HUMAN RIGHTS QUARTERLY

The Philosophic Foundations of Human Rights

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I. INTRODUCTION

Today, through the United Nations and its half century of enactments, an impressive body of human rights doctrine is embodied in international law. This is in sharp contrast to the situation fifty years ago when there was no body of international human rights law.

Having come this far legally, why then should one still be concerned with the philosophic foundations of such international human rights law? To philosophize, Plato taught, is to come to know oneself. Others say that the special function of philosophy is to deepen our understanding of truth. Still others see the philosopher as a judge, assessing the varieties of human experience and pronouncing on the claim to knowledge.[1] Yet, still more reasons exist for exploring the philosophic underpinnings of human rights law.

First, one's own attitudes toward the subject of international human rights law are likely to remain obscure unless one understands the philosophies that shape them.[2] Piaget's statement that "morality is the logic of action" contains a striking insight.

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1. The term "justification of moral principles" is used here in the sense of "warranted assertions" containing qualities that go beyond local and transient rightness. I believe that most of what passes for discussion of "truth" in philosophy is such justification. *See* Hilary Putnam, *Are Legal Values Made or Discovered,* 1 LEGAL THEORY 5 (1995) (analyzing truth and warranted assertions).
2. A familiar anecdote is that of Gertrude Stein, who, on her deathbed, asked of her friends: "What is the answer? What is the answer?" A philosopher friend leaned over and spoke gently in her ear. Gertrude Stein closed her eyes and whispered: "Then, what is the question? What is the question?" Identifying the pertinent questions is a large measure of the philosophic enterprise.

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Second, if one understands the law addressed, one is more amenable to the authority of the international law of human rights. That trait is particularly valuable for an arena that still lacks formal enforcement mechanisms. Stated another way, one furthers fidelity to human rights law by understanding the moral justifications that underlie that law.

Third, understanding the philosophic foundations of the law helps one devise a translation formula that will permit men and women to speak to each other across the gulfs of creed and dogma, a necessary exercise for universal recognition of international law principles.

What then is the segment of philosophy examined when delving into human rights? The answer is that human rights are a set of moral principles and their justification lies in the province of moral philosophy. This article explores that field.[3]

This article will first address the historical sources of human rights justifications, next survey key modern human rights theories, and then analyze some of the current conflicts in human rights theory. At best, it can only touch on the teachings in a field that is complex, vast, and too often obscure.[4]

II. THE NATURE OF HUMAN RIGHTS

One of the initial questions in any philosophic inquiry is what is meant by human rights. The question is not trivial. Human beings, as Sartre said, are "stalkers of meaning." Meaning tells one "why." Particularly in the international sphere, where diverse cultures are involved, where positivist underpinnings are shaky, and where implementation mechanisms are fragile, definition can be crucial. Indeed, some philosophic schools assert that the entire task of philosophy centers on meaning. How one understands the meaning of human rights will influence one's judgment on such issues as which rights are regarded as universal, which should be given priority, which can be overruled by other interests, which call for international

3. It bears emphasis that while the modern human rights theories discussed below have been articulated largely by Western philosophers, the moral concepts are not exclusively Western and find counterparts in non-Western thought as well. Of course, the truth of a philosophical principle should not depend on its geography but instead on the soundness of its foundation. Self-determination, for example, is a Western-originated concept.

4. The last fifteen years alone have produced numerous volumes and articles on moral philosophy, though surprisingly few have dealt directly with human rights. The dense, specialized lexicon that most theorists use unfortunately means that they fail to reach the wide audience that they should seek.

pressures, which can demand programs for implementation, and for which one will fight.

What is meant by *human* rights? To speak of *human* rights requires a conception of what rights one possesses by virtue of being human. That does not mean human rights in the self-evident sense that those who have them are human, but rather, the rights that human beings have simply because they are human beings and independent of their varying social circumstances and degrees of merit.

Some scholars identify human rights as those that are "important," "moral," and "universal." It is comforting to adorn human rights with those characteristics; but, such attributes themselves contain ambiguities. For example, when one says a right is "important" enough to be a *human* right, one may be speaking of one or more of the following qualities: (1) intrinsic value; (2) instrumental value; (3) value to a scheme of rights; (4) importance in not being outweighed by other considerations; or (5) importance as structural support for the system of the good life. "Universal" and "moral" are perhaps even more complicated words. What makes certain rights universal, moral, and important, and who decides?[5]

Intuitive moral philosophers claim that definitions of human rights are futile because they involve moral judgments that must be self-evident and that are not further explicable. Other moral philosophers focus on the consequences of human rights and their purpose. The prescriptivist school says that one should not be concerned with what is *sought* to be achieved by issuing a moral (human rights) utterance but with that which is actually accomplished.

The definitional process is not easier when examining the term human *rights*. Certainly "rights" is a chameleon-like term that can describe a variety of legal relationships.[6] Sometimes "right" is used in its strict sense of the right holder being *entitled* to something with a correlative duty in another. Sometimes "right" is used to indicate an *immunity* from having a legal status altered. Sometimes it indicates a *privilege* to do something. Sometimes it refers to a *power* to create a legal relationship. Although all of these terms have been identified as rights, each invokes different protections.

For example, when speaking of an *inalienable* right, does one mean a right to which no expectations or limitations are valid? Or does one mean a *prima facie* right with a special burden on the proponent of any limitation? Or is it a principle that one must follow unless some other moral principle weighty enough to allow abridgment arises?

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5. For a discussion of the difficulties in determining the universality of a proposition, see Richard Mervyn Hare, Freedom and Reason 10–13, 30 (1963).
6. *See* Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning (Yale Univ. Press, 1923).

If one classifies a right as a *claim* against a government to refrain from certain acts, such as not to torture its citizens or deny them freedom of speech, religion, or emigration, then other complexities arise. If a particular claim stems from a metaphysical concept such as the nature of humanity, or from a religious concept such as the divine will, or from some other *a priori* concept, then the claim may really be an immunity to which normative judgments should not apply. If, however, the claim is based on certain interests such as the common good, other problems arise such as the need to determine what constitutes the common good, or the need to balance other societal interests, that may allow a wide variety of interpretations not supportive of individual human rights demands.

If speaking of the "rights" in the International Covenant on Economic, Social and Cultural Rights,[7] such as the right to social security, health, education, fair wages, a decent standard of living, and even holidays with pay, what does one intend? Are these rights that individuals can realistically assert, or are they only aspirational goals? Assuming they are rights as intended, on whom are the correlative duties imposed?

If one speaks of *privileges*, other concerns arise. If the privileges are granted by the state, then presumably the state is entitled to condition them. Does the right of a state to derogate from rights in an international covenant mean that the rights are, in fact, only privileges? Here too, the answer is connected to the moral strength and inviolability of the "right" or "privilege" that is involved.

The definitional answers to these questions are obviously complex.

To summarize, even where international law has established a conventional system of human rights, a philosophic understanding of the nature of rights is not just an academic exercise. Understanding the nature of the "right" involved can help clarify one's consideration of the degree of protection available, the nature of derogations or exceptions, the priorities to be afforded to various rights, the question of the hierarchical relationships in a series of rights, the question of whether rights "trump" competing claims based on cultural rooting, and similar problems. To be sure, the answers to these questions may evolve over time through legal rulings, interpretations, decisions, and pragmatic compromises. But how those answers emerge will be influenced, if not driven by, the moral justifications of the human rights in issue.

A starting point in understanding the moral foundations of human rights law is to examine the *sources* of human rights claims. From where does one

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7. International Covenant on Economic, Social and Cultural Rights, *adopted* 16 Dec. 1966, 993 U.N.T.S. 3, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) (*entered into force* 3 Jan. 1976).

derive the moral justifications that can be urged for or against human rights law? What is their scope or content, and how compelling are they?

III. SOURCES OF HUMAN RIGHTS

A. Religion

To be sure, the term "human rights" as such is not found in traditional religions. Nonetheless, theology presents the basis for a human rights theory stemming from a law higher than that of the state and whose source is the Supreme Being.

If one accepts the premise of the Old Testament that Adam was created in the "image of God," this implies that the divine stamp gives human beings a high value of worth.[8] In a similar vein the Quran says, "surely we have accorded dignity to the sons of man." So too, in the Bhagavad-Gita, "Who sees his Lord/Within every creature/Deathlessly dwelling/Amidst the mortal: That man sees truly . . . ."

In a religious context every human being is considered sacred. Accepting a universal common father gives rise to a common humanity, and from this flows a universality of certain rights. Because rights stem from a divine source, they are inalienable by mortal authority. This concept is found not only in the Judeo-Christian tradition, but also in Islam and other religions with a deistic base.[9]

Even if one accepts the revealed truth of the fatherhood of God and the brotherhood of all humans, the problem of which human rights flow therefrom remains. Equality of all human beings in the eyes of God would seem a necessary development from the common creation by God, but freedom to live as one prefers is not. Indeed, religions generally impose severe limitations on individual freedom. For most religions, the emphasis falls on duties rather than rights. Moreover, revelation is capable of differing interpretations, and some religions have been quite restrictive toward slaves, women, and nonbelievers, even though all are God's creations. Thus, at least as practiced, serious incompatibilities exist between various

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8. An appealing expression of this comes from the Talmud:

> A man may coin several coins with the same matrix and all will be similar, but the King of Kings, the Almighty, has coined every man with the same matrix of Adam and no one is similar to the other. Therefore, every man ought to say the whole world has been created for me.

