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How Should Human Rights be Conceived?

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World Poverty and Human Rights
Polity Press 2002

2.0 Introduction

Supranational, national, and subnational systems of law contain various human rights. The content of these rights and of any corresponding legal obligations and burdens depends on the legislative, judicial, and executive bodies that maintain and interpret the laws in question. In the aftermath of World War II, it has come to be widely acknowledged that there are also moral human rights, whose validity is independent of any and all governmental bodies. In their case, in fact, the dependence is thought to run the other way: only if they respect moral human rights do any governmental bodies have legitimacy, that is, the capacity to create moral obligations to comply with, and the moral authority to enforce, their laws and orders.

This essay first appeared in *Jahrbuch für Recht und Ethik* 3 (1995): 103–20. Work on it was supported by a 1993–4 Laurance S. Rockefeller Fellowship at the Princeton University Center for Human Values. I am greatly indebted to my colleagues there, and very specially to Amy Gutmann, for a most productive discussion of an earlier version. I also wish to thank my fellow participants at the Law and Ethics Conference for their valuable comments, and Eric Goldstein for extensive and very helpful written criticisms. The last third of the essay has been significantly revised.

Human rights of both kinds can coexist in harmony. Whoever cares about moral human rights will grant that laws can greatly facilitate their realization. And human-rights lawyers can acknowledge that the legal rights and obligations they draft and interpret are meant to give effect to preexisting moral rights. In fact, this acknowledgment seems implicit in the common phrase "internationally recognized human rights." It is clearly expressed in the Preamble of the *UDHR*, which presents this *Declaration* as stating moral human rights that exist independently of itself. This acknowledgment bears stressing because the distinction between moral and legal human rights is rarely drawn clearly. Many are therefore inclined to believe that our human rights are whatever governments agree them to be. This is true of legal human rights. But it is false, as these governments have themselves acknowledged, of moral human rights. Governments may have views on what moral human rights there are – their (not legally binding) endorsement of the *UDHR* expresses such a view – but even all of them together cannot legislate such rights out of existence.

My aim here is to explicate the moral notion of human rights. I define this task narrowly. I do not address the ontological status of human rights – the sense in which they may be said to exist and the way in which their existence (in this sense) might be known and justified. Nor do I discuss the work of selection, specification, and justification that goes into formulating a full list or conception of human rights. Instead, I focus on an issue that is best examined before the others. How should human rights be conceived? What does the assertion of a human right assert, especially in regard to correlative responsibilities?

Beginning with this issue makes sense. An explication of what human rights are does not presuppose more than a rough idea about what goods are widely recognized as worthy of inclusion. But such an explication is presupposed in the selection and justification of particular human rights – even though it cannot by itself settle what human rights there are or even whether there are any human rights at all. The fact that some formulated right has all the conceptual features of a human right does not entail that it exists (can be justified as such) any more than the fact that King Arthur as described has all the conceptual features of a human being entails that there was such a person. Settling what human rights there are requires not merely conceptual explication, but also substantive moral arguments pro and con. Such arguments must be informed by an understanding of what human rights are.

2.1 From natural law to rights

The moral notion of human rights has evolved from 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 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.[80]

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. Regarding 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 claim that "every man has a Right to every thing; even to one another's body."[81] Since the concept of human rights, which is at issue here, has not been used in this vein, I leave such uses aside and focus on uses that present natural law, or the natural rights of others, as making moral demands on human conduct, practices, and institutions.

Conceiving the natural law, natural rights, or human rights as making weighty moral demands suggests that these demands ought to play an important role in our thinking and discourse about, and ought to be reflected and respected in, our social institutions and conduct. They should normally trump or outweigh other moral and nonmoral concerns and considerations.

In conceiving of moral demands as unrestricted, we believe that whether persons ought to respect them does not depend on their particular epoch, culture, religion, moral tradition, or philosophy.[82] Unrestricted moral demands need not assign obligations to everyone. The moral demand that rulers are to govern in the interest of the governed, for example, may be unrestricted even while it assigns obligations only to those in power. But, not being spatially or temporally confined, unrestricted moral demands 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 demands 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 demands 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,[83] or if understanding and appreciating them required mental faculties that a significant proportion of humankind does not have and cannot develop. The sharability of a moral demand is, then, a function of how widely it can be shared across persons and cultures and of how accessible it is to each of them. The notions of being unrestricted and being broadly sharable are related in that we tend to feel more confident about conceiving of a moral demand as unrestricted when this demand is not parochial to some particular epoch, culture, religion, moral tradition, or philosophy.

