps also on how advantaged she is within the social order in question. The degree of a person's blameworthiness will depend on further factors as well, such as her education, experience and circumstances.

haps, *Charles Darwin* has expressed rather well more than a century ago: „If the misery of our poor be caused not by laws of nature, but by our own institutions, great is our sin."[26]

Can we reject social, economic and cultural rights on the ground that, unlike the favored civil and political rights, they are in many actual social contexts fated to be mere manifesto rights? There is no clear canonical explication of the polemical expression „manifesto right," but perhaps we can clarify its meaning as follows: A postulated (legal or moral) right is a manifesto right if and only if

1) it is not now the case that all supposed rightholders have secure access to the object of the right; *and*

2) (a) it is left unspecified who is supposed to do what in order to bring it about that all supposed rightholders have secure access to the object of the right *or*

   (b) the agents upon whom specific demands are made cannot reasonably meet these demands to the extent necessary to bring it about that all supposed rightholders have secure access to the object of the right.[27]

Since (1) is satisfied in the relevant cases, rebutting the manifesto charge requires that I deny both (2a) and (2b).

Let us begin with (2b). A society cannot reasonably guarantee to all of its members a happy love life or a trip to the moon. Rights to such benefits would therefore be mere manifesto rights. This defect can be avoided by relativizing the objects of the relevant rights to a society's possibilities: A society *can* work on removing restrictions and overcoming taboos and prejudices that make it harder for some of its members to enjoy a happy love life. The – now relativized – right not to be hampered in one's quest for a happy love life by nonessential restrictions or by avoidable taboos and prejudices is then not a manifesto right (which does not mean, of course, that it deserves inclusion on the list of human rights).

It can be demanded even from a very poor society that it make everyone's access to the necessities of subsistence as secure as possible. By understanding Article 25 as requiring this and nothing more – as *not* requiring that all must have enough to eat when enough food can simply not be produced – we rescue it from the charge that it, by virtue of satisfying (2b), postulates a mere manifesto right. And this understanding accords with common usage: A society's human-rights re-

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26 Quoted by *Stephen Jay Gould* in „The Moral State of Tahiti – and of Darwin" in Natural History 10/91, 12 - 19, p. 19.

27 Compare, for example, *Onora O'Neill*: Faces of Hunger, London, Allen and Unwin, 1986, p. 101. It makes no sense, I think, to broaden this definition to include rights that cannot now be fulfilled because of the obduracy of the powers that be. Doing so would make all rights into manifesto rights in just those cases where it is most urgent to assert them. We don't want to say, I trust, that the rights of Jews violated by the Nazis in 1938 - 42 were mere manifesto rights.

cord is not blemished merely because it is, under prevailing conditions, unable to secure minimally adequate nutrition for all. The human right does not then entitle one to food that would have to be withheld from others who also need it to survive. Some may starve to death without any official disrespect of Article 25.

An analogous point holds true of civil rights: A poor society may not have the resources effectively to protect the physical security of all of its citizens. This does not show that Article 3 postulates a manifesto right. The human right there postulated does not entitle one to protection that would have to be withheld from others who need it just as much. So rights of both kinds are here on a par.