Sanhedrin 38:1 (Adin Steinsaltz ed., Random House 1989).

9. *See generally* Simon Greenberg, Foundations of a Faith (1967); Leonard Swidler, Religious Liberty and Human Rights: In Nations and in Religions (1986); Ann Elizabeth Mayer, Islam and Human Rights (1991).

religious practices and the scope of human rights structured by the United Nations.

However, religious philosophers of all faiths are engaged in the process of interpreting religious doctrines toward the end of effecting a reconciliation with basic human rights prescriptions. This process is largely via hermeneutic exercise, namely reinterpretation of a religion's sacred texts through both historical explication and a type of prophetic application to modern conditions.

Thus, religious doctrine offers a promising possibility of constructing a broad intercultural rationale that supports the various fundamental principles of equality and justice that underlie international human rights. Indeed, once the leap to belief has been made, religion may be the most attractive of the theoretical approaches. When human beings are not visualized in God's image then their basic rights may well lose their metaphysical *raison d'être*. On the other hand, the concept of human beings created in the image of God certainly endows men and women with a worth and dignity from which the components of a comprehensive human rights system can flow logically.

B. Natural Law: The Autonomous Individual

Philosophers and jurists did not leave human rights solely to theologians. In their search for a law that was higher than positive law, they developed the theory of natural law. Although natural law theory has underpinnings in Sophocles and Aristotle, it was first elaborated by the stoics of the Greek Hellenistic period, and later by those of the Roman period. Natural law, they believed, embodied those elementary principles of justice which were right reason, *i.e.*, in accordance with nature, unalterable, and eternal. A classic example is that of Antigone who defied Creon's command not to bury her slain brother by claiming that she was obeying immutable laws higher then the ruler's command.

Medieval Christian philosophers, such as Thomas Aquinas, put great stress on natural law as conferring certain immutable rights upon individuals as part of the law of God.[10] However, critical limitations in the medieval concepts that recognized slavery and serfdom excluded central ideas of freedom and equality.

As feudalism declined, modern secular theories of natural law arose, particularly as enunciated by Grotius and Pufendorf. Their philosophy detached natural law from religion, laying the groundwork for the secular,

10. St. Thomas Aquinas, Summa Theologica Lib. II, pt. II (1475).

rationalistic version of modern natural law. According to Grotius, a natural characteristic of human beings is the social impulse to live peacefully and in harmony with others. Whatever conformed to the nature of men and women as rational, social beings was right and just; whatever opposed it by disturbing the social harmony was wrong and unjust. Grotius defined natural law as a "dictate of right reason."[11] He claimed that an act, according to whether it is or is not in conformity with rational nature, has in it a quality of moral necessity or moral baseness.

Grotius was also a father of modern international law. He saw the law of nations as embodying both laws that have as their source the will of man and laws derived from the principles of the law of nature. This theory, of course, has immense importance for the legitimacy of international law.

Natural law theory led to natural rights theory—the theory most closely associated with modern human rights. The chief exponent of this theory was John Locke, who developed his philosophy within the framework of seventeenth century humanism and political activity, known as the Age of Enlightenment.[12] Locke imagined the existence of human beings in a state of nature. In that state men and women were in a state of freedom, able to determine their actions, and also in a state of equality in the sense that no one was subjected to the will or authority of another. However, to end the hazards and inconveniences of the state of nature, men and women entered into a "social contract" by which they mutually agreed to form a community and set up a body politic. Still, in setting up that political authority, individuals retained the natural rights of life, liberty, and property. Government was obliged to protect the natural rights of its subjects, and if government neglected this obligation, it forfeited its validity and office.[13]

Natural rights theory was the philosophic impetus for the wave of revolt against absolutism during the late eighteenth century. It is visible in the French Declaration of the Rights of Man,[14] in the US Declaration of Independence,[15] in the constitutions of numerous states created upon liberation from colonialism, and in the principal UN human rights documents.

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11. Hugo Grotius, De Jure Belli et Pacis (Book 1, 1689). *See also* Heinrich Albert Rommen, The Natural Law: A Study in Legal and Social History and Philosophy (1948).
12. John Locke, The Second Treatise of Government (1952).
13. Nearly a century later, Rousseau refined the concept of a social contract. He saw the first virtue of the social contract as its capacity to organize in collective defense of liberty and order. Second, the social contract establishes a community with potential for doing justice, thereby giving the citizens the morality that had been wanting in the state of nature. Jean-Jacques Rousseau, On the Social Contract (Judith R. Masters trans., St. Martin's Press 1978) (1762).
14. Declaration of the Rights of Man and of Citizens (France 1789).
15. The Declaration of Independence (US 1776).

Natural rights theory makes an important contribution to human rights. It affords an appeal from the realities of naked power to a higher authority that is asserted for the protection of human rights. It identifies with and provides security for human freedom and equality, from which other human rights easily flow. It also provides properties of security and support for a human rights system, both domestically and internationally.

From a philosophical viewpoint, the critical problem that natural rights doctrine faced is how to determine the norms that are to be considered as part of the law of nature and therefore inalienable, or at least *prima facie* inalienable.

Under Locke's view of human beings in the state of nature, all that was needed was the opportunity to be self-dependent; life, liberty, and property were the inherent rights that met this demand. But what about a world unlike the times of Locke, in which ample resources are not available to satisfy human needs? Does natural law theory have the flexibility to satisfy new claims based on contemporary conditions and modern human understanding? Perhaps it does, but that very potential for flexibility has formed the basis for the chief criticism of natural rights theory. Critics pointed out that most of the norm setting of natural rights theories contain *a priori* elements deduced by the norm setter. In short, the principal problem with natural law is that the rights considered to be natural can differ from theorist to theorist, depending upon their conceptions of nature.

Because of this and other difficulties, natural rights theory became unpopular with legal scholars and philosophers.[16] However, in revised form, natural rights philosophy had a renaissance in the aftermath of World War II, as discussed below.

C. Positivism: The Authority of the State

The assault upon natural law intensified during the nineteenth and twentieth centuries. John Stuart Mill claimed that rights are founded on utility. Karl von Savigny in Germany, and Sir Henry Maine in England, claimed that rights are a function of cultural variables. However, the most serious attack on natural law came from a doctrine called legal positivism. This philosophy came to dominate legal theory during most of the nineteenth century and commands considerable allegiance in the twentieth.

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16. *See, e.g.,* JEREMY BENTHAM, THE BOOK OF FALLACIES (1824) (discussing natural rights as so much "bawling on paper"). Oft-quoted is his colorful attack: "Right is a child of law; from real laws come real rights, but from imaginary law, from laws of nature, come imaginary rights. . . . Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts." *Id.*

Classical positivist philosophers deny an *a priori* source of rights and assume that all authority stems from what the state and officials have prescribed. This approach rejects any attempt to discern and articulate an idea of law transcending the empirical realities of existing legal systems. Under positivist theory, the source of human rights is found only in the enactments of a system of law with sanctions attached to it. Views on what the law "ought" to be have no place in law and are cognitively worthless. The theme that haunts positivist exponents is the need to distinguish with maximum clarity law as it is from law as it ought to be, and they condemned natural law thinkers because they had blurred this vital distinction. In its essence, positivism negates the moral philosophic basis of human rights.[17]

By divorcing a legal system from the ethical and moral foundations of society, positive law encourages the belief that the law must be obeyed, no matter how immoral it may be, or however it disregards the world of the individual. The anti-Semitic edicts of the Nazis, although abhorrent to moral law, were obeyed as positive law. The same is true of the immoral apartheid practices that prevailed in South Africa for many years. The fact that positivist philosophy has been used to justify obedience to iniquitous laws has been a central focus for much of the modern criticism of that doctrine. Critics of positivism maintain that unjust laws not only lack a capacity to demand fidelity, but also do not deserve the name of law because they lack internal morality.

Even granting the validity of the criticism, the positivist contribution can still be significant. If the state's processes can be brought to bear in the protection of human rights, it becomes easier to focus upon the specific implementation that is necessary for the protection of particular rights. Indeed, positivist thinkers such as Jeremy Bentham and John Austin were often in the vanguard of those who sought to bring about reform in the law. Always under human control, a positivist system also offers flexibility to meet changing needs.

The *methodology* of the positivist jurists in the technical building of legal conceptions is also pragmatically useful in developing a system of rights in international law. For example, the UN human rights treaties, being rules developed by the sovereign states themselves and then made part of a system of international law, reflect a positive set of rights. While many states may differ on the theoretical basis of these rules, the rules provide a legal grounding for human rights protection. On the other hand, in theory, positivism tends to undermine an international basis for human rights

17. *See, e.g.*, Herbert Lionel Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1955); JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Wilfrid E. Rumble ed., 1985).

because of the emphasis positivists place on the supremacy of *national* sovereignty without accepting the restraining influence of an inherent right above the state. Under this view, rules of international law are not law but merely rules of positive morality set or imposed by opinion. Furthermore, by emphasizing the role of the nation state as the source of law, the positivist approach produces the view that the individual has no status in international law.

D. Marxism: Man as a Specie Being

Marxist theory, like natural law, is also concerned with the nature of human beings. However, in Marxism, the view of men and women is not one of autonomous individuals with rights developed from either a divine or inherent nature, but of men and women as "specie beings."[18]

While Marxism fell along with the fall of Communism in Eastern Europe, it was a dominant philosophy in much of the world for many years; in variant forms, Marxism has residual influence, particularly in assigning values to social and economic rights.

Marx regarded the law of nature approach to human rights as idealistic and ahistorical. He saw nothing natural or inalienable about human rights. In a society in which capitalists monopolize the means of production, Marx regarded the notion of individual rights as a bourgeois illusion. Concepts such as law, justice, morality, democracy, freedom, etc., were considered historical categories, whose content was determined by the material conditions and the social circumstances of a people. As the conditions of life change, so the content of notions and ideas may change.

Marxism sees a person's essence as the potential to use one's abilities to the fullest and to satisfy one's needs.[19] In capitalist society, production is controlled by a few. Consequently, such a society cannot satisfy those individual needs. An actualization of potential is contingent on the return of men and women to themselves as social beings, which occurs in a communist society devoid of class conflict. However, until that stage is reached, the state is a social collectivity and is the vehicle for the transformation of society. Such a conceptualization of the nature of society precludes the existence of individual rights rooted in the state of nature that are prior to the state. The only rights are those granted by the state, and their exercise is contingent on the fulfillment of obligations to society and to the state.

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18. *See* Sir Isaiah Berlin, Two Concepts of Liberty (1958).
19. Karl Marx, The Economic and Philosophic Manuscripts of 1844 (Martin Milligan trans., Dirk J. Struik ed., 1969).

The Marxist system of rights has often been referred to as "parental," with the authoritarian political body providing the sole guidance in value choice. The creation of such a "specie being" is a type of paternalism that not only ignores transcendental reason, but negates individuality.[20] In practice, pursuit of the prior claims of society as reflected in the interests of the Communist state has resulted in systematic suppression of individual civil and political rights.

On an international level, Marxist theory proved incompatible with a functioning universal system of human rights. The prior claims of a Communist society do not recognize overruling by international norms. While Communist governments admitted a theoretical recognition of the competence of the international community to establish transnational norms, the application of those norms was held to be a matter of exclusive domestic jurisdiction. Communist states repeatedly asserted in international fora that their alleged abuse of human rights was a matter of exclusive *domestic* jurisdiction, not just as a matter of protecting sovereignty or avoiding the embarrassment of international examination, but the assertions reflected communist theory of the unlimited role of the state to decide what is good for the specie beings.[21] Be that as it may, Marxism itself now ironically has become a past historical category.

E. The Sociological Approach: Process and Interests

To many scholars, each of the theories of rights discussed thus far is deficient. Moreover, the twentieth century is quite a different place from the nineteenth. Natural and social sciences have developed and begun to increase understanding about people and their cultures, their conflicts, and their interests. Anthropology, psychology, and other disciplines lent their insights. These developments inspired what has been called the sociological school of jurisprudence. "School" is perhaps a misnomer, because what has evolved is a number of disparate theories that have the common denominator of trying to line up the law with the facts of human life in society. Sociological jurisprudence tends to move away from both *a priori* theories and analytical types of jurisprudence. This approach, insofar as it relates to human rights, sometimes directs attention to the questions of institutional development, sometimes focuses on specific problems of public policy that

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20. No attempt is made here to deal with some of the substantial reinterpretation and modification of Marxist theory utilized by various Third World Socialist countries. *See* Julius Nyerere, Ujamaa: Essays on Socialism (1968).
21. *See, e.g.*, Valerii Chalidze, To Defend These Rights: Human Rights and the Soviet Union (Guy Daniels trans., 1974).

have a bearing on human rights, and sometimes aims at classifying behavioral dimensions of law and society. In a human rights context, the approach is useful because it identifies the empirical components of a human rights system in the context of the social process.[22]

A primary contribution of the sociological school is its emphasis on obtaining a just equilibrium of interests among prevailing moral sentiments and the social and economic conditions of time and place. In many ways this approach can be said to build on William James' pragmatic principle that "the essence of good is simply to satisfy demand."[23] This approach also was related to the development in twentieth century society of increased demands for a variety of wants beyond classical civil and political liberties—such matters as help for the unemployed, the handicapped, the underprivileged, minorities, and other elements of society.

It is not possible here to outline the particular approaches of the leading sociological thinkers, but Roscoe Pound's analysis merits special reference. Pound pointed out that during the nineteenth century, the history of the law was written largely as a record of an increasing recognition of individual rights.[24] In the twentieth century, however, this history should be written in terms of a continually wider recognition of human wants, human demands, and social interests. Pound catalogued the interests as individual, public, and social. He did not try to give value preferences to these interests. His guiding principle was one of "social engineering," that is, the ordering of human relations through politically organized society so as to secure all interests insofar as possible with the least sacrifice of the totality of interests.

The approach of Pound and his progeny usefully enlarges one's understanding of the scope of human rights and their correlation with demands. His identification of the interests involved takes into account the realities of the social process; he shows one how to focus on rights in terms of what concerns people and what they want. He makes one "result-minded, cause-minded and process-minded."[25]

However, an approach that merely catalogues human demands is deficient in failing to focus on how rights are interrelated or what the priorities should be. The sociological school does not answer the logical question of how a normative conclusion about rights can be derived empirically from factual premises such as having interests. A descriptive science in the social human rights field is helpful, "but is not enough" to satisfy the need of goal identification.[26] The sociological approach thus provides a useful method, but a method in need of a philosophy. Nonethe-

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22. *See* KARL LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE (1962).
23. WILLIAM JAMES, PRAGMATISM (1975).
24. 1 ROSCOE POUND, JURISPRUDENCE § 8 (1959).
25. 3 ROSCOE POUND, JURISPRUDENCE (1959).
26. *See* Karl Llewellyn, *Book Review*, 28 U. CHI. L. REV. 174 (1960).

less, by providing a quantitative survey of the interests that demand satisfaction, this school sharpens perceptions of the values involved and the policies necessary to achieve them.

F. Rights Based on the Value of Utility

Another theory that has played a commanding role in political and moral philosophy is utilitarianism.

Utilitarianism is a *maximizing* and *collectivizing* principle that requires governments to maximize the total net sum of the happiness of all their subjects. This principle is in contrast to natural rights theory, which is a *distributive* and *individualizing* principle that assigns priority to specific basic interests of each individual subject.

Classic utilitarianism, the most explored branch of this school, is a moral theory that judges the rightness of actions affecting outcomes in terms of securing the greatest happiness to all concerned. Utilitarian theory played a commanding role in the philosophy and political theory of the nineteenth century and continues with some vigor in the twentieth.

Jeremy Bentham, who expounded classical utilitarianism, believed that every human decision was motivated by some calculation of pleasure and pain. He thought that every political decision should be made on the same calculation, that is, to maximize the net produce of pleasure over pain. Hence, both governments and the limits of governments were to be judged not by reference to abstract individual rights, but in terms of what tends to promote the greatest happiness of the greatest number. Because all count equally at the primary level, anyone may have to accept sacrifices if the benefits they yield to others are large enough to outweigh such sacrifices.

Bentham's happiness principle enjoyed enormous popularity and influence during the first half of the nineteenth century when most reformers spoke the language of utilitarianism. Nonetheless, Bentham's principle met with no shortage of criticism. His "felicific calculus," that is, adding and subtracting the pleasure and pain units of different persons to determine what would produce the greatest net balance of happiness, has come to be viewed as a practical, if not a theoretic, impossibility.

Later utilitarian thinkers have restated the doctrine in terms of "revealed preferences."[27] Here, the utilitarian guide for governmental conduct would

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27. *See* Joseph Raz, The Morality of Freedom 267–87 (1986). "Consequentialism" is a school of modern moral philosophy that embraces the family of utilitarian theories, some egoistic in principle, some altruistic, some benevolent, etc. Generally, it may be described as holding that actions and other objects of moral assessment are justified only if their consequences have more intrinsic value than alternate actions. The term "consequentialism" was introduced into technical philosophy in 1958 by G.E.M. Anscombe. Consequentialist theorists are often at odds with each other.

not be pleasure or happiness, but an economically focused value of general welfare, reflecting the maximum satisfaction and minimum frustration of wants and preferences. Such restatements of utilitarian theory have an obvious appeal in the sphere of economic decision making. Even then, conceptual and practical problems plague utilitarian value theory: the ambiguities of the welfare concept, the nature of the person who is the subject of welfare, the uncertain basis of individual preference of one whose satisfaction is at issue, and other problems inherent in the process of identifying the consequences of an act and in estimating the value of the consequences.

The approach to the problem of rights through theories of values has an obvious attraction. Utilitarian theories have a teleological structure, that is, they seek to define notions of right solely in terms of tendencies to promote certain specified ends. An ontological commitment may not be necessary here (at least, it is not so evident) because values (equality, happiness, liberty, dignity, respect, etc.) concern behavior and are not known in a metaphysical sense but rather are accepted and acted upon.

The essential criticism of utilitarianism is that it fails to recognize individual autonomy; it fails to take rights seriously.[28] Utilitarianism, however refined, retains the central principle of maximizing the aggregate desires or general welfare as the ultimate criterion of value. While utilitarianism treats persons as equals, it does so only in the sense of including them in the mathematical equation, but not in the sense of attributing worth to each individual. Under the utilitarian equation, one individual's desires or welfare may be sacrificed as long as aggregate satisfaction or welfare is increased. Utilitarianism thus fails to treat persons as equals, in that it literally dissolves moral personality into utilitarian aggregates. Moreover, the mere increase in aggregate happiness or welfare, if abstracted from questions of distribution and worth of the individual, is not a real value or true moral goal.

Hence, despite the egalitarian pretensions of utilitarian doctrine, it has a sinister side in which the well-being of the individual may be sacrificed for what are claimed to be aggregate interests, and justice and right have no secure place. Utilitarian philosophy thus leaves liberty and rights vulnerable to contingencies, and therefore at risk.[29] In an era characterized by inhumanity, the dark side of utilitarianism made the philosophy too suspect

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28. An oft-quoted criticism is Rawls' observation that "[u]tilitarianism does not take seriously the distinction between persons." JOHN RAWLS, A THEORY OF JUSTICE 187 (1971).
29. Some utilitarians, notably John Stuart Mill, allow that in moral and legal practice, justice and rights may be considerations superior to interests and to the liberty to pursue the satisfaction of interests. But they insist that justice and rights are derivative of interests and desires and are to be given context by determining what is necessary to maximize the satisfaction of the latter. That, of course, makes justice and rights contingent and does not satisfy the theories that assign rights superior moral standing. In other words, so long

to be accepted as a prevailing philosophy. Indeed, most modern moral theorists seem to have reached an antiutilitarian consensus, at least in recognizing certain basic individual rights as constraints on any maximizing aggregative principle. In Ronald Dworkin's felicitous phrase, rights must be "trumps" over countervailing utilitarian calculations.

IV. MODERN HUMAN RIGHTS THEORIES

A. Rights Based on Natural Rights: Core Rights

The aftermath of World War II brought about a revival of natural rights theory. Certainly, this was due in part to the revulsion against Naziism and the horrors that could emanate from a positivist system in which the individual counted for nothing. It was not surprising that a renewed search for immutable principles to protect humanity against such brutality emerged.

Of course, a large variety of presentations and analyses among scholars exist addressing theories of moral philosophy.[30] While the new rights philosophers do not wear the same metaphysical dress as the early expounders of the Rights of Man, most adopt what may be called a qualified natural law approach in that they try to identify the values that have an eternal and universal aspect. They agree that only a positive legal system that meets those values can function as an effective legal system. In a larger sense, the object of much of revived natural rights thought can be viewed as an attempt to work out the principles that might reconcile the "is" and the "ought" in law.

The common theme emerging from a huge family of theories is that a minimum absolute or core postulate of any just and universal system of rights must include some recognition of the value of individual freedom or autonomy.

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as utility is what Mill said it is, namely, "the ultimate appeal on all ethical questions," individual rights can never be secure. JOHN STUART MILL, ON LIBERTY (Appleton-Century-Crofts & Co. 1947) (1959).

30. Modern rights theorists display a number of common characteristics. First, they are eclectic, borrowing from each other's insights so that it is somewhat imprecise to characterize their theories as simply utilitarian, naturalist, positivist, or any of the other classifications that philosophers use. Second, most rights theorists recognize the need to identify the justifications that can validate the moral principles of human rights. Third, they acknowledge the benefits of constructing an entire system of rights that can satisfy all morally relevant actions and institutions in consistent and conflict-resolving ways. Unfortunately, many theorists also get caught up in the distinctions and fine tunings of contractualism, consequentialism, value neutrality, objectivity, relativism, pluralism, and other branches of epistemological, metaphysical, or ethical philosophy without advancing our understanding of the moral foundations of human rights much beyond the classic theories. In the discussion that follows, there is space to address only the more influential modern theories, and then only in bare bones outline.

Underlying such foundational or core rights theory is the omnipresence of Immanuel Kant's compelling ethic. Kant's ethic maintains that persons typically have different desires and ends, so any principle derived from them can only be contingent. However, the moral law needs a categorical foundation, not a contingent one. The basis for moral law must be *prior* to all purposes and ends. The basis is the individual as a transcendental subject capable of an autonomous will. Rights then flow from the autonomy of the individual in choosing his or her ends, consistent with a similar freedom for all.

In short, Kant's great imperative is that the central focus of morality is personhood, namely the capacity to take responsibility as a free and rational agent for one's system of ends. A natural corollary of this Kantian thesis is that the highest purpose of human life is to will autonomously. A person must always be treated as an end, and the highest purpose of the state is to promote conditions favoring the free and harmonious unfolding of individuality. Kant's theory is transcendental, *a priori*, and categorical (all amount to the same thing), and thus overrides all arbitrary distinctions of race, creed, and custom, and is universal in nature.[31]

In variant forms, modern human rights core theories seem to be settling for concepts of natural necessity. By necessity one means prescribing a minimum definition of what it means to be human in any morally tolerable form of society. Put another way, some modes of treatment of human beings are so fundamental to the existence of anything that one would be willing to call a society that it makes better sense to treat an acceptance of them as constitutive of man or woman as a social being, rather than as an artificial convention. This view does not entail verified propositions as science requires. Rather, it views human life as encompassing certain freedoms and sensibilities without which the designation "human" would not make sense. To use a linguistic metaphor, humanity has a grammatical form of which certain basic human rights are a necessary part. This concept of what one views human beings to be is a profound one, even if it is deemed self-evident.

To be sure, many of the new individualist theories possess a certain vindication aspect. They can be viewed as saying that if one adopts certain human rights as norms (*e.g.*, freedom of thought, equality), one can produce

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31. Even most positivist and utilitarian philosophers now seem to concede that unless the idea of Kantian's moral, nonlegal right is admitted, no account of justice as a distinct segment of morality can be given. Put simply, any society which uses the vocabulary of rights presupposes that some justification is required to interfere with a person's freedom. Without that minimal right of freedom, an important segment of our moral scheme (but not all of it) would have to be relinquished, and the various political rights and responsibilities about which we talk could not exist. *See* H.L.A. HART, THE CONCEPT OF LAW (1994); *see also* JULES L. COLEMAN, MARKETS, MORALS AND THE LAW (1988) (exemplifying a modern positivist philosopher's view).

a certain kind of society; and if one finds that kind of society desirable, one should adopt the norms and call them absolute principles. This reasoning is of course a type of tautology. Then again, tautologies can be significant if society is willing to accept them.

The renaissance of qualified or modified natural rights or core theories has seminally influenced conventional international human rights norms. The Universal Declaration of Human Rights[32] reflects that influence, as seen in the Declaration's opening statement: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[33] In a similar vein, Article 1 provides: "All human beings are born free and equal in dignity. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood."[34] The debt that "inherent dignity" and "inalienable rights" owe to natural law philosophy is obvious. The key human rights treaties also reflect quite directly the moral universalist foundations discussed above.

The philosophic justification and affirmance of the core principles of human rights as universal principles are highly significant and reassuring for the vitality of human rights in rules for the world of nations. Rights that preserve the integrity of the person flow logically from the fundamental freedom and autonomy of the person. So does the principle of nondiscrimination that must attach to any absolute concept of autonomy. However, affirming such basic or core principles is one thing; working out all the other elements of a complete system of rights such as international law seeks to provide is something else. What rights derive from those deemed core rights? How are they developed with generic consistency? By what theory does one test the legitimacy of an overall system? The next sections discuss some of the leading rights theories that have wrestled with the methodology and justification of an *overall* system of rights.

B. Rights Based on Justice

The monumental thesis of modern philosophy is John Rawls' *A Theory of Justice*.[35] "Justice is the first virtue of social institutions," says Rawls.[36]

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32. Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., (Resolutions, part 1), at 71, U.N. Doc. A/810 (1948), *reprinted in* 43 Am. J. Int'l L. Supp. 127 (1949).
33. *Id.*
34. *Id.* art. 1.
35. John Rawls, Theory of Justice §§ 1–4, 9, 11–17, 20–30, 33–35, 39–40 (1971) (explaining the essence of Rawls' theory).
36. *Id.* § 1 at 3.

Human rights, of course, are an end of justice; hence, the role of justice is crucial to understanding human rights. No theory of human rights for a domestic or international order in modern society can be advanced today without considering Rawls' thesis.

Principles of justice, according to Rawls, provide a way of assigning rights and duties in the basic institutions of society. These principles define the appropriate distribution of the benefits and burdens of social cooperation. Rawls' thesis is that

> [e]ach person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. . . . Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests.[37]

But what are the rights of justice? Put another way, what are the principles of morality or the foundation of rules that would be agreed upon by all members of a society? To set the stage for ascertaining the principles of justice, Rawls imagines a group of men and women who have come together to form a social contract. Rawls conceives the contractors in an original position.

The original position is one of equality of the contractor with respect to power and freedom. It is taken for granted that all know the general principles of human psychology, sociology, economics, social organization, and the theory of human institutions. However, the contractors are under a "veil of ignorance" as to the particular circumstances of their own society or of their individual race, sex, social position, wealth, talents, opinions, aspirations, and tastes.[38] Therefore, they are prevented from making a self-interested decision that otherwise would corrupt the fairness of their judgment. In that hypothetical original position, all of the contractors would consider only their own self-interest, which is to acquire a sufficiency of primary human goods, namely fundamental liberties, rights, and opportunities of income and wealth as social bases of self-esteem. Hence, in the original position, contractors would choose a basic structure for society *fairly* because they would be abstracted from knowing the detailed facts about their own condition in the real world.

Rawls then tries to show that if these men and women were rational and acted only in their self-interest under a "veil of ignorance," they would choose principles that would be good for all of the members, not simply to the advantage of some. The answers given by those in the original position may then be taken as a blueprint, or as a pattern for the establishment of laws that are worthy of the universal assent of citizens everywhere. In other

37. *Id.* § 1 at 3–4.
38. *Id.* § 2 at 12.

words, their choices would be the basis for the ordering of a just society in any time or place. Rawls' system thus allows us to derive universal principles of justice (morality) acceptable to all rational human beings.

What particular principles would be chosen? Rawls claims that the contractors, who are in the original position of choosing their own status and prospects, will choose two principles of justice.

Rawls' First Principle is that "each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all."[39] Rawls' principles of justice are arranged in a hierarchy. The first priority is that of liberty. "[L]iberty can be restricted only for the sake of liberty. There are two cases: (a) a less extensive liberty must strengthen the total system of liberty shared by all; (b) a less than equal liberty must be acceptable to those [citizens] with the lesser liberty."[40]

The First Principle focuses on the basic *liberties*. Rawls does not enumerate them precisely, but indicates, roughly speaking, that they include political liberty, freedom of speech and assembly, liberty of conscience and thought, freedom of the person (along with the right to hold personal property), and freedom from arbitrary arrest and seizure. The First Principle requires that these liberties be equal because citizens of a just society are to have the same basic rights. Rawls applies a value criteria in determining basic liberties. He believes that a liberty is more or less significant depending on whether it serves the full, informal, and effective exercise of the moral powers.

Rawls' Second Principle deals with distributive justice. It holds that: "Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity."[41] The general conception of justice behind these two principles reached in the original position, is one of "fairness."[42]

Rawls' Second Principle is a strongly egalitarian concept which holds that unless there is a distribution that makes both groups better off, an equal distribution is preferred. Thus, the higher expectations of those better situated are just only if they are part of a scheme that improves the expectations of the least advantaged. In Rawls' theory, the Difference

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39. *Id.* § 46 at 302.
40. *Id.* (giving examples of restrictions on the scope of majority rule imposed by a bill of rights and restrictions on the freedom to speak imposed by a system of rules of order).
41. *Id.* Rawls' savings principle is a complex restraint on distribution to any one generation by allowing for accumulation of savings to improve the standard of life of later generations of the least advantaged. *Id.* § 44.
42. *Id.* § 11 at 63.

Principle is the most egalitarian principle that would be rational to adopt among the various available alternatives.

Rawls recognizes that a person may be unable to take advantage of rights and opportunities as a result of poverty and ignorance and a general lack of means. These factors, however, are not considered to be constraints on liberty; rather, they are matters that affect the "worth" or "value" of liberty. Liberty is represented by the complete system of the liberties, while the worth of liberty to persons and groups is proportional to their capacity to advance their ends within the framework that the system defines. The basic liberties must be held equally. However, the worth of liberty may vary because of inequality in wealth, income, or authority. Therefore, some have greater means to achieve their aims than others. However, the lesser worth of liberty is compensated for by the Difference Principle discussed above. Rawls, in short, builds a two-part structure of liberty that allows a reconciliation of liberty and equality.[43]

This philosophy, of course, is highly abstract and not easily digested. When one tries to apply Rawls' principles to the nonmetaphorical world, some difficult empirical questions arise.

Consider, for example, the basic civil and political liberties identified by Rawls that involve recognition of individual autonomy. The demands made are of a negative sort; they principally involve noninterference with the equal sharing of basic liberties by individuals. Rawls' overriding principle of justice requires that all citizens share these liberties equally (as indeed, international law provides: here, the respective positions of modern utilitarian, egalitarian, and natural rights philosophy seem to be in general agreement). Moreover, groupings are not empirically difficult. The inclusion of all persons in these liberties does not negate or reduce the share of any and causes the least chance of a clash with other values. In constructing a rights system, it is therefore appropriate to impose a heavy burden on those who would treat persons unequally by denying any of them basic liberties.

However, in the real world, will clashes not occur between liberty and other interests, such as public order and security, or efficient measures to ensure public health and safety? To solve this conflict, Rawls suggests a Principle of Reconciliation under which basic liberties may be restricted only when methods of reasoning acceptable to all make it clear that unrestricted liberties will lead to consequences generally agreed to be harmful for all. This Principle of Reconciliation is that of the common interest. A basic liberty may be limited *only* in cases where there would be an advantage to the total system of basic liberty.

With respect to Rawls' Second Principle, the problems are more

43. *Id.* at 204.

complex. Here, Rawls holds that a condition of distributive justice is fair equality of opportunity. Opportunity, stated as a principle of nondiscrimination, is easy to put into a legal precept, and international human rights covenants and many domestic constitutions do prohibit discrimination by virtue of sex, race, religion, or national origin. However, empirical knowledge tells one that equality of opportunity is not enough because society creates the conditions of the pursuit, thereby affecting the outcome.

For example, a person who grows up under conditions of discrimination and deprivation has less opportunity to get into a college than someone from the mainstream of society with a good elementary and secondary education. Hence, to provide equality of opportunity one must compensate for unequal starting points. However, the opportunities of others also should be protected. The object, therefore, is to give those who have had an unequal start the necessary handicap points and yet not denigrate the opportunities of others. Whether one utilizes subsidies, special courses, quotas, or affirmative action programs depends on how compelling a society views the obligation to provide equality of opportunity. Here, a utilitarian and egalitarian approach may differ substantially. In some democratic states, for example, affirmative action programs for minorities have met a utilitarian backlash. It is not easy to resolve the differences, but understanding the moral conceptions enables one to focus on reconciliation of competing views.

With respect to a more equal apportionment of economic benefits derived under Rawls' Second Principle and the Difference Principle, even more difficult problems arise because the demands on society are heavier. Economic benefits may range from modest ones such as free education, aid to the elderly, aid to the handicapped, social security, etc., to major redistributions of wealth. Obviously such benefits are not achieved merely by a negative restraint on government; they require tinkering with distribution.

But *how much* tinkering with the distribution system is suitable, and to *what* desirable ends? Reasonable moral persons interested both in the well-being of the individual and the common good might recognize that certain economic needs of those at the bottom strata of society present so imperative a claim for relief that they outweigh a larger aggregate of benefits to those higher on the economic scale.[44] One's moral theory affects what one is willing to accept as relevant facts, as well as the degree of sacrifice one is willing to accept to further egalitarian goals. Rawls' Difference Principle addresses this issue. However, if one acknowledges the claims for

44. Thus, one would hardly dispute that higher taxation of the upper end of the population is desirable in order to provide for the needs of those at the lower end.

more equitable distribution of economic benefits, one must still decide at what point on the spectrum one draws the line and says that the claims for equality do not outweigh the competing values of liberty or the utilitarian aggregate benefits that will be decreased by meeting the claims. It may be that in any particular social structure the inequalities allowed under the Difference Principle would produce a minimum distribution of goods and benefits too small to satisfy the reasonable demands of the least advantaged, or too large to command acceptance by the advantaged.

Rawls' thesis presents still more difficult moral issues of distributive justice in the international context. For example, many developing nations are economically disadvantaged and their disadvantages can only be redressed by substantial transfer to them of resources, technology, and other benefits from developed countries. The sources of those inequalities compete for dominance in determining the appropriate moral response.

One basis put forward for the disadvantages suffered by developing nations is that developed countries caused the disadvantages through colonialism, imperialism, racism, and other exploitation. If developed states accept that claim, then the moral response should be that the entity that caused the harm should remedy it or, at least, contribute substantially to the remedy. If, however, the accusation is rejected (as unfair, too old, inaccurate, etc.) the moral justification for a response is different. The developed countries may still be willing to help lessen international economic inequality, but that task may be undertaken not out of guilt or the need to make reparations, but out of a utilitarian calculus that includes such values as increasing markets, creating alliances, lessening tension, etc. However, the utilitarian calculation may not warrant any substantial reallocation. Or the response may be elicited through the moral obligation to advance a just world order along the Rawlsian Difference Principle. However, here the Rawlsian concept may impose conditions: for example, in the latter case, donor states may require the donees to accommodate certain civil and political liberties that are part of the donors' concept of justice, as a reciprocal element of (or the price for) a more just international system.[45]

These issues are obviously quite complicated with numerous considerations of *real politik* intersecting, but even this short discussion shows that one cannot divorce the tough issues of fulfilling economic and social rights on both a domestic and international level from the moral issues.

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45. *See, e.g.,* FELIX E. OPPENHEIM, THE PLACE OF MORALITY IN FOREIGN POLICY ch. 3 (1991) (discussing how twenty-four industrial nations decided in Brussels on 4 July 1980 to grant economic aid to less developed nations on the basis of a series of criteria, including adherence to the rule of law and "respect for human rights"). Another condition for transfer of resources from developed to less developed states might be that the receiving states use the resources to increase distributive justice among their own citizens and thereby benefit the poor in those states (extending the lines of Rawls' Difference Principle).

Critics of Rawls' theory maintain that it was designed to support the institutions of modern democracy in a *domestic* state context. But even if that were the case, the criticism does not refute his moral thesis, nor an international extension of it.[46]

Indeed, even if Rawls' theory was intended as a model for domestic states, its application can further an international just order. This is because in the real world, state parties only reach questions of international justice *after* dealing first with the basic structure of the state's institutions, and second with the rights and duties of individual members. If Rawls' moral principles produce justice for individuals in a *domestic* state, that achievement takes a long step toward gaining the domestic state's endorsement and adherence to *international* human rights principles. In this regard, the international world order is no greater than the sum of its state parts. Hence, if the Rawlsian moral schemata contributes to a realization of domestic justice by the various state parts, the prescriptions of international human rights will invariably be served.

Rawls himself has suggested that his model can be applied to a world order if one extends the concept of the original position and thinks of the parties as representatives of different states who together must choose the fundamental principles to adjudicate claims among states. But as Thomas M. Franck has pointed out, once the actors in the original position are *representatives of states*, the dynamic changes, and it is not clear that these actors would opt for moral principles that further human rights unless they themselves are representatives of *just* states.[47] It is a fair point that the implications of Rawls' model on an international level still need to be worked through. In any event, Rawls' moral structure—showing how the values of liberty and equality underlying the nature of the autonomous human can be realized in open institutional forms—should at least be morally compelling for a world in which large segments of humanity suffer oppression, poverty, and deprivation of civil, political, social, and economic rights.

One cannot cover Rawls' highly complex neo-Kantian theory or deal with the considerable critical analysis of it in a few pages,[48] but even brief

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46. *See* JOHN RAWLS, KANTIAN CONSTRUCTIVISM IN MORAL THEORY: THE DEWEY LECTURES (1980) (conceding this point). But Rawls' later writings do not diminish the force of his theory of justice.
47. THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 213–33, 285 n.8 (1990).
48. The literature dealing with Rawls' thesis, pro and con, is vast. *See, e.g.*, Thomas M. Scanlon, Jr., *Rawls' Theory of Justice*, 121 U. PA. L. REV. 1020 (1973); ROBERT WOLFF, UNDERSTANDING RAWLS (1977); READING RAWLS (Norman Daniels ed., 1975); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); THOMAS W. POGGE, REALIZING RAWLS (1989). The best of these are CHANDRAN KUKATHAS & PHILLIP PETIT, RAWLS: A THEORY OF JUSTICE AND ITS CRITICS (1990), and the excellent collection of essays in COMMUNITARIANISM AND INDIVIDUALISM (Shlomo Avineri & Avner de-Shalit eds., 1992).

discussion shows the importance of his theory for the moral justification of a rights-based system of government under a participatory structure. Rawls effects a reconciliation of tensions between egalitarianism and noninterference, as well as between demands for freedom by the advantaged and demands for equality by the less advantaged.[49] His structure of social justice maximizes liberty and the worth of liberty to both groups. One may also consider whether Rawls' thesis is reflected in the consensus on human rights found in the international human rights covenants, and whether, in fact, most of the nations have tacitly agreed to a social contract in this area. Rawls' theory is obviously comforting for the construct of constitutional democracy as well as for the concept of the universality of human rights.

C. Rights Based on Reaction to Injustice

At least brief mention should be made of Professor Edmund Cahn's theory of justice. While Cahn's theory no longer has the influence it once enjoyed, it has a particular appeal to human rights activists. Cahn asserts that although there may be universal *a priori* truths concerning justice from which one may deduce rights or norms, it is better to approach justice from its negative rather than its affirmative side.[50] In other words, it is much easier to identify *injustice* from experience and observation than it is to identify *justice*. Furthermore, says Cahn, where justice is thought of in the customary manner as an ideal mode or condition (*e.g.*, Rawls), the human response will be contemplative, and "contemplation bakes no loaves."[51] But the response to a real or imagined instance of injustice is alive with movement and warmth, producing outrage and anger. Therefore, he concludes, "'[j]ustice' . . . means the active process of remedying or preventing what would arouse the sense of injustice."[52] An examination of the instances that will be considered as effecting an injustice thereby allows a positive formulation of justice.

This concept of the need to right wrong has the capacity to produce action. The practical starting point may well be the strongly felt response to words that move one with emotional force and practical urgency to press for the satisfaction or repair of some need, deprivation, threat, or insecurity.

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49. One might contrast Rawls' fertile moral landscape with theories in Robert Nozick, Anarchy, State and Utopia 321–22 (1974). Nozick's system, which he calls "libertarian capitalism," is a radical extension of classical laissez-faire theory. *See* Jerome Shestack, *The Jurisprudence of Human Rights, in* International Human Rights (Theodor Meron ed., 1983).
50. Edmond Cahn, The Sense of Injustice (1949).
51. *Id.* at 13.
52. *Id.* at 13–14 (emphasis omitted).

Such an approach obviously will find a response in human rights advocates anxious to focus public attention on the injustice of the wide variety of egregious human rights abuses that remain prevalent.

However, with the more sophisticated kinds of entitlements arising from considerations of social justice, there is less agreement on what constitutes injustice, and Cahn's insight offers less help. Here one needs an overall structure of the type presented by moral philosophers such as Rawls, Ackerman, or Gewirth.[53] Still, Cahn's insight is useful; in the end it may well be that society will secure only those rights for which its members are aroused to fight.

D. Rights Based on Dignity

A number of human rights theorists have tried to construct a comprehensive system of human rights norms based on a value-policy oriented approach focused on the protection of human dignity.[54] Some religious philosophers, holding dignity to be the inherent quality of the sacredness of human beings, believe that an entire rights system can flow from that concept. A secular exposition of that theory is best presented by Professors McDougal, Lasswell, and Chen.

McDougal, Lasswell, and Chen proceed on the premise that demands for human rights are demands for wide sharing in all the values upon which human rights depend and for effective participation in all community value processes. The interdependent values, which can all fall under the rubric of human dignity, are the demands relating to (1) respect, (2) power, (3) enlightenment, (4) well-being, (5) health, (6) skill, (7) affection, and (8) rectitude. McDougal, Lasswell, and Chen assemble a huge catalogue of the demands that satisfy these eight values, as well as all of the ways in which they are denigrated.

McDougal, Lasswell, and Chen find a great disparity between the rising common demands of people for values of human dignity and their achievement. This disparity is due to "environmental factors," such as "population, resources, and institutional arrangements,"[55] and also to

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53. Alan Gewirth is another influential neo-Kantian philosopher who merits study. Gewirth holds that in reasoning ethically, an agent abstracts from his or her particular ends and thinks in terms of what generic rights for rational autonomy the agent would demand on the condition of a like extension to all other agents. These rights are those of freedom and well-being, that Gewirth calls generic rights. He frames his moral thesis on the Principle of Generic Consistency: "Act in accord with the generic rights of your recipients as well as yourself." From these generic rights flow an entire structure of civil, political, economic, and social rights. Alan Gewirth, Reason and Morality (1978).
54. *See, e.g.*, Myres S. McDougal et al., Human Rights and World Public Order (1980).
55. *Id.* at 38.

"predispositional factors," such as special interests seeking "short-term payoffs . . . in defiance of the common interests that give expression to human dignity values."[56] The ultimate goal, as they see it, is a world community in which a democratic distribution of values is encouraged and promoted, all available resources are utilized to the maximum, and the protection of human dignity is regarded as a paramount objective of social policy. While they call their approach a policy-oriented perspective, their choice of human dignity as the *super value* in the shaping and sharing of all other values has a natural rights ring to it.

Their approach also has been criticized as having a Western orientation, which it does, but that does not mean it is wrong. A more telling criticism is the difficulty in making use of their system. Their list of demands is huge; no hierarchical order exists; both trivial and serious claims are intertwined; and it has a utopian aspect that belies reality. Still, McDougal, Lasswell, and Chen have shown how a basic value such as dignity—a value on which most people would agree—can be a springboard for structuring a rights system. Even if one disagrees with their formulation, they have opened the door for a simpler and more useful construction to be built on their insights.

E. Rights Based on Equality of Respect and Concern

A striking aspect of modern theorists is their pronounced effort to reconcile different theories of rights. In this regard, in the discussion of modern theories, one must consider the work of Ronald Dworkin, who offers a promising reconciliation theory between natural rights and utilitarian theories.[57] Dworkin proceeds from the postulate of political morality, *i.e.*, that governments must treat all their citizens with equal concern and respect. No basis for any valid discourse on rights and claims exists in the absence of such a premise.

Dworkin next endorses the egalitarian character of the utilitarian principle that "everybody can count for one, nobody for more than one."[58] Under this principle he believes that the state may exercise wide interventionist functions in order to advance social welfare.

Dworkin believes that a right to liberty in general is too vague to be

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56. *Id.* at 45.
57. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977). *See* Jules L. Coleman, *Truth and Objectivity in Law*, 1 LEGAL THEORY 33, 51 (1995) (finding that Dworkin's perspective changed between 1977, when he wrote TAKING RIGHTS SERIOUSLY, *supra*, and 1986, when he wrote *Law's Empire*, RONALD DWORKIN, LAW'S EMPIRE (1986), in order to deal with the value of community).
58. A practical political application of this principle is participatory democracy.

meaningful. However, certain specific liberties such as freedom of speech, freedom of worship, rights of association, and of personal and sexual relations, do require special protection against governmental interference. This is not because these preferred liberties have some special substantive or inherent value (as most rights philosophers hold), but because of a kind of procedural impediment that these preferred liberties might face. The impediment is that if those liberties were left to a utilitarian calculation, that is, an unrestricted calculation of the general interest, the balance would be tipped in favor of restrictions.

Why is there such an impediment? Dworkin says that if a vote were truly utilitarian, then all voters would desire the liberties for themselves, and the liberties would be protected under a utilitarian calculation. However, a vote on these liberties would not be truly utilitarian nor would it afford equal concern about and respect for liberties solely by reflecting personal wants or satisfactions of individuals and affording equal concerns to others. This is because external preferences, such as prejudice and discrimination against other individuals deriving from the failure to generally treat other persons as equals, would enter into the picture. These external preferences would corrupt utilitarianism by causing the individual to vote against assigning liberties to others.

Accordingly, the liberties that must be protected against such external preferences must be given a preferred status. By doing so, society can protect the fundamental right of citizens to equal concern and respect because it prohibits "decisions that seem, antecedently, likely to have been reached by virtue of the external components of the preferences democracy reveals."[59]

The argument is attractive because Dworkin (like Rawls, but in a different way) has minimized the tension between liberty and equality. Dworkin does so not by conceding a general right to liberty (which might exacerbate the tension), but by specifying particular basic liberties that society must protect to prevent corruption of a government's duty to treat persons as equals.

Dworkin's theory seems to retain both the benefits of natural rights theory without the need for an ontological commitment, and the benefits of utilitarian theory without the need to sacrifice basic individual rights. Dworkin's resplendent universe thus seems to accommodate the two major planets of philosophic thought. Dworkin's theory is also valuable in focusing on the relational rather than the conflicting aspects of liberty and equality. Even if one is not fully convinced at this stage by Dworkin's analysis, one has the feeling that his reconciling approach should work within the institutions of a participatory democracy.

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59. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 57, at 180.

F. Theory Based on Cultural Relativism (versus Universalism)

The clash between those who evaluate human rights from the perspective of cultural relativism and those who view human rights from the universalist or individualist perspective impacts the moral foundations of human rights. This clash immerses one in the vortex of contemporary human rights politics.

Cultural relativism, as a concept to justify departure from human rights standards in international law on cultural grounds, has scant claim to moral validity. Still, because cultural relativism has been given the trappings of philosophic credentials even in UN circles, it must be addressed.

Cultural relativism is essentially an anthropological and sociological concept loosely grounded in the theory of moral relativism. The notion is that cultures manifest so wide and diverse a range of preferences, morality, motivations, and evaluations that no human rights principles can be said to be self-evident and recognized in all times and all places. Moral relativism is not very influential in modern philosophy, but cultural relativism has been used frequently as an argument against the universality of human rights.

Cultural relativists,[60] in their most aggressive conceptual stance, argue that no human rights are absolutes, that the principles that one may use for judging behavior are relative to the society in which one is raised, that there is infinite cultural variability, and that all cultures are morally equal or valid.[61] Put into a philosophical calculus, the relativist says that "truth is just for a time or place" identified by the standards of one's cultural peers.[62] Relativism thus shifts the touchstones by which to measure the worth of human rights practice. To suggest that fundamental rights may be overridden or adjusted in light of cultural practices is to challenge the underlying moral justification of a universal system of human rights, reflecting the autonomous individual nature of the human being.

What are the sources of cultural relativism? Is it a philosophy at all? How should one analyze cultural relativism in the context of international human rights?[63]

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60. This term, as used here, includes a broad spectrum of relativist theories (cultural, ethnic, particularist, moral). The various relativist schools vary considerably.
61. *See* RHODA E. HOWARD, HUMAN RIGHTS AND THE SEARCH FOR COMMUNITY (1995); *see also* Rhoda E. Howard, *Cultural Absolutism and the Nostalgia for Community*, 15 HUM. RTS. Q. 315 (1993); Rhoda E. Howard, *Dignity, Community and Human Rights*, *in* HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS (Abdullahi Ahmed An-Na'im ed., 1995) (pointing out that "cultural relativists" convert to "cultural absolutists" when they maintain that there is one universal principle, acting in accordance with the principles of one's own group).
62. In many ways, the conflict builds on Hegel's distinction between *moralität* (abstract or universal rules of morality) and *sittlichkeit* (ethical principles specific to a certain community).
63. It is not within the scope of this article to cover the way in which relativism versus individualism plays out in domestic politics, except for a brief note. In some Western

Moral relativism, the normative basis of cultural relativism, is said to derive from the famous aphorism (of dubious meaning) by the Greek philosopher Protagoras that "[m]an is the measure of all things." Plato's Theaetus states the Protagorean thesis in terms of the community (not the individual) as the measure of all things, and Plato fairly decimates the concept. The Protagorean view had, at most, a feeble foothold in philosophic thought until the late eighteenth century when Johan Gottfried von Herder, dissenting from Enlightenment philosophy, claimed that all nations had a unique way of being; only regional and contingent principles existed. Condemning universal values, he introduced the concept of *Volksgeist*, the spirit of the people. Von Herder's view influenced German romanticism and French counterrevolutionary writers who glorified the aggregate of local customs and prejudices under an umbrella called "culture."

From time to time during the nineteenth and early twentieth centuries, the claims of *Volksgeist* arose mostly in the European political context of ultranationalism versus universalist principles of Enlightenment philosophy. In time, with the rise of Pan-Germanism, culture was reduced to the cult of origins. During the Nazi period, the *Volksgeist* theme revealed and realized its stark and tragic totalitarian potential.[64]

During the nineteenth century colonial period, many anthropologists, imbued with feelings of Western superiority, viewed other cultures as "native," "primitive," or "barbaric," relegating those cultures to an inferior status. During the post–World War II period, Western anthropologists and sociologists confessed error and embraced a concept of cultural relativism as a counterpoint to colonialization. In combating colonialization with its implications of superiority over the colonists, the French anthropologist Claude Lévi-Strauss and others of his school argued for the separate, independent value of all cultures, stating that the West should stop extending its culture to the rest of the world. The goal of bringing about independence from colonialism was certainly worthy, but the anthropologists and sociologists went further and gave cultural relativism a moral or

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states, in particular, a communitarian movement has developed during the past several decades, largely in opposition to political liberalism. Normatively, communitarians ally themselves with moral relativism. The liberal individualist response accuses the communitarians of a conservative political ideology that denigrates individual autonomy and freedom of choice. *See* COMMUNITARIANISM AND INDIVIDUALISM, *supra* note 48 (exemplifying the debate on relativism versus individualism).

64. *See* ALAIN FINKIELKRAUT, LA DEFAITE DE LA PENSEE (Judith Friedlander trans., Columbia Univ. Press 1995) (1987). In France, for example, the defenders of Albert Dreyfus, in the spirit of the Enlightenment, maintained that "man is not the slave of his race, language or religion, nor of the course of rivers, or the direction of mountain races." The Anti-Dreyfusards found Dreyfus guilty by virtue of his ethnicity, which they regarded as at odds with the true ethnically pure French character. France, as it turned out, by rehabilitating Dreyfus, then opted for a society constituted by a social contract and universal principles rather than one based on the idea of a collective spirit.

ethical stance. In restoring the dignity stolen from other cultures through Western imperialism, they argued that all cultures were morally equal and that universalist values (such as universal human rights) were dead.[65]

For the new states, the theme of cultural identity was appealing; it helped them break with Western imperialism, and it permitted the colonialized to affirm their cultural differences, and to turn what colonizers had mocked into a subject of pride. It was logical that most new states wanted to make their own cultural traditions part of national life and to bind individuals to the integrity and cohesion of the socially-minded spirit. In some states, however, pursuit of cultural identity had deleterious effects. While such pursuit provided a means of resistance under colonial rule, afterwards it turned out to have a repressive side by creating an obligatory homogeneity and diminishing the place of the individuals in the calculus of identity politics.

With this background, this article examines the tenets of cultural relativism, particularly in the context of international human rights. What are the objectives of cultural relativism compared to those of universalism? What are the respective camps defending? A universal moral philosophy affirms principles that protect universal, individual human rights of liberty, freedom, equality, and justice everywhere, giving them a nontransient, nonlegal foundation. The relativists defend a cultural conditioning that supposedly reflects a set of wants and goods that members of disparate cultural groups share (and that may include various human rights goods), but are not wants and goods arrived at through individual choices or preserved for individuals in the community as a matter of right.[66]

Posing the contrast this way should deflate the cultural relativist position in any objective value comparison with universalist principles. But

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65. Alain Finkielkraut's satirical but insightful account of how cultural relativism has played out is summarized in a recent review of Finkielkraut by Paul Berman:

> In our eagerness to repudiate anything smacking of old-fashioned imperialism, we seize on the principles of modern anthropologists, who insist on regarding the culture of one society as fully equivalent to the culture of another. We applaud ourselves for discovering that our own culture is merely one among many, and is not to be seen as anything superior. But, having set out in the morning along that admirably egalitarian path, we find by about noon that we are obliged to describe the democratic notions of human rights and freedom as merely anthropological traits peculiar to our own culture, and, not wishing to impose our local customs on anyone else, we are obliged by nightfall to conclude that human rights and democracy are fine for us and other customs are fine for other people. Freedom for us, oppression for others (for such is their culture, and we must respect it).

Paul Berman, *In Defense of Reason*, NEW YORKER MAG., 4 Sept. 1995, at 94 (reviewing FINKIELKRAUT, *supra* note 64).

66. One should mention a basic classic dilemma that relativists face. Relativism holds that all cultures are valid and none absolute or false. Universalism holds that its principles are absolute. If that universalist thesis is *false* then relativism is refuted. If that thesis is *true*, then relativism is refuted. A theory that justifies its own rejection is not a strong contender for acceptance.

cultural relativism cannot be dismissed so readily, if only because in the real world, repressive rulers utilize the relativist claim as justification for their ruling practices. Many examples illustrate repressive rulers who seek to rationalize repressive practices by claiming that the culture of their society accepts those practices over universalist international human rights prescriptions, and that to criticize their society's human rights practices is to impose Western cultural imperialism over their local culture. Thus, rulers use cultural relativist arguments to justify limitations on speech, subjugation of women, female genital mutilation, amputation of limbs and other cruel punishment, arbitrary use of power, and other violations of international human rights conventions. It is no wonder that the doctrine that human rights are contingent on cultural practice has been called the "gift of cultural relativists to tyrants."

Does the cultural relativist thesis withstand scrutiny? The reason it does not has several levels.

First, John Finnis has cogently shown that those philosophers who have surveyed modern anthropological literature have found the basic assumption underlying the relativist approaches unwarranted:

> All human societies show a concern for the value of human life; . . . in none is the killing of other human beings permitted without some fairly definite justification. . . . [I]n all societies there is some prohibition of incest, some opposition to boundless promiscuity and to rape, some favour for stability and permanence in sexual relations. All human societies display a concern for truth, [and] all societies display a favour for the values of co-operation, of common over individual good, of obligation between individuals, and of justice within groups. All know friendship. All have some conception of *meum* and *tuum*, title or property, and of reciprocity. . . . All display a concern for powers or principles which are to be respected as suprahuman; in one form or another, religion is universal.[67]

Here, in short, is a universality of basic moral requirements manifested in value judgments.

One, therefore, should not have to probe deeply to conclude that there is a universal cultural *receptivity* to such fundamental rights as freedom from torture, slavery, arbitrary execution, due process of law, and freedom to travel. Moreover, any observer of state practice can cite example after example where repression that one authoritarian government excuses as cultural identity, turns out *not* to be a cultural tradition at all when a democratic government replaces the authoritarian one. Further, many examples of peoples of like cultures living virtually side by side, where one

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67. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 83–84 (1980). *See generally* ALISON D. RENTELN, INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM (1990).

state condemns human rights abuses and a counterpart state creates abuses, illustrate this point. Thus, most human rights abuses are not legitimately identified with the authentic culture of any society, only with authoritarian rulers of that society.[68]

Indeed, even most confirmed relativist scholars are repulsed at practices that are highly coercive and abusive and accept that at least some human rights values are absolute. This is no more than a recognition, grudging or not, that suffering and abuse are not culturally authentic values and cannot be justified in the name of cultural relativism. In short, it is wrong to say that all cultures are equally valid; some cultures contain evil elements which have no rational, intuitive, or empirical claim to moral equivalence with nonabusive cultures.

Second, cultural relativists often incorrectly perceive the attributes of cultural communities. Cultural relativists tend to look at cultures from a static, romanticized perspective in which traditional societies are defined as unchanging, holistic entities, unaffected by human history or the dynamics of cultural change.[69] However, this view fails to take into account the dynamism of culture that normally offers its members a range of development options, or is willing to accommodate varying individual responses to its norms, while preserving legitimate values of authentic tradition. Anthropologists acknowledge that culture is flexible and holds many possibilities of choice within its framework. To recognize the values held by a given people at a given time in no wise implies that these values are a constant or static factor in the lives of current or succeeding generations of the same group.

Third, the dynamics of change have been accelerated in this technological, communicative age with the result that many closed societies, once exposed to individualist benefits, seek to incorporate those values and interests into their culture. In fact, individualist values have a great deal of appeal to all cultures once the values are perceived. Of course, a necessary element of bringing about such change is free discourse between cultures so that the human rights benefits can be known. It is telling that authoritarian

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68. Related to whether cultural attributes are real or pretextual is the fact that cultural norms are often subject to different interpretations and to manipulation by individuals or groups. For example, male chauvinism of the early nineteenth century made the concept of women's place being in the home a cultural attribute of that time in Victorian England. *See* CARLOS SANTIAGO NINO, THE ETHICS OF HUMAN RIGHTS (1991) (discussing the moral foundations of human rights).

69. *See* Howard, *Cultural Absolutism and the Nostalgia for Community*, *supra* note 61, at 326–28. Rhoda Howard points out the tendency of many cultural relativists to present traditional societies in mystical or aggregative terms that ignore or belittle individual preferences. Yet, as communitarian societies have changed, they approach the individualist model in culture as well as politics and economics. *Id.* at 329–32.

rulers try to prevent such discourse; that, at the least, reveals a lack of faith in their normative position.

Fourth, another approach still exists that, in part, renders moot the conflict between universalist and relativist theory. This approach consists of appreciation of what has transpired in international law. Even as theorists have continued to quarrel with each other, fundamental human rights principles have become *universal* by virtue of their entry into international law as *jus cogens*, customary law, or by convention. In other words, the relativist argument has been overtaken by the fact that human rights have become hegemonic and therefore universal by fiat.

The relativist, of course, may reply that international law is not a decisive foundation for the relativist any more than an iniquitous positive law is for the universalist. However, one can counter this argument in relativist terms. Law creates societal pressure for adherence; adherence creates habit; habit creates custom; custom becomes a cultural attribute. Thus, the legal standards convert to the very cultural standard that the cultural relativist advocates. To be sure, the normal process is for theory to turn into law. But conversely, law creates the cultural attributes of a society.[70] In any event, the broad acceptance by many nations across the globe of the principal human rights treaties can be taken, at least on the legal level if not yet in practice, as a triumph of universalism over relativism.

Finally, it is revealing that the implications of the relativist position for human rights has obviously been troubling to many relativist theorists who, in personal terms, would like to see human rights values firmly ensconced in world affairs. They search for justifications other than the universalist theories to affirm human rights, a search which in itself speaks for the flimsy, if not spurious foundations of cultural relativism.

For example, Joseph Raz grounds rights in interests that are themselves grounded in values.[71] Richard Rorty argues that human rights activists should rely not on reason and theory but on passion and the courage of their convictions.[72] Other theorists produce other rationales. Whether at the end of the day individualists and relativists will recommend the same policies on different moral grounds is still an open question among some theorists. While such reconciliation may not satisfy the universalist thesis, human rights proponents should take comfort from the moral compulsion a good person feels to combat evil and to vindicate human rights. If enough feel that moral compulsion, the universalist goals then will have been fulfilled.

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70. For example, in the United States in the South, opponents of civil rights laws argued that these laws were against the Southern "way of life." But the enactment of the civil rights laws brought about a change in the way of life and the cultural pattern of Southern society in a fairly short period of time.
71. Raz, *supra* note 27.
72. Richard Rorty, Philosophy and the Mirror of Nature (1979).

V. CONCLUSION

This brief description of modern theories of rights does not even begin to exhaust the elaborate and daunting literature and complexities of the subject. Moreover, the development of rights theory will certainly benefit from flourishing new philosophic and scientific exploration. Scholars such as Rawls, Ackerman, Coleman, Donagan, Donnelly, Dworkin, Finnis, Gewirth, Heller, Howard, Michelman, Nagel, Nino, Nozick, Raz, Richards, Rorty, Sumner, and others in many nations and from diverse backgrounds are still adding insights to classic moral philosophy and developing or refining their own theories both in domestic and international contexts. It is the natural bent of theory analysis to raise queries and articulate doubts. The field is stirring, and the potential for new insight remains large.

Long ago, Hume asked what authority any moral reasoning can have that leads into opinions that are wide of mankind's general practice. It remains a haunting point as one views the gap between the international law of human rights and contemporary practice. A more promising question may be whether moral reasoning can narrow the gap between moral principle and practice. Hopefully, the discussion here, albeit with all the questions it raises, will affirm faith in the meaningfulness and rationality of a quest for a humane society.