Let us turn from the continuities in the conceptual evolution – from natural law to natural rights to human rights – to its discontinuities, which reveal what shift in the content of unrestricted and broadly sharable moral demands is associated with the shift in terminology. Expressing moral demands in the natural-rights rather than the natural-law idiom involves a significant narrowing of content possibilities by introducing the idea that the relevant moral demands 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 demands on one's conduct toward other subjects at all and, even if it does, need not involve the idea that by violating such demands 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 demands as broadly sharable in a world that has become much larger and more heterogeneous. This secularization centers on a specific view about the point of the moral demands (duties) singled out as natural. The point of respecting them is the protection of others; one's concern to honor one's moral duties is motivated by a deeper and prior moral concern for the interests of others.[84]

This specification of the point of moral demands entails a narrowing of content possibilities. The natural-law idiom lends itself to

expressing any moral demands that might apply to human persons; but not all of these demands can be expressed equally well in the language of natural rights. Three historically prominent categories of moral demands are endangered by the shift in terminology: religious duties, duties toward oneself, and moral demands 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 connection 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.[85] 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.[86] 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.[87] This contrasts with the case of nonhuman animals, which have no past or potential future ability to make claims: here the language of rights can seem out of place.[88]

2.2 From natural rights to human rights

The language of human rights partakes in the specification 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 demands 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 coined the phrase "political not metaphysical."[89] The adjective "human" – unlike "natural" – does not suggest an ontological status independent 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 demands is thereby further broadened in that these demands 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 demands: 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. 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.[90] 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 *UDHR*: "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 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 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 to those in whose name such officials are acting.

Before discussing these matters further in section 2.3, 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 demands.[91] The object of each of these basic human needs is the object of a human right.[92] Recognizing these basic needs as giving rise to human rights involves a commitment to oppose official disrespect of these needs on the part of one's own society (and other comparable social systems in which one is a participant).[93]

Let me 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 speak (outside legal contexts) of human rights often do not have a clear sense of what they take human rights to be. I want to be clearer here. And my account should then be tested not against what people actually say about human rights, but against what they would or should affirm 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 as to which candidate human rights, if any, we should recognize. My examples from the *UDHR* 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.

2.3 Official disrespect

In our world, official agents are paradigmatically exemplified by governments and their agents and agencies. A paradigmatic instance of official disrespect of human rights is, then, their violation by a government. Governments may do so by issuing or maintaining unjust laws or orders that authorize or require human-rights violations or they may do so "under color of law," that is, by perversely construing existing legislation as licensing human-rights violating policies.

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 severely, and harm and frighten more people, than private wrongs. 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 consider other candidate instances of official disrespect. 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 its 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, perhaps, 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 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 little or nothing to enforce it. In view of this plurality of cases, how shall we explicate the idea of official disrespect of human rights?

To make these issues more concrete, let us focus on Article 19 of the *UDHR*: "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 officials may nonetheless 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 of human rights.

A more plausible explication of "official disrespect" would have us focus on the extent to which the government, including its various agencies and officials, is actually interfering with protected conduct. But this proposal leaves out officially tolerated private violence as exemplified by "outraged citizens" in former and present communist societies, death squads in various authoritarian societies of Latin America, militias in Indonesia, and "war veterans" in Zimbabwe. We should not settle for an understanding of official disrespect that provides an incentive to governments to let their opponents be 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 suppressed with impunity by persons organized or encouraged by the government, then these interferences must be included under the notion of official disrespect.

This modification may not go far enough. Death squads 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 peasants or migrant workers. Veterans of the revolution may organize in similar ways to suppress anti-communist opinions. 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 strong measures to protect the rights of an unpopular group – foreign residents with southern facial features in Germany, for instance – would diminish their own popularity.) We should consider such cases, as well, to exemplify official disrespect: some persons suffer restrictions 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. A nearly 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 could happen to them if they speak 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 clear-cut 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 of, 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.[94]

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 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,[95] 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 work 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 citizens actively engaged in the political life of their society.) More reliable than a commitment by the government, which may undergo a radical change in personnel from one day to the next, is a commitment by the citizenry. This latter commitment tends to foster the former – 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 whom their realization crucially depends. Enduring respect of human rights is, then, sustained not just by the country's constitution, its legal and political system, and the attitudes of its politicians, judges, and police. It is sustained more deeply by the attitudes of its people, as shaped also by the education system and the economic distribution.

Such socioeconomic factors are important to the realization of human rights also in another way. Consider Article 5 of the *UDHR*: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." In 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 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. They often have only minimal financial reserves and no other place to spend the night, there may be a general oversupply of servants, and they may have reason to believe that their present employer would refuse to issue them the favorable reference they need to find new employment.

When servants live in such conditions, their human right to be free from cruel, inhuman, or degrading treatment is not fulfilled. This flaw can perhaps be corrected through severe penal laws with aggressive enforcement. But it may also be tackled, probably more effectively, through other measures expanding literacy, knowledge of existing legislation, shelters for dismissed servants, educational and employment opportunities and unemployment benefits for the poor, and efforts to build a culture of civic solidarity and equal citizenship.

The arguments of the last four paragraphs may be accused of abusing the plausible, mostly civil rights of the *UDHR* to support their opposites: social and economic pseudo-rights. (Yet another social democrat dressed in liberal's clothing!) It is true that my view undercuts the sharp distinction between different kinds of rights to some extent. To see whether this makes sense, let us proceed, with the libertarian reservations about social and economic human rights in mind, to a more straightforward explication of my institutional understanding of human rights.[96]

2.4 The libertarian critique of social and economic rights

The concept of rights suggests an interactional understanding, matching each right with certain directly corresponding duties.[97] This understanding sustains a familiar dispute about what duties human rights entail. On one side are libertarians who require these to be exclusively negative duties (to refrain from violating the right in question). Such a minimalist account disqualifies the "human rights" to social security, work, rest and leisure, an adequate standard of living, education, or culture postulated in Articles 22–7 of the *UDHR* on the ground that they essentially entail positive duties. On the other side are maximalist accounts according to which all human rights entail both negative duties (to avoid depriving) and positive duties (to protect and to help). For the minimalist, human rights require only self-restraint. For the maximalist, they require efforts to fulfill everyone's human rights anywhere on earth: "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."[98]

The institutional understanding of human rights I propose allows us to transcend the terms of this debate. By postulating a human right to X, one is asserting that any society or other social system, insofar as this is reasonably possible, ought to be so (re)organized that all its members have secure access to X, with "security" always understood as especially sensitive to persons' risk of being denied X or deprived of X officially: by the government or its agents or officials.[99] Avoidable insecurity of access, beyond certain plausibly attainable thresholds, constitutes official disrespect and stains the society's human-rights record. Human rights are, then, moral claims on the organization 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 influential) citizens. Persons share responsibility for official disrespect of human rights within any coercive institutional order they are involved in upholding.

This institutional understanding can draw support from Article 28 of the *UDHR*: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized." As the reference to "the rights and freedoms set forth in this Declaration" indicates, this article does not add a further right to the list, but makes a statement about the concept of a human right, about what human rights mean or require. This statement might be unpacked in four steps:

1 How fully human rights *can* be realized in some institutional order is measured by how fully these human rights generally are, or (in the case of a hypothetical institutional order) generally would be, realized in it.
2 Any institutional order should be designed so that human rights are realized in it as fully as reasonably possible.
3 A human right is *realized* in some institutional order insofar as, and fully if and only if, this human right is fulfilled for all those whose conduct this order constrains.
4 A human right is *fulfilled* for some person insofar as she enjoys secure access to its object.

On the interactional understanding of human rights, governments and individuals have a responsibility not to violate human rights. On my institutional understanding, by contrast, their responsibility is to work for an institutional order and public culture that ensure that all members of society have secure access to the objects of their human rights. Thus linking rights fulfillment with insecurity rather than violation can make a difference in cases of two kinds. A person may fully enjoy X even while her access to X is insecure (as when persons relevantly like her, say blacks or vocal government opponents, are beaten or threatened). Conversely, a person may be temporarily deprived of X, through a crime by a rogue government official perhaps, in a society that is very effective in preventing crimes of the relevant type. Opposite to the interactional understanding, my institutional one regards only the first case as a human-rights problem.

In proposing this institutional understanding, I reject its interactional alternatives: I deny, for instance, that postulating that persons have a human right to X is tantamount to asserting 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 others or to deprive them 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 goes 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).

By reconceiving human rights in this way, the familiar dispute is transformed. 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 then upon your government and your fellow citizens.[100] The institutional understanding thus occupies an appealing middle ground: it goes beyond (minimalist interactional) libertarianism, which disconnects us from any deprivations we do not directly bring about, without falling into a (maximalist interactional) utilitarianism of rights, which holds each of us responsible for all deprivations whatever, regardless of the nature of our causal relation to them.[101]

But this is not all. The most remarkable feature of this institutional understanding is that it can go well beyond minimalist libertarianism without denying its central tenet: that human rights entail only negative duties. The normative force of others' human rights for me is that I must not help uphold and impose upon them coercive social institutions under which they do not have secure access to the objects of their human rights. I would be violating this duty if, through my participation, I helped sustain a social order in which such access is not secure, in which blacks are enslaved, women disenfranchised, or servants mistreated, for example. Even if I owned no slaves or employed no servants myself, I would still share responsibility: by contributing my labor to the society's economy, my taxes to its governments, and so forth. I might honor my negative duty, perhaps, through becoming a hermit or an emigrant, but I could honor it more plausibly by working with others toward shielding the victims of injustice from the harms I help produce or, if this is possible, toward establishing secure access through institutional reform.

Libertarians insist on a minimalist constraint on what duties human rights can impose: human rights require that we not harm others in

certain ways – not that we protect, rescue, feed, clothe, and house them. My institutional understanding can accept this constraint without disqualifying social and economic human rights. Given the minimalist constraint, such human rights give you claims not against all other human beings, but specifically against those who impose a coercive institutional order upon you. Such a coercive order must not avoidably restrict the freedom of some so as to render their access to basic necessities insecure – especially through official denial or deprivation. If it does, then all human agents have a negative duty, correlative to the postulated social and economic human rights, not to cooperate in upholding it unless they compensate for their cooperation by protecting its victims or by working for its reform. Those violating this duty share responsibility for the harms (insecure access to basic necessities) produced by the unjust institutional order in question.[102]

A human right to basic necessities, as postulated, for instance, in Article 25 of the *UDHR*, becomes more plausible when construed along these lines. On my institutional understanding, 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 any coercive social order they collectively impose upon each of themselves is one under which, insofar as reasonably possible, each has secure access to these necessities. Surprisingly perhaps, this duty was well expressed by Charles Darwin 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."[103]

2.5 The critique of social and economic rights as "manifesto rights"

Social and economic rights are often dismissed 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 this polemical term. The basic charge is that such rights are somehow unrealistic or unclear about the duties they entail.

Sometimes the obduracy, even brutality, of those in power makes it unrealistic to expect the rights of their subjects to be fulfilled. But we do not want to say, I trust, that these rights are therefore manifesto rights. Doing so would belittle moral rights in just those cases where it is most urgent to assert them. The Nazis, at the peak of their power (1938–42), were not violating mere manifesto rights.

Perhaps the meaning of the expression is, then, best clarified as follows. A legal or postulated 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 this right; and
(2a) 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
(2b) 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.[104]

Since the assertion of social and economic rights matters especially in contexts where these rights are not fulfilled, let us assume that (1) is satisfied. Rebutting the manifesto charge thus requires denying both (2a) and (2b).

Let us begin with (2b). A society cannot secure for 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 means. 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 of a very poor society that it reduce insecurity of access to basic necessities as far as reasonably possible toward a plausible security threshold. 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 the right it postulates satisfies (2b) and hence is a mere manifesto right. And this understanding accords with common usage: a society's human-rights record is not stained 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 bodily integrity of all 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 civil rights postulated in the *UDHR* make clear and specific demands on governments, 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 the realization of even the clearly civil human right not to be subjected to cruel, inhuman, or degrading treatment (Article 5) requires that such treatment by private agents, too, must be effectively discouraged and presupposes certain commitments and dispositions on the part of the citizenry. Understanding human rights in this way does not turn them into manifesto rights: each member of society, according to his or her means, is to help create 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, quite specific. In a society where 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 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 basic necessities. This unspecific demand may have quite specific implications in a given social context, such as 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 also escape clause (2a) and therefore cannot be dismissed as mere manifesto rights.

2.6 Disputes about kinds of human rights

This chapter develops a specific institutional understanding of what human rights are. It does not directly address the question of what human rights there are. In sections 2.4 and 2.5 I have tried to show, however, that my institutional understanding of human rights narrows the gap between those who, in line with some Western governments, emphasize civil and political rights and those who, in line with various

socialist and developing states, emphasize social, economic, and cultural rights.

This institutional understanding narrows the philosophical gap because it does not sustain the thought that civil and political human rights require only restraint, while social and economic human rights also demand positive efforts and costs. Rather, it emphasizes negative duties across the board. Human agents are not to collaborate in upholding a coercive institutional order that avoidably restricts the freedom of some so as to render their access to basic necessities insecure without compensating for their collaboration by protecting its victims or by working for its reform.

This institutional understanding also undercuts any systematic correlation between categories of human rights and ways of fulfilling them. The latter may vary in time and place. Thus, in order to realize the classical civil right to freedom from inhuman and degrading treatment, a particular society may need to establish certain social and economic safeguards. And in order to realize a human right to adequate nutrition, perhaps all that is needed is an effective criminal statute against speculative hoarding of foodstuffs. In this way, the concrete demands different categories of human rights make on an institutional order may in fact turn out to be similar, and, if so, my institutional understanding would narrow also the practical-political gap between the two sides. Those who endorse only civil and political human rights will work for institutional reforms that reduce poverty and illiteracy where doing so is an effective strategy for reducing insecurity of access to the objects of civil and political human rights. And those who endorse only social and economic human rights will work for institutional reforms that grant the poor genuine political participation and ways of defending their legal rights in the courts where doing so enhances the capacity of the poor to fend for themselves and thus reduces insecurity of access to the objects of social and economic human rights.

All this is not to say that it makes no difference which rights we single out as human rights. But if my institutional understanding indeed reduces the philosophical and the practical-political importance of the actual controversies about this question, then this is another reason in its favor. Even if we continue to disagree about which goods should be included in a conception of human rights, we can then – provided we really care about the realization of human rights rather than about ideological propaganda victories – work together on the same institutional reforms instead of arguing over how much praise or blame is deserved by this state or that.

3

Loopholes in Moralities

3.0 Introduction

One can think of a morality as an abstract standpoint outside the world from which what occurs within it – actions, persons, institutions, states of affairs – is evaluated. One can also think of a morality as itself in the world, as a more or less unified set of moral beliefs, attitudes, and conduct dispositions characteristic of particular persons or groups. In this second sense, moralities have real effects; and these may themselves be made a subject of evaluation. Such a perspective upon conduct-guiding structures of values and norms – or *codes* – is familiar to economists and legislators, who take social effects into account in designing or evaluating a tax code, for example. My aim is to extend this perspective to both key domains of morality: to *ethics*, concerned with the moral evaluation of conduct and character, with the life one should lead and the person one should strive to be, and to *justice*, concerned with the moral evaluation of social

This chapter was first published in the *Journal of Philosophy* 89, 2 (February 1992): 79–98. It has greatly benefited from criticisms and suggestions by many persons, including Bruce Ackerman, Rogers Albritton, Christian Barry, Rüdiger Bittner, Alex George, Robert Guay, Amy Gutmann, Charles Larmore, David Luban, Sidney Morgenbesser, Warren Quinn, and Ling Tong. Note 115 is newly added.