It may seem at first that the two kinds of rights fare quite differently with regard to (2a): The right postulated in Article 5 makes a very clear and specific demand on governments not to subject persons to cruel, inhuman or degrading treatment or punishment, while the right postulated in Article 25 seems merely to assert that it would be a good thing if (any society were so organized that) all had enough to eat. But this contrast is deceptive if it is true that even the most clearly civil of the human rights in the *Universal Declaration* – such as those postulated in the Articles 5, 17.2 and 19 we have looked at – require that interference with protected conduct, no matter by whom, must be effectively discouraged and suppressed. These civil rights require certain commitments and dispositions on the part of the citizenry, or so I have argued. Understanding them in this way does not turn them into manifesto rights: Each member of society, according to his or her means, is to help bring about and sustain a social and political order under which all have secure access to the objects of their civil rights. This demand, so abstractly put, is unspecific but, within any particular social context, will be quite specific: In a society in which domestic servants must often suffer inhuman and degrading treatment from their employers, citizens have a human-rights-based obligation to help institute appropriate legal protections as well as perhaps a literacy program and/or unemployment benefits. My understanding of the economic rights of Article 25 is closely parallel: Each member of society, according to his or her means, is to help bring about and sustain a social and economic order within which all have secure access to the necessities of subsistence. This unspecific demand may have quite specific implications in a given social context, e.g. in a society whose poorest members lack secure access to minimally adequate nutrition. Rights of both kinds are then on a par in this respect. And if *situational* specificity is what matters, then rights of both kinds escape clause (2a) and therefore cannot be assigned manifesto status.

I conclude that the institutional understanding of human rights makes sense. According to it, postulating a human right to X is tantamount to (a) recognizing that human beings have a basic need for X and (b) recognizing as a weighty moral reason the imperative that in one's society all should enjoy secure access to X, esp. vis-à-vis threats of official violations.

Zusammenfassung

Die Rede von Menschenrechten – ebenso wie die von (objektivem) Naturrecht und von (subjektiven) natürlichen Rechten – bezieht sich auf eine besondere Klasse von moralischen Anliegen, die (1) zu den gewichtigsten gehören, (2) uneingeschränkt gelten und (3) allgemein akzeptierbar sein sollen. Dabei ist die Rede von Menschenrechten spezifischer als die Rede von Naturrecht und die von natürlichen Rechten, indem sie sich einerseits auf die moralischen Ansprüche von Menschen – *aller* Menschen – konzentriert und andererseits nur Bedrohungen ausschließt, die einen offiziellen Charakter haben. Das letztere Merkmal läßt sich wie folgt interpretieren: Wer ein Recht auf X als ein Menschenrecht behauptet, fordert, daß jede Gesellschaft (und jedes vergleichbare Sozialsystem) so organisiert sein sollte, daß alle Mitglieder sicheren Zugang zu X haben (wobei der Grad der geforderten Sicherheit von den Mitteln und Umständen der betreffenden Gesellschaft abhängt). Wenn eine Gesellschaft sich nicht so organisiert, ist das eine *offizielle Mißachtung* der betreffenden Menschenrechte. Dies wiegt besonders schwer, wenn der Zugang zu X aufgrund offizieller Rechtsverletzungen unsicher ist, also von politischen Autoritäten verweigert wird. Mitglieder einer Gesellschaft, die in einer solchen Situation nicht nach Kräften auf die erforderlichen institutionellen Veränderungen hinarbeiten, verletzen eine *negative* Rechtspflicht: die Pflicht nämlich, nicht an der Durchsetzung ungerechter Institutionen mitzuwirken.

Dieses Verständnis von Menschenrechten erleichtert die Begründung von sozialen, ökonomischen und kulturellen Menschenrechten. Auch diese Rechte können nämlich so verstanden werden, daß sie nur eine negative Pflicht implizieren, die Pflicht nämlich, Mitbürgern keine soziale Ordnung aufzuerlegen, unter der sie keinen sicheren Zugang zur Befriedigung ihrer Grundbedürfnisse haben. Darüber hinaus läßt sich plausibel machen, daß auch die klassischen Bürgerrechte soziale und ökonomische Implikationen haben. Um Freiheit von unmenschlicher oder erniedrigender Behandlung zu gewährleisten, wird eine Gesellschaft vielleicht mehr tun müssen, als lediglich geeignete Strafrechtsnormen durchzusetzen. Vielmehr werden häufig auch soziale und wirtschaftliche Vorkehrungen notwendig sein, die z. B. sicherstellen, daß Hausangestellte lesen und schreiben können, ihre Rechte und Möglichkeiten verstehen und im Falle plötzlicher Entlassung ökonomisch abgesichert sind.