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## Elements of a Theory of Human Rights

### I. THE NEED FOR A THEORY

Few concepts are as frequently invoked in contemporary political discussions as human rights. There is something deeply attractive in the idea that every person anywhere in the world, irrespective of citizenship or territorial legislation, has some basic rights, which others should respect. The moral appeal of human rights has been used for a variety of purposes, from resisting torture and arbitrary incarceration to demanding the end of hunger and of medical neglect.<sup>1</sup>

At the same time, the central idea of human rights as something that people have, and have even without any specific legislation, is seen by many as foundationally dubious and lacking in cogency. A recurrent question is, Where do these rights come from? It is not usually disputed that the invoking of human rights can be politically powerful. Rather, the worries relate to what is taken to be the “softness” (some would say “mushiness”) of the conceptual grounding of human rights. Many philosophers and legal theorists see the rhetoric of human rights as just

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1. See *International Human Rights in Context: Law, Politics and Morals*, ed. Henry J. Steiner and Philip Alston (New York: Oxford University Press, 2000); Richard Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (New York: Routledge, 2000); Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed. (Ithaca: Cornell University Press, 2003). See also Micheline R. Ishay, *The Human Rights Reader: Major Political Writings, Essays, Speeches, and Documents from the Bible to the Present* (New York: Routledge, 1997).

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loose talk—perhaps kindly and well meaning forms of locution—but loose talk nevertheless.

The contrast between the widespread use of the idea of human rights and the intellectual skepticism about its conceptual soundness is not new. The U.S. Declaration of Independence, in 1776, took it to be “self-evident” that everyone is “endowed by their Creator with certain inalienable rights,” and thirteen years later, the French declaration of “the rights of man” asserted that “men are born and remain free and equal in rights.” But it did not take Jeremy Bentham long, in his *Anarchical Fallacies* written during 1791 and 1792 (aimed against the French “rights of man”), to propose the total dismissal of all such claims. Bentham insisted that “natural rights is simple nonsense: natural and imprescriptible rights (an American phrase), rhetorical nonsense, nonsense upon stilts.”<sup>2</sup> That suspicion remains very alive today, and despite persistent use of the idea of human rights in practical affairs, there are many who see the idea of human rights as no more than “bawling upon paper,” to use another of Bentham’s barbed portrayals of natural right claims.

The dismissal of human rights is often comprehensive and is aimed against any belief in the existence of rights that people can have unconditionally, simply by virtue of their humanity (rather than having them contingently, on the basis of specific qualifications, such as citizenship or legal entitlements). Some critics, however, propose a discriminating rejection: they accept the general idea of human rights but exclude, from the acceptable list, specific classes of proposed rights, in particular the so-called economic and social rights, or welfare rights. These rights, which are sometimes referred to as second generation rights, such as a common entitlement to subsistence or to medical care, have mostly been added relatively recently to earlier enunciations of human rights, thereby vastly expanding the claimed domain of human rights.<sup>3</sup> These

2. Jeremy Bentham, *Anarchical Fallacies; Being an Examination of the Declaration of Rights Issued during the French Revolution* (1792); republished in *The Works of Jeremy Bentham*, vol. II, ed. J. Bowring (Edinburgh: William Tait, 1843), p. 501.

3. See Ivan Hare, “Social Rights as Foundational Human Rights,” in *Social and Labour Rights in Global Context*, ed. Bob Hepple (Cambridge: Cambridge University Press, 2002), and William F. Felice, *The Global New Deal: Economic and Social Human Rights in World Politics* (Lanham: Rowman & Littlefield, 2003). See also Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge, Mass.: Harvard University Press, 1990), and Thomas W. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (London: Polity Press, 2002).

additions have certainly taken the contemporary literature on human rights well beyond the eighteenth-century declarations that concentrated on a narrower class of “rights of man,” including such demands as personal liberty and political freedom. These newer inclusions have been subjected to more specialized skepticism, with the critics focusing on their feasibility problems and their dependence on specific social institutions that may or may not exist.<sup>4</sup>

Human rights activists are often quite impatient with such critiques. The invoking of human rights tends to come mostly from those who are concerned with changing the world rather than interpreting it (to use a classic distinction made famous, oddly enough, by that overarching theorist, Karl Marx). It is not hard to understand their unwillingness to spend time trying to provide conceptual justification, given the great urgency to respond to terrible deprivations around the world. This proactive stance has had its practical rewards, since it has allowed immediate use of the colossal appeal of the idea of human rights to confront intense oppression or great misery, without having to wait for the theoretical air to clear. However, the conceptual doubts must also be satisfactorily addressed, if the idea of human rights is to command reasoned loyalty and to establish a secure intellectual standing. It is critically important to see the relationship between the force and appeal of human rights, on the one hand, and their reasoned justification and scrutinized use, on the other.

There is, thus, need for some theory and also for some defense of any proposed theory. The object of this article is to do just that, and to consider, in that context, the justification of the general idea of human rights and also of the includability of economic and social rights within the broad class of human rights. For such a theory to be viable it is necessary to clarify what kind of a claim is made by a declaration of human rights, and how such a claim can be defended, and furthermore how the diverse criticisms of the coherence, cogency and legitimacy of human

4. The reasoning behind such rejection has been powerfully presented by Maurice Cranston, “Are There Any Human Rights?” *Daedalus* (1983): 1–17, and Onora O’Neill, *Towards Justice and Virtue* (Cambridge: Cambridge University Press, 1996). See also the critique of Michael Ignatieff, supporting some claims to human rights while strongly disputing others, in *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2001).

rights (including economic and social rights) can be adequately addressed. That is the aim of this article.

However, before going into this investigation, I should make a clarificatory point. The rhetoric of human rights is sometimes applied to particular legislations inspired by the idea of human rights. There is clearly no great difficulty in seeing the obvious judicial status of these already legalized entitlements. No matter what they are called (“human rights laws” or any other appellation), they stand shoulder to shoulder with other established legislations. The present inquiry on the foundations and cogency of human rights does not have any direct bearing on the obvious *legal* status of these “human rights laws,” once they have been properly legislated. As far as these laws are concerned, the relevance, if any, of this study would lie, rather, in the *motivation* that leads to the enacting of such laws, which builds on the pre-legislative standing of these claims.

Indeed, a great many acts of legislation and legal conventions (such as the “European Convention for the Protection of Human Rights and Fundamental Freedoms”) have been clearly inspired by a belief in some pre-existing rights of all human beings. This applies even to the adoption of the U.S. Constitution, including the Bill of Rights, linked to the normative vision of the U.S. Declaration of Independence (as was noted earlier). The difficult questions regarding the status and standing of human rights arise in the domain of ideas, before such legalization occurs. We also have to examine whether legislation is the pre-eminent, or even a necessary, route through which human rights can be pursued.

## II. QUESTIONS TO BE ANSWERED

A theory of human rights must address the following questions in particular:

- (1) What kind of a statement does a declaration of human rights make?
- (2) What makes human rights important?
- (3) What duties and obligations do human rights generate?
- (4) Through what forms of actions can human rights be promoted, and in particular whether legislation must be the principal, or even a necessary, means of implementation of human rights?

(5) Can economic and social rights (the so-called second generation rights) be reasonably included among human rights?

(6) Last but not least, how can proposals of human rights be defended or challenged, and how should their claim to a universal status be assessed, especially in a world with much cultural variation and widely diverse practice?

These questions are addressed sequentially in what follows. However, since this is not a detective story, I am perhaps allowed to give away a sketch of the proposed answers, with the hope that this might help in following this long and not entirely uncomplicated article (even though there is some risk of oversimplification involved in any summary formulation).

(1) Human rights can be seen as primarily ethical demands. They are not principally “legal,” “proto-legal” or “ideal-legal” commands. Even though human rights can, and often do, inspire legislation, this is a further fact, rather than a constitutive characteristic of human rights.

(2) The importance of human rights relates to the significance of the freedoms that form the subject matter of these rights. Both the opportunity aspect and the process aspect of freedoms can figure in human rights. To qualify as the basis of human rights, the freedoms to be defended or advanced must satisfy some “threshold conditions” of (i) special importance and (ii) social influenceability.

(3) Human rights generate reasons for action for agents who are in a position to help in the promoting or safeguarding of the underlying freedoms. The induced obligations primarily involve the duty to give reasonable consideration to the reasons for action and their practical implications, taking into account the relevant parameters of the individual case. The reasons for action can support both “perfect” obligations as well as “imperfect” ones, which are less precisely characterized. Even though they differ in content, imperfect obligations are correlative with human rights in much the same way as perfect obligations are. In particular, the acceptance of imperfect obligations goes beyond volunteered charity or elective virtues.

(4) The implementation of human rights can go well beyond legislation, and a theory of human rights cannot be sensibly confined within the juridical model in which it is frequently incarcerated. For example, public recognition and agitation (including the monitoring of violations)

can be part of the obligations—often imperfect—generated by the acknowledgment of human rights. Also, some recognized human rights are not ideally legislated, but are better promoted through other means, including public discussion, appraisal and advocacy (a basic point that would have come as no surprise to Mary Wollstonecraft, whose *A Vindication of the Rights of Woman: with Strictures on Political and Moral Subjects* was published in 1792).

(5) Human rights can include significant and influenceable economic and social freedoms. If they cannot be realized because of inadequate institutionalization, then, to work for institutional expansion or reform can be a part of the obligations generated by the recognition of these rights. The current unrealizability of any accepted human right, which can be promoted through institutional or political change, does not, by itself, convert that claim into a *non-right*.

(6) The universality of human rights relates to the idea of survivability in unobstructed discussion—open to participation by persons across national boundaries. Partisanship is avoided not so much by taking either a *conjunction*, or an *intersection*, of the views respectively held by dominant voices in different societies across the world (including very repressive ones), but through an *interactive* process, in particular by examining what would survive in public discussion, given a reasonably free flow of information and uncurbed opportunity to discuss differing points of view. Adam Smith's insistence that ethical scrutiny requires examining moral beliefs from, inter alia, "a certain distance" has a direct bearing on the connection of human rights to global public reasoning.

### III. HUMAN RIGHTS: ETHICS AND LAW

What kind of an assertion does a declaration of human rights make? I would submit that proclamations of human rights are to be seen as articulations of ethical demands. They are, in this respect, comparable with pronouncements in utilitarian ethics, even though their respective substantive contents are, obviously, very different. Like other ethical claims that demand acceptance, there is an implicit presumption in making pronouncements on human rights that the underlying ethical claims will survive open and informed scrutiny. Indeed, the invoking of such an

interactive process of critical scrutiny, open to information (including that about other societies) as well as to arguments coming from far as well as near, is a central feature of the theory of human rights proposed here. It differs both (i) from trying to justify the ethics of human rights in terms of shared—and already established—universal values (the uncomplicated “non-partisan” view), and (ii) from abdicating any claim of adherence to universal values (and in this sense, eschewing any claim to being “non-partisan”) in favor of a particular political conception that is suitable to the contemporary world.<sup>5</sup>

These issues, which relate to the foundational discipline of ethical critique, will be examined later, in Section IX, in response to question (6). But the point to note for the moment, in answer to the first question, is that pronouncements of human rights are quintessentially ethical articulations, and they are *not*, in particular, putative legal claims, despite considerable confusion on this point, generated not least by Jeremy Bentham, the obsessive slayer of what he took to be legal pretensions. (I shall return later in this section to the nature of the misapprehension involved.)

A pronouncement of human rights includes an assertion of the importance of the corresponding freedoms—the freedoms that are identified and privileged in the formulation of the rights in question—and is indeed motivated by that importance. For example, the human right of not being tortured springs from the importance of freedom from torture for all. But it includes, furthermore, an affirmation of the need for others to consider what they can reasonably do to secure the freedom from torture for any person. For a would-be torturer, the demand is obviously quite straightforward, to wit, to refrain and desist. The demand takes the clear form of what Immanuel Kant called a perfect obligation.<sup>6</sup> However, for others too (that is, those other than the would-be torturers) there are responsibilities, even though they are less specific and come in the general form of “imperfect obligations” (to invoke another Kantian

5. There are different variants of these two contrasting positions, and also other alternatives that differ from both, which are helpfully discussed and distinguished in Charles Beitz, “Human Rights as a Common Concern,” *American Political Science Review* 95 (June 2001): 269–82.

6. Immanuel Kant, *Critique of Practical Reason* (1788), trans. L. W. Beck (New York: Bobbs-Merrill, 1956).

concept).<sup>7</sup> The perfectly specified demand not to torture anyone is supplemented by the more general, and less exactly specified, requirement to consider the ways and means through which torture can be prevented and then to decide what one should, thus, reasonably do. The relations between human rights, freedoms, and obligations will be further investigated in Sections IV through VI.

Even though recognitions of human rights (with their associated claims and obligations) are ethical affirmations, they need not, by themselves, deliver a complete blueprint for evaluative assessment. An agreement on human rights does involve a firm commitment, to wit, to give reasonable consideration to the duties that follow from that ethical endorsement. But even with agreement on these affirmations, there can still be serious debates, particularly in the case of imperfect obligations, on (i) the ways in which the attention that is owed to human rights should be best paid, (ii) how the different types of human rights should be weighed against each other and their respective demands integrated together, (iii) how the claims of human rights should be consolidated with other evaluative concerns that may also deserve ethical attention, and so on.<sup>8</sup> A theory of human rights can leave room for further discussions, disputations and arguments. The approach of open public reasoning, which is central to the understanding of human rights as proposed here, can definitively settle some disputes about coverage and content (including the identification of some clearly sustainable rights and others that would be hard to sustain), but may have to leave others, at least tentatively, unsettled.<sup>9</sup> The admissibility of a

7. I have discussed, in an earlier paper, the relevance of the Kantian distinction between “perfect” and “imperfect” obligations even for a largely consequentialist framework. “Consequential Evaluation and Practical Reason,” *Journal of Philosophy* 97 (2000): 477–502.

8. Some of the central issues are discussed by John Mackie, “Can There Be a Rights-based Moral Theory?” *Studies in Ethical Theory: Midwest Studies in Philosophy* 3, ed. Peter A. French, et al. (Morris : University of Minnesota, 1978). Reprinted in *Theories of Rights*, ed. Jeremy Waldron (Oxford: Oxford University Press, 1984), pp. 168–81.

9. This applies not only to the persistence of interpersonal disagreements, but also to specific areas of unresolved disputes within one person’s own reasoned assessment. An adequate theory of rationality has to make room for such “incompleteness” of assessment. The general issue of admissibility of incompleteness is discussed in my *Collective Choice and Social Welfare* (San Francisco: Holden-Day, 1970; republished, Amsterdam: North-Holland, 1979); “Maximization and the Act of Choice,” *Econometrica* 65 (1997): 745–80,

domain of continued dispute is no embarrassment to a theory of human rights.<sup>10</sup>

In practical applications of human rights, such debates are, of course, quite common and entirely customary, particularly among human rights activists. What is being argued here is that the possibility of such debates—without losing the basic recognition of the importance of human rights—is not just a feature of what can be called human rights *practice*, they are actually part of the general *discipline* of human rights including the underlying theory (rather than being an embarrassment to that discipline). An acknowledgment of the necessity to pay ethical attention to human rights, far from obliterating the need for such deliberation, actually invites it. A theory of human rights can, therefore, allow considerable internal variations, without losing the commonality of the agreed principle of attaching substantial importance to human rights (and to the corresponding freedoms and obligations) and of being committed to considering seriously how that importance should be appropriately reflected.

Variability of this kind is not only not an embarrassment, it tends to be standardly present in all general theories of substantive ethics. Indeed, a similar diversity can be found within utility-centered ethics, even though this feature of that large ethical discipline often receives little or no recognition. In the case of utility-based reasoning, variations can arise not only from the different ways in which utilities can be interpreted (as *pleasures*, fulfillment of *desires*, or realization of *choices*),<sup>11</sup> nor only from the acknowledged heterogeneity of utilities themselves (well

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reprinted in *Rationality and Freedom* (Cambridge, Mass.: Harvard University Press, 2002); and also “Incompleteness and Reasoned Choice,” *Synthese* (forthcoming 2004). See also Isaac Levi, *Hard Choices: Decision Making under Unresolved Conflict* (Cambridge: Cambridge University Press, 1986), and Hilary Putnam, “Über die Rationalität von Präferenzen,” *Allgemeine Zeitschrift für Philosophie* 21 (1996): 204–28, English version, “On the Rationality of Preferences,” in his *The Collapse of the Fact / Value Dichotomy and Other Essays* (Cambridge, Mass.: Harvard University Press, 2002).

10. Also, as Jeremy Waldron has argued, disagreement about rights “is a sign—the best possible sign in modern circumstances—that people *take rights seriously*.” See *Law and Disagreement* (Oxford: Oxford University Press, 2001), p. 311.

11. See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (London: Payne, 1789; republished, Oxford: Clarendon Press); Henry Sidgwick, *The Method of Ethics* (London: Macmillan, 1874); A. C. Pigou, *The Economics of Welfare* (London: MacMillan, 1920); Frank P. Ramsey, *Foundations: Essays in Philosophy, Logic, Mathematics*

recognized by both Aristotle and John Stuart Mill).<sup>12</sup> They can also arise from the diversity of ways in which utilities can be used, whether by mere *addition*, or by *multiplication* (after suitable normalization), or through the *addition of concave transformations* of utility functions, all of which have been proposed and pursued, within the discipline of utility-based evaluation.<sup>13</sup> Further, the discipline of interpersonal comparison of utilities may itself allow alternative procedures of quantification of utilities and go comfortably with accommodating permissible variations within specified classes of “partial comparability.”<sup>14</sup> The existence of different ways of making use of utility-based reasoning and alternative utilitarian procedures does not invalidate or even undermine the general approach of utility-centered ethics. And, similarly, the ethics of human rights is not nullified or thwarted by internal variations that it allows and incorporates.

Thus, the analogy between articulations of human rights and utilitarian pronouncements has considerable perspicacity, even though the great founder of modern utilitarianism, Jeremy Bentham, managed to miss that connection altogether in his classic hatchet job on natural rights in general and on the “rights of man” in particular. Bentham took

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*and Economics* (London: Routledge, 1978); Richard M. Hare, *Freedom and Reason* (Oxford: Clarendon Press, 1963); J.C.B. Gosling, *Pleasure and Desire* (Oxford: Clarendon Press, 1969); Derek Parfit, *Reasons and Persons* (Oxford: Clarendon Press, 1984); R. E. Goodin, “Laundering Preferences,” in *The Foundations of Social Choice Theory*, ed. Jon Elster and Aanund Hylland (Cambridge: Cambridge University Press, 1986), pp. 75–101; James Griffin, *Well-being* (Oxford: Clarendon Press, 1986); John Broome, *Weighing Goods* (Oxford: Blackwell, 1991); among many other contributions.

12. See Aristotle, *The Nicomachean Ethics*, trans. David Ross, rev. ed. (Oxford: Clarendon Press, 1980), and John Stuart Mill, *Utilitarianism* (London, 1861; republished London: Collins/Fontana, 1962). I have discussed the issues involved in “Plural Utility,” *Proceedings of the Aristotelian Society* 81 (1980–81): 193–215.

13. See John F. Nash, “The Bargaining Problem,” *Econometrica* 18 (1950): 155–62; John C. Harsanyi, “Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility,” *Journal of Political Economy* 63 (1955): 309–21; James A. Mirrlees, “An Exploration of the Theory of Optimum Income Taxation,” *Review of Economic Studies* 38 (1971): 175–208.

14. These issues are discussed in Amartya Sen, “Interpersonal Aggregation and Partial Comparability,” *Econometrica* 38 (1970): 393–409, and *Choice, Welfare and Measurement* (Oxford: Blackwell, 1982; republished, Cambridge, Mass.: Harvard University Press, 1997); Charles Blackorby, “Degrees of Cardinality and Aggregate Partial Orderings,” *Econometrica* 43 (1975): 845–52; Ben J. Fine, “A Note on ‘Interpersonal Aggregation and Partial Comparability,’” *Econometrica* 43 (1975): 169–72; *Interpersonal Comparisons of Well-beings*, ed. Jon Elster and John Roemer (Cambridge: Cambridge University Press, 1991).

the appropriate comparison to be that between the legal significance, respectively of: (1) declarations of human rights, and (2) actually legislated rights. Not surprisingly, he found the former to be essentially lacking in legal status in the way the latter, obviously enough, would have. Bentham's dismissal of human rights came, thus, with amazingly swiftness.

*Right*, the substantive *right*, is the child of law; from *real* laws come *real* rights; but from *imaginary* laws, from "law of nature" [can come only] "*imaginary* rights."<sup>15</sup>

It is easy to see that Bentham's rejection of the idea of natural "rights of man" depends substantially on the rhetoric of privileged use of the term of "rights," seeing it in its specifically legal interpretation. However, insofar as human rights are meant to be significant ethical claims, the pointer to the fact that they do not by themselves have legal or institutional force is obvious enough, but also quite irrelevant to the discipline of human rights.<sup>16</sup> The appropriate comparison is, surely, between:

- (1) a utility-based ethics (championed by Bentham himself), which sees intrinsic ethical importance in utilities but none in human rights or human freedoms (any role that the latter can have in the utilitarian system is, thus, entirely instrumental), and
- (2) an ethics that makes room for the fundamental significance of human rights (as the advocates of "rights of man" did), linked with a diagnosis of the basic importance of human freedoms and the obligations generated by that diagnosis.<sup>17</sup>

15. Jeremy Bentham, *Anarchical Fallacies*, in *Collected Works*, vol. II, p. 523.

16. Accepting a general contrast between the respective categories of ethical assertions and legal pronouncements does not, of course, deny the possibility that ethical views may contribute to the interpretation and, thus, the substantive content of laws. The recognition of that possibility may go against a strictly positivist theory of law (on which see Ronald Dworkin, *A Matter of Principle* [Cambridge, Mass.: Harvard University Press, 1985]). This understanding does not, however, obliterate the motivational and substantive distinction between primarily ethical claims and principally legal proclamations.

17. The importance of rights and freedoms can, of course, be combined with incorporating the significance of utility or well-being in ethical reasoning, but if such a "combined" system is to be pursued, some consistency problems will have to be faced in devising a coherent and integrated social choice procedure; on this see Amartya Sen, "The

Just as utilitarian ethical reasoning takes the form of insisting that the utilities of the relevant persons must be taken into account in deciding on what should be done, the human rights approach demands that the acknowledged human rights must be given ethical recognition (the form and the informational basis of that recognition will be discussed further in the next two sections). The relevant comparison lies in this contrast, *not* in differentiating the legal force of legislated rights (for which Bentham's phrase "the child of law" is an appropriate description) from the absence of any legal standing generated by an ethical recognition of rights (without any legislation or legal reinterpretation). Indeed, even as Bentham was busy in 1791 and 1792 writing down his dismissal of "rights of man," the reach and range of ethical interpretations of rights were being powerfully explored by Thomas Paine's *Rights of Man*, and by Mary Wollstonecraft's *A Vindication of the Rights of Woman: with Strictures on Political and Moral Subjects*, both published during the period 1791 to 1792 (though neither seemed to arouse Bentham's curiosity).<sup>18</sup>

An ethical understanding of human rights goes not only against seeing them as legal demands (and against taking them to be, as in Bentham's view, legal *pretensions*), but also differs from a law-centered approach to human rights that sees them as if they are basically *grounds* for law, almost "laws in waiting." Ethical and legal rights do, of course, have motivational connections. In a rightly celebrated article "Are There Any Natural Rights?" Herbert Hart has argued that people "speak of their moral rights mainly when advocating their incorporation in a legal system." He added that the concept of a right "belongs to that branch of morality which is specifically concerned to determine when one person's freedom may be limited by another's and so to determine what actions may appropriately be made the subject of coercive legal

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Impossibility of a Paretian Liberal," *Journal of Political Economy* 78 (1970): 152–57, and *Rationality and Freedom* (Cambridge, Mass.: Harvard University Press, 2002), essays 12–14 and 20–22. See also Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), and the special number of *Analyse & Kritik* 18 (1996) on "the Liberal Paradox," particularly Kotaro Suzumura, "Welfare, Rights and Social Choice Procedures," pp. 20–37.

18. Thomas Paine, *The Rights of Man: Being an Answer to Mr. Burke's Attack on the French Revolution* (1791); second part, *Combining Principle and Practice* (1792); republished, *The Rights of Man* (London: Dent, and New York: Dutton, 1906). Mary Wollstonecraft, *A Vindication of the Rights of Woman* (1792); republished, *The Rights of Woman* (London: Dent, and New York: Dutton, 1929).

rules.”<sup>19</sup> Whereas Bentham saw rights as a “child of law,” Hart’s view takes the form, in effect, of seeing some natural rights as *parents* of law: they motivate and inspire specific legislations. Although Hart does not make any reference whatever to human rights in his article, the reasoning about the role of natural rights as inspiration for legislation can be seen to apply to the concept of human rights as well.<sup>20</sup>

There can, in fact, be little doubt that the idea of moral rights can serve, and has often served in practice, as the basis of new legislation. It has frequently been utilized in this way, and this is indeed an important *use* of human rights. That, for example, is precisely the way the diagnosis of inalienable rights was invoked in the U.S. Declaration of Independence and reflected subsequently in the Bill of Rights, a route that has been well-trodden in the legislative history of many countries in the world.<sup>21</sup> Providing inspiration for legislation is certainly one way in which the ethical force of human rights has been constructively deployed.

However, to acknowledge that such a connection exists is not the same as taking the relevance of human rights to lie *exclusively* in determining what should “appropriately be made the subject of coercive legal rules.” It is important to see that the idea of human rights can be, and is, actually used in several other ways as well. Indeed, if human rights are seen as powerful moral claims, indeed as “moral rights” (to use Hart’s phrase), then surely we have reason for some catholicity in considering different avenues for promoting these claims. (This question will be pursued in Section VII.) The ways and means of advancing and implementing human rights need not, thus, be confined only to making new laws (even though sometimes legislation may indeed turn out to be the right way to proceed). For example, monitoring and other activist support, provided by such organizations as Human Rights Watch or

19. H. L. A. Hart, “Are There Any Natural Rights?” *The Philosophical Review* 64 (1955), reprinted in *Theories of Rights*, ed. Jeremy Waldron (Oxford: Oxford University Press, 1984), p. 79.

20. On this see Maurice Cranston, “Are There Any Human Rights?”

21. The framers of the Universal Declaration of Human Rights in 1948 hoped, in fact, that this declaration would serve as a template for bills of rights in different nations, with national courts taking a lead in their enforcement. See Mary Ann Glendon’s wonderful account of that remarkable history, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001).

Amnesty International or OXFAM or Médecins Sans Frontières, can themselves help to advance the effective reach of acknowledged human rights.<sup>22</sup> In many contexts, legislation may not, in fact, be involved.

#### IV. RIGHTS, FREEDOMS AND SOCIAL INFLUENCE

Why are human rights important? Since declarations of human rights are ethical affirmations of the need to pay appropriate attention to the significance of freedoms incorporated in the formulation of human rights (as was discussed in the last section), an appropriate starting point must be the importance of freedoms of human beings to be so recognized. Note that while rights involve claims (specifically, claims on others who are in a position to make a difference), freedoms, in contrast, are primarily descriptive characteristics of the conditions of persons.<sup>23</sup>

By starting from the importance of freedoms as the appropriate human condition on which to concentrate, rather than on utilities (as Bentham did), we get a motivating reason not only for celebrating our own rights and liberties, but also for our taking an interest in the significant freedoms of others, not just in their pleasures and desire-fulfillment (as under utilitarianism). Bentham's insistence on choosing utility as the basis of ethical evaluation can be contrasted with the reasons for focusing instead on freedoms. I have discussed elsewhere why those reasons are weighty and how the focus on freedoms can avoid some of the major pitfalls of concentrating only on utility in the form of pleasure or desire fulfillment. For example, the utilitarian calculus can suffer from valuational distortions resulting from the neglect of substantive deprivation of those who are chronically disadvantaged but who learn, by force of circumstances, to take pleasure in small mercies and

22. Since the Gilbert Murray Lecture given at Oxford in November 2002, in which this article originated, was arranged by OXFAM (Gilbert Murray was one of OXFAM's founders), it was also a suitable occasion to discuss this broader connection of human rights with a plurality of ways of pursuing them.

23. However, the ethical force of freedoms can help to generate claims on others. On different aspects of the "entanglements" between descriptive and evaluative concerns, see Hilary Putnam, *The Collapse of the Fact / Value Dichotomy and Other Essays* (Cambridge, Mass.: Harvard University Press, 2002). See also William Van Orman Quine, "Two Dogmas, Of Empiricism," in his *From a Logical Point of View* (Cambridge, Mass.: Harvard University Press, 1961), pp. 20–46, and Vivian Walsh, "Philosophy and Economics," in *The New Palgrave: A Dictionary of Economics*, ed. John Eatwell, Murray Milgate and Peter Newman (London: Macmillan, 1987), pp. 861–69.

get reconciled to cutting down their desires to “realistic proportions” (thereby appearing to be not particularly deprived in the special metric of pleasures or desire-fulfillment).<sup>24</sup>

Before going into the difficult issue of duties related to rights, which will be examined in Section VI, some exploration of the connection between rights and freedoms is necessary, to which I devote the rest of this section as well as Section V. Freedoms can vary in importance and also in terms of the extent to which they can be influenced by social help. For a freedom to count as a part of the evaluative system of human rights, it clearly must be important enough to justify requiring that others should be ready to pay substantial attention to decide what they can reasonably do to advance it. It also has to satisfy a condition of plausibility that others could make a material difference through taking such an interest.

There have to be some “threshold conditions” of (i) importance and (ii) social influenceability for a freedom to figure within the interpersonal and interactive spectrum of human rights. Insofar as the idea of human rights demands public discussion and engagement, which I noted earlier and will further discuss in Section IX, the agreement that would be sought is not only on whether some specific freedom of a particular person has any ethical importance whatsoever (that condition can be easy to satisfy), but also whether its significance and its influenceability meet the threshold conditions for inclusion among the human rights on which the society should focus.

The threshold conditions may prevent, for a variety of reasons, particular freedoms from being an appropriate subject matter of human rights. To illustrate, it is not hard to argue that some importance should be attached to all four of the following freedoms:

- (1) a person’s freedom not to be assaulted;
- (2) her freedom to receive medical care for a serious health problem;
- (3) her freedom not to be called up regularly by her neighbors whom she detests;
- (4) her freedom to achieve tranquillity.

24. The evaluative framework of substantive freedoms can provide a more robust appreciation of a person’s inability to achieve what they have reason to value. On this see my “Well-being, Agency and Freedom: The Dewey Lectures 1984,” *Journal of Philosophy* 82 (1985): 169–220; *Inequality Reexamined*; and *Development as Freedom* (New York: Knopf, 1999).

However, even though all four may be important in one way or another, it is not altogether implausible to argue that the first (freedom not to be assaulted) is a good subject matter for a human right, and so is the second (freedom to receive necessary medical care),<sup>25</sup> but the third (freedom not to be called up by detested neighbors) is not, in general, important enough to cross the threshold of social significance to qualify as a human right. Also, the fourth, while quite possibly extremely important for the person, is too inward-looking—and too hard to be influenced by others—to be a good subject matter for human rights. The exclusion of a “right to tranquillity” relates not to any skepticism about the possible importance of tranquillity and the significance of a person’s being free to achieve it, but to the difficulty of guaranteeing it through social help.

There can be fruitful debates on the thresholds and their use, and in particular on whether a specific case of freedom meets the threshold conditions or not. As was briefly discussed in Sections II and III (and will be further examined in Section IX), such discussions are part of the discipline of human rights. The analyses of thresholds, related both to the seriousness and to the social influenceability of particular freedoms, cannot but have a significant place in the discipline of human rights.

## V. PROCESSES, OPPORTUNITIES AND CAPABILITIES

I turn now to a closer scrutiny of the contents of freedom and its multiple features. I have argued elsewhere that “opportunity” and “process” are two aspects of freedom that require distinction, with the importance of each deserving specific acknowledgment.<sup>26</sup> An example can help to bring out the *separate* (though not necessarily independent) relevance of both *substantive opportunities* and *freedom of processes*.

Consider an adult person, let us call her Rima, who decides that she would like to go out in the evening. To take care of some considerations

25. However, in the second case (that is, the entitlement to necessary medical care), we shall have to discuss whether this type of a “welfare right,” or more generally, economic and social rights, can be seen as human rights, and this examination will be taken up in Section VIII.

26. See *Rationality and Freedom* (Cambridge, Mass.: Harvard University Press, 2002), particularly my Arrow Lectures (“Freedom and Social Choice”) included there: essays 20 through 22.

that are not central to the issues involved here (but which could make the discussion more complex), it is assumed that there are no particular safety risks involved in her going out, and that she has critically reflected on this decision and judged that going out would be the sensible, indeed the ideal, thing to do. Now consider the threat of a violation of this freedom if some authoritarian guardians of society decide that she must not go out in the evening (“it is most unseemly”), and if they force her, in one way or another, to stay indoors. To see that there are two distinct issues involved in this one violation, consider an alternative case in which the authoritarian bosses decide that she must—absolutely *must*—go out (“you are expelled for the evening: just obey”). There is clearly a violation of freedom here even though Rima is being forced to do exactly what she would have chosen to do anyway, and this is readily seen when we compare the two alternatives “choosing freely to go out” and “being forced to go out.” The latter involves an immediate violation of the *process aspect* of Rima’s freedom, since an action is being forced on her (even though it is an action she would have freely chosen also).

The opportunity aspect may also be affected, since a plausible accounting of opportunities can include having options and it can *inter alia* include valuing free choice. However, the violation of the opportunity aspect would be more substantial and manifest if she were not only forced to do something chosen by another, but in fact, forced to do something she herself would not otherwise choose to do. The comparison between “being forced to go out” (when she would have gone out anyway, if free) and, say, “being forced to polish the shoes of others at home” (not her favorite activity) brings out this contrast, which is primarily one of the opportunity aspect, rather than the process aspect. In being forced to stay home and polish the shoes of others, Rima loses freedom in two different ways, related respectively to (1) being forced with no freedom of choice, and (2) being obliged in particular to do something she would not choose to do.<sup>27</sup>

Both processes and opportunities can figure in human rights. A denial of “due process” in being, say, imprisoned without a proper trial can be the subject matter of human rights (no matter what the outcome of the

27. More complex features of the opportunity aspect and the process aspect of freedoms are also discussed in my Arrow Lectures (“Freedom and Social Choice”) in *Rationality and Freedom*, essays 20 through 22.

fair trial might be), and so can be the denial of the opportunity of medical treatment, or the opportunity of living without the danger of being assaulted (going beyond the exact process through which these opportunities are made real).

For the opportunity aspect of freedom, the idea of “capability” (that is, the opportunity to achieve valuable combinations of human functionings: what a person is able to do or be) can typically provide a helpful approach.<sup>28</sup> It allows us to distinguish appropriately between (1) what she values *doing or being*, and (2) the *means* she has to achieve what she values. By shifting attention, in particular, towards the former, the capability-based approach resists an overconcentration on means (such as incomes and primary goods) that can be found in some theories of justice (for example, in the Rawlsian Difference Principle). The capability approach can capture the fact that two persons can have very different substantial opportunities even when they have exactly the same set of means: for example, a disabled person can do far less than an able-bodied person can, with exactly the same income and other “primary goods.” The disabled person cannot, thus, be judged to be equally advantaged—with the same substantive opportunities—as the person without any physical handicap but with the same set of means (such as income and wealth and other primary goods). The capability perspective concentrates on what actual opportunities a person has, not the means over which she has command. More particularly, the capability perspective allows us to take into account the parametric variability in the relation between the means, on the one hand, and the actual opportunities, on the other.<sup>29</sup>

28. On the concept of capability, see my “Equality of What?” in *Tanner Lectures on Human Values*, vol. I, ed. Sterling M. McMurrin (Cambridge: Cambridge University Press, and Salt Lake City: University of Utah Press, 1980), pp. 197–220, and *Commodities and Capabilities* (Amsterdam: North-Holland, 1985), and also, jointly edited with Martha Nussbaum, *The Quality of Life* (Oxford: Clarendon Press, 1993). The approach is powerfully developed and applied by Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000). See also the related theories of substantial opportunities developed by Richard Arneson, “Equality and Equality of Opportunity for Welfare,” *Philosophical Studies* 56 (1989): 77–112; G. A. Cohen, “On the Currency of Egalitarian Justice,” *Ethics* 99 (1989): 906–44; and John E. Roemer, *Theories of Distributive Justice* (Cambridge, Mass.: Harvard University Press, 1996), among others contributors.

29. The importance of this variability for a theory of justice is discussed in my “Justice: Means versus Freedoms,” *Philosophy & Public Affairs* 19 (1990): 111–21. Differences in the capability to function can arise even with the same set of personal means (such as primary

The capability perspective can also help in bringing out the need for transparent valuational scrutiny of individual advantages and adversities, since the different *functionings* have to be assessed and weighted in relation to each other, and the opportunities of having different *combinations* of functionings also have to be evaluated.<sup>30</sup> The richness of the capability perspective broadly interpreted, thus, includes its insistence on the need for open valuational scrutiny for making social judgments, and in this sense, it fits in well with the importance of public reasoning.<sup>31</sup> This openness of transparent valuation contrasts with burying the evaluative exercise in some mechanical, and valuationally opaque, convention (for example, by taking market-evaluated income to be the invariable standard of individual advantage, thereby giving implicit normative priority to institutionally determined market prices).

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goods) for a variety of reasons, such as (1) *personal heterogeneities* (related, for example, to disability, or proneness to illness), (2) *environmental diversities* (such as climatic conditions, or varying threats from epidemic diseases or from local crime), (3) *variations in non-personal resources* (such as the nature of public health care, or social cohesion), or (4) *different relative positions vis-à-vis others* (well illustrated by Adam Smith's discussion, in the *Wealth of Nations*, of the fact that the clothing and other resources one needs "to appear in public without shame" depends on what other people standardly wear and how they typically live in that society).

30. The need for an explicit valuational exercise is, thus, seen as an advantage, rather than a limitation of the capability approach. For arguments in different directions on this issue, see Charles R. Beitz, "Amartya Sen's Resources, Values and Development," *Economics and Philosophy* 2 (1986): 282–90; Bernard Williams, "The Standard of Living: Interests and Capabilities," in Amartya Sen et al., *The Standard of Living*, ed. Geoffrey Hawthorn (Cambridge: Cambridge University Press, 1987), pp. 94–102; Amartya Sen, *Inequality Reexamined*, and "Capability and Well-being," in *The Quality of Life*, ed. Nussbaum and Sen, pp. 31–53.

31. The capability approach can allow considerable difference in application. For a somewhat different perspective, see Martha Nussbaum, "Nature, Function, and Capability: Aristotle on Political Distribution," *Oxford Studies in Ancient Philosophy*, Supplementary Volume (1988), pp. 145–54, and *Women and Human Development: The Capabilities Approach*. Nussbaum has discussed the importance of identifying an overarching "list of capabilities," with given priorities, in a more Aristotelian way. My own reluctance to join the search for such a canonical list arises partly from my difficulty in seeing how the exact lists and weights would be chosen without appropriate specification of the context of their use (which could vary), but also from a disinclination to accept any substantive diminution of the domain of public reasoning. The framework of capabilities, as I see it, helps to clarify and illuminate the *subject matter* of public reasoning, which can involve epistemic issues (including claims of objective importance) as well as ethical and political ones. It does not—and cannot—displace the need for public reasoning.

There has, however, been some serious criticism of describing these substantive opportunities—to live one kind of a life or another—as “freedoms,” and it has been argued that this makes the idea of freedom too inclusive. For example, in her illuminating and sympathetic critique of my *Development as Freedom*, Susan Okin has presented arguments to suggest that I tend “to overextend the concept of freedom.”<sup>32</sup> She argues: “It is hard to conceive of some human functionings, or the fulfillment of some needs and wants, such as good health and nourishment, as freedoms without stretching the term until it seems to refer to everything that is of central value to human beings” (p. 292).

There is indeed scope for argument on how broadly the concept of freedom should be used. But the particular example considered in Okin’s counterargument is, I think, based on a misinterpretation of the idea of freedom underlying the concept of capability. It has not been suggested at all that a functioning (for example, being in good health or being well-nourished) should be seen as freedom of any kind. Rather, freedom, in the form of capability, concentrates on the *opportunity* to achieve combinations of functionings (including, inter alia, the opportunity to be well-nourished or in good health, as in this particular case): the person is *free to use* this opportunity or not. A capability reflects the alternative combinations of functionings over which the person has freedom of effective choice.

It is, therefore, not being suggested at all that *being* well-nourished or in good health is to be seen as a freedom in itself.<sup>33</sup> Capability, as a kind of freedom, refers to the extent to which the person is *able to choose* particular combinations of functionings (including, inter alia, such things as being well-nourished), no matter what the person actually decides to choose. Mahatma Gandhi famously did not use that opportunity to be well-fed when he chose to fast, as a protest against the

32. Susan Okin, “Poverty, Well-being and Gender: What Counts, Who’s Heard?” *Philosophy & Public Affairs* 31 (2003): 280–316. On related issues see also Joshua Cohen, “Review of Sen’s *Inequality Reexamined*,” *Journal of Philosophy* 92 (1994): 275–88, esp. 278–80, and G. A. Cohen, “Review: Amartya Sen’s Unequal World,” *The New Left Review* (1995): 117–29, esp. 120–25.

33. I have discussed this issue in “Well-being, Agency and Freedom: The Dewey Lectures 1984.” It is also important to examine how the concept of “freedom” links with a broadly defined idea of “interest,” which underlies Joseph Raz’s reasoned diagnosis: “Rights ground requirement for action in the interest of other beings.” See *The Morality of Freedom* (Oxford: Clarendon Press, 1986), p. 180.

policies of the British Raj in India. In terms of the actual functioning of being well-nourished, the fasting Gandhi did not differ from a starving famine victim, but the freedoms and opportunities they respectively had were quite different. The *freedom to have* any particular thing can be distinguished from actually *having* that thing. What a person is free to have, not just what he or she actually has, is relevant, I have argued, to a theory of justice.<sup>34</sup> A similar point can be made about the relevance of substantive freedoms in a theory of human rights.

The fact that many of the terrible deprivations in the world seem to arise from a lack of freedom to avoid those deprivations (rather than from choice, including choosing to be “indolent”: a classic issue in the historical literature on poverty) is an important motivational reason to emphasize the role of freedom. This led Marx to argue passionately for the need to replace “the domination of circumstances and chance over individuals by the domination of individuals over chance and circumstances.”<sup>35</sup> The general idea of freedom, with its many distinct components, seems particularly relevant to normative social choice theory, in general, and to the theory of justice, in particular. The argument here is that it can also figure powerfully in the normative foundations of human rights.

To take a different type of example, consider the freedom of new immigrants to West Europe or North America to conserve the ancestral cultural customs and life-styles from their countries of origin. This complex subject cannot be adequately assessed without distinguishing between *doing* something and being *free* to do that thing. A strong argument can be constructed in favor of an immigrant’s having the freedom to retain at least parts of her ancestral life-style, but this must not be seen as an argument in favor of her pursuing her ancestral life-style whether she chooses to do this or not. The central issue, in this argument, is the *freedom* to choose how she should live, including the *opportunity* to

34. G. A. Cohen has presented arguments in favor of focusing on achieved functionings—related to his concept of “midfare”—rather than on capability; see his “On the Currency of Egalitarian Justice,” and “Equality of What? On Welfare, Resources and Capabilities,” in *The Quality of Life*, ed. Nussbaum and Sen, pp. 125–41. See also Richard Arneson, “Equality and Equality of Opportunity for Welfare,” *Philosophical Studies* 56 (1989): 77–112.

35. Karl Marx, *The German Ideology*, with Friedrich Engels, in *Karl Marx: Selected Writings*, ed. David McLellan (Oxford: Oxford University Press, 1977), p. 190.

pursue ancestral customs, and it cannot be turned into an argument for her specifically pursuing those customs in particular, irrespective of the alternatives she has and the choices she would make.<sup>36</sup> The importance of capability, reflecting opportunities, is central to this distinction.<sup>37</sup>

I have been concentrating on what the capability perspective can do for a theory of justice or of human rights in the immediately preceding discussion, but I now to turn to what it *cannot* do. Although the idea of capability has considerable merit in the assessment of the opportunity aspect of freedom, it cannot possibly deal adequately with the process aspect of freedom, since capabilities are characteristics of individual advantages, and they fall short of telling us enough about the fairness or equity of the processes involved, or about the freedom of citizens to invoke and utilize procedures that are equitable.

Let me illustrate the contrast of perspectives with a somewhat harsh example. It is now fairly well established that given symmetric care, women tend to live longer than men. If one were concerned only with capabilities (and nothing else), and in particular with equality of the capability to live long, it would have been possible to construct an argument for giving men more medical attention than women to counteract the natural masculine handicap. But giving women less medical attention than men for the same health problems would clearly violate an important requirement of process equity, and it seems reasonable to argue, in cases of this kind, that demands of equity in process freedom could sensibly override a single-minded concentration on the opportunity aspect of freedom (and the requirements of capability equality in particular). While it is important to emphasize the relevance of the capability perspective in judging people's substantive opportunities (particu-

36. Though this is not the occasion to provide a critical assessment of "multiculturalism" as a social policy, it is perhaps worth noting here that there is a big difference between (1) valuing multiculturalism because of the way, and to the extent that, it enhances the freedoms of the people involved to choose to live as they would like (and have reason to like); and (2) valuing cultural diversity *per se*, which focuses on the descriptive characteristics of a societal pattern, rather than on the freedoms of the people involved.

37. Capability is also central to the relationship between multiculturalism and gender equity. The important question that Susan Okin asks in her joint book, *Is Multiculturalism Bad for Women?*, ed. J. Cohen, M. Howard and M. C. Nussbaum (Princeton, N.J.: Princeton University Press, 1999), turns, to a great extent, on possible tensions between multiculturalism and the freedom of individual persons (in this case, women) within a community to freely consider and choose how they would live.

larly in comparison with alternative approaches that focus on incomes, or primary goods, or resources), that point does not, in any way, go against seeing the simultaneous relevance also of the process aspect of freedom in a theory of human rights, or, for that matter, in a theory of justice.

Related to this issue, I should perhaps take the opportunity here to correct a misinterpretation of the place of the capability perspective in a theory of justice. A theory of justice, or more generally an adequate theory of normative collective choice, has to be alive both to the fairness of the processes involved and to the equity and efficiency of the substantive opportunities that people can enjoy.<sup>38</sup> In dealing with the latter, capability can indeed provide a very helpful perspective, in comparison with, say, the Rawlsian concentration on “primary goods.” But capability can hardly serve as the sole informational basis for the other considerations, related to processes, that must also be accommodated in normative collective choice theory.

Perhaps the point can be seen most easily by considering the different components of Rawls’s theory of justice. His “first principle” of justice involves the priority of liberty, and the first part of the “second principle” involves process fairness, through demanding that “positions and offices be open to all.” Even though the concerns that lead Rawls to these particular formulations can be dealt with in different ways, not only in the way that Rawls himself addresses them, the force and cogency of these Rawlsian concerns can neither be ignored nor be adequately addressed through relying only the informational base of capabilities.<sup>39</sup>

In contrast, capability comes into its own in dealing with the *remainder* of the second principle, viz. “the Difference Principle” (with its con-

38. The plurality of concerns, involving processes as well as opportunities, which is inescapably involved in normative collective choice (including theories of justice), is discussed in my *Collective Choice and Social Welfare* (1970) and “Well-being, Agency and Freedom: The Dewey Lectures 1984,” *Journal of Philosophy* 82 (1985). Since I have seen it asserted that I propound a “capability-based theory of justice,” I should make it absolutely clear that this could be true only in the rather limited sense of naming something according to a *principal* part of it (comparable with, say, using England for Great Britain, or Holland for the Netherlands).

39. See my *Collective Choice and Social Welfare*, particularly chapters 5 through 9, and “Well-being, Agency and Freedom: The Dewey Lectures 1984.” The issues involved are more fully addressed in my forthcoming book *Freedom and Justice*, to be published by Harvard University Press.

centration on “primary goods”).<sup>40</sup> The territory that Rawls reserved for the accounting of primary goods, as used in his Difference Principle, would indeed be, I argue, better served by the capability perspective. That does not, however, obliterate in any way the relevance of the rest of the territory of justice, in which process considerations, including liberty and procedural equity, figure. The same plurality of informational base links with the multiplicity of considerations that can be invoked in a theory of human rights. Capabilities and the opportunity aspect of freedom, important as they are, have to be supplemented by considerations of fair processes and the lack of violation of the individual’s right to invoke and utilize them.

#### VI. DUTIES, REASONABLE CONSIDERATION AND IMPERFECT OBLIGATIONS

I turn now from rights to correlative duties. We can, again, proceed from the importance of freedoms and their different aspects. Since freedoms are important, people have reason to ask what they should do to help each other in defending or promoting their respective freedoms. Since violation, or non-realization, of the freedoms underlying significant rights are, in this evaluative system, bad things to happen, even others who are not themselves responsible for causing the violation have a good reason to consider what they should do to help.<sup>41</sup> Nevertheless, the move from a *reason* for action to help another person, which is easy to see in a consequence-sensitive ethical system, to an actual *duty* to give

40. It was indeed in the context of identifying an inadequacy in the Rawlsian focus on primary goods in the Difference Principle, for judging distributional equity, that the use of the capability perspective was proposed in my 1979 Tanner Lectures, published as “Equality of What?” (1980). In judging distributional equity, the capability perspective also has, I believe, advantages over the concentration on what Ronald Dworkin calls “resources” in “What Is Equality? Part 2: Equality of Resources,” *Philosophy & Public Affairs* 10 (1981): 185–243. Dworkin has recently argued that on one interpretation, there is no substantial difference between my focus on capability and his focus on resources, while on another interpretation, he is just right and I am plain wrong (*Sovereign Virtue: The Theory and Practice of Equality* [Cambridge, Mass.: Harvard University Press, 2000]). I resist the temptation, which I must confess is fairly strong, to join that debate in this article.

41. The rationale and reach of a consequence-sensitive framework for this type of ethical reasoning have been investigated in my essays “Rights and Agency,” *Philosophy & Public Affairs* 11 (1982): 3–39, “Positional Objectivity,” *Philosophy & Public Affairs* 22 (1993): 126–45, and “Consequential Evaluation and Practical Reason,” *Journal of Philosophy* 97 (2000).

reasonable consideration to undertaking such an action might appear, at least at first sight, to be a rather gigantic jump.

However, that sense of distance is largely illusory. The difference would indeed involve an immense escalation if the duty in question were not one of giving reasonable consideration to a possible action, but an absolute obligation to undertake that action, no matter what other values one has and what other commitments one has reason to consider. But that way of seeing one's duties—as compulsory action—is not only at some distance from the acknowledgment of reasons for action, but it also lacks cogency, and even internal coherence. There are many fine deeds for each of which a reason for action exists, but it would typically be impossible to carry out the totality of all those deeds. There is a need for the assessment of priorities and for discrimination in the way the obligation to give reasonable consideration may be followed up by sensible choices of action.

To accept that one has a duty to give reasonable consideration to many different types of actions is not an agreement to tie oneself up in hopeless knots. And it is particularly important in the present context to emphasize the converse: the determination not to get into a pandemonium of practical reasoning is not a ground for denying that one does have a duty to give reasonable consideration to what one can sensibly do for the rights, and the underlying significant and influenceable freedoms, of others. The demands of reasonable consideration would vary with a great many parameters that may be relevant to a person's practical reasoning.<sup>42</sup> Even though the acknowledgment that certain freedoms qualify as human rights already reflects an assessment of their general importance and their possible influenceability (discussed in Section IV), a person has to go beyond these pervasive features into more specific circumstances in giving reasonable consideration to what he or she, in particular, should do in a specific case.

The person has to judge, for example, how important the freedoms and rights are in the case in question compared with other claims on the person's possible actions (involving other rights and freedoms, but also

42. Making adequate room for parametric variations is a general feature of rational assessment, and not a characteristic only of ethical reasoning in particular. I have discussed this issue in *Rationality and Freedom* (Cambridge, Mass.: Harvard University Press, 2002), essays 1 through 5.

altogether different concerns that a person may, *inter alia*, sensibly have). Furthermore, the person has to judge the extent to which he or she can make a difference in this case, either acting alone or in conjunction with others. It will be relevant also to consider what others can be expected to do, and the appropriateness of how the required supportive actions may be shared among possible agents. A great many parametric considerations of these and other kinds will inescapably figure in the reasoned evaluation of what a person should do, even after the need to undertake such an evaluation has been fully accepted. Also, since detailed reflection on what one should do is itself time consuming (and cannot even be actually undertaken for all the ills of the world), the duty of reasonable consideration will not, in a great many cases, translate into an obligation to take on an elaborate scrutiny—only a willingness to do just that, when it seems relevant and appropriate.

The recognition of obligations in relation to the rights and freedoms of all human beings need not, thus, be translated into preposterously demanding commands. And yet, despite the parametric variability of the reach and force of reasonable consideration, the requirement to give such consideration is not by any means vacuous. The basic general obligation is that one must be willing to *consider* seriously what one should reasonably do, taking note of the relevant parameters of the cases involved. The necessity to ask that question (rather than proceeding on the assumption that we owe nothing to others, unless we have actually harmed them) can be the beginning of a more comprehensive line of ethical reasoning.<sup>43</sup> The territory of human rights firmly belongs there. The reasoning cannot, however, end there. Given one's limited abilities and reach, and the need for priorities involving different types of obligations as well as the demands of other moral concerns, there are serious exercises of practical reasoning to be undertaken, in which one's various obligations (including "imperfect obligations") must figure, in an explicit or implicit form.

The recognition of human rights is not an insistence that everyone everywhere rises to help prevent every violation of every human right no matter where it occurs. It is, rather, an acknowledgment that if one is in a plausible position to do something effective in preventing the violation

43. The centrality of that general question is powerfully discussed by Thomas Scanlon, *What We Owe to Each Other* (Cambridge, Mass.: Harvard University Press, 1998).

of such a right, then one does have an obligation to consider doing just that. It is still possible that other obligations or non-obligational concerns may overwhelm the reason for the particular action in question, but that reason cannot be simply brushed away as being “none of one’s business.” Loosely specified obligations must not be confused with no obligations at all. Rather, they belong, as was mentioned earlier, to the important category of duties that Immanuel Kant called “imperfect obligations” (and to which he attached great importance).

It is to be noted that, in this understanding, imperfect obligations are ethical requirements that stretch beyond the fully delineated duties, “the perfect obligations,” that specific persons may have to perform particular acts. They involve the demand that serious consideration be given by anyone in a position to provide reasonable help to the person whose human right is threatened. These “imperfect obligations” firmly correlate, in the same way as fully specified “perfect obligations” do, with the recognition of rights. The difference lies in the nature and form of the obligations, not in the general correspondence between rights and obligations, which apply in the same way to imperfect as well as perfect obligations.

It may be useful to illustrate, with a concrete example, the distinction between different kinds of obligations that, despite their differences in content, relate in a similar way to human rights. Consider a real-life case that occurred in Queens, New York, in 1964, when a woman, Kitty Genovese, was fatally assaulted in full view of many others watching the event from their apartments, who did nothing to help her. It is plausible to argue that three terrible things happened here, which are distinct but interrelated:

- (1) the woman’s freedom—and right—not to be assaulted and killed was violated (this is clearly the principal nastiness in this case);
- (2) the murderer violated the immunity that anyone should have against assault and killing (a violation of a “perfect obligation”); and
- (3) the others who did nothing whatever to help the victim also transgressed their general—and “imperfect”—obligation to seriously consider providing the help which they could reasonably be expected to provide.

These distinct failings bring out a complex pattern of rights–duties correspondence in a structured ethics, which can help to explicate the

evaluative framework of human rights, which yields imperfect as well as perfect obligations.<sup>44</sup>

The presumed precision of legal rights is often contrasted with inescapable ambiguities in the ethical claims of human rights. This contrast, however, is not in itself a great embarrassment for ethical claims, including those of imperfect obligations, since a framework of normative reasoning can sensibly allow variations that cannot be easily accommodated in fully specified legal requirements. As Aristotle remarked in the *Nicomachean Ethics*, we have “to look for precision in each class of things just so far as the nature of the subject admits.”<sup>45</sup>

As it happens, however, in the laws of some countries, there is even a legal demand, which can hardly have extreme precision, for providing reasonable help to third parties. For example, in France there is provision for “criminal liability of omissions” in the failure to provide reasonable help to others suffering from particular types of transgressions. Not surprisingly, ambiguities in the application of such laws have proved to be quite large and have been the subject of considerable legal discussion in recent years.<sup>46</sup> The ambiguity of duties of this type, whether in ethics or in law, would be difficult to escape if third-party obligations of others in general are given some room, and this cannot be avoided for an adequate theory of human rights.

## VII. RECOGNITION, AGITATION AND LEGISLATION

While the preceding analysis has been concerned with giving reasonable consideration to actions in general that people can undertake in defending or advancing the human rights of others, it is the legislation of human rights, along with their institutionalization, that has tended to

44. In this analysis I do not go into the distinction between *agent-specific* and *agent-neutral* moral evaluations. The present line of characterization can be further extended through making room for “position specific” assessments, in ways that I have tried to investigate in “Rights and Agency,” and “Positional Objectivity.”

45. The admissibility of inescapable ambiguities within a framework of rational assessment is discussed in my “Internal Consistency of Choice,” *Econometrica* 61 (1993): 495–521, and “Maximization and the Act of Choice,” *Econometrica* 65 (1997): 745–79, both reprinted in *Rationality and Freedom*. See also *Inequality Reexamined*, pp. 46–49, 131–35.

46. See, for example, Andrew Ashworth and Eva Steiner, “Criminal Omissions and Public Duties: The French Experience,” *Legal Studies* 10 (1990): 153–64; Glanville Williams, “Criminal Omissions: The Conventional View,” *Law Quarterly Review* 107 (1991): 86–98.

receive the lion's share of attention in the theoretical literature in this field. It is this legislative outlook that has also been firmly incorporated in much of the institutional understanding of human rights. However, while legislation is an important domain of public action, there are other ways and means which are also important and often effective in advancing the cause of recognized human rights.

First, under what can be called the "recognition route" (to be distinguished from the "legislative route"), there is acknowledgment but not necessarily any legalization or institutional enforcement of a class of claims that are seen as fundamental human rights.<sup>47</sup> The Universal Declaration of Human Rights, sponsored by the United Nations in 1948, which was perhaps the most important move that promoted global activities on human rights in the last century, falls solidly into this category (even though, as was discussed earlier, the framers of the Declaration had also hoped that it would lead to specific bills of rights in different countries). Subsequently, there has been a sequence of other international declarations, often through the United Nations, giving recognition, rather than a legal and coercive status, to various general demands, for example the "Declaration on the Right to Development," signed in 1986.<sup>48</sup> This approach is motivated by the idea that the ethical force of human rights is made more powerful in practice through giving it social recognition and an acknowledged status, even when no enforcement is instituted.

A second line of advance goes beyond recognition to active agitation. There can be organized advocacy urging compliance with certain basic claims of all human beings that are seen as human rights, and there can

47. As Charles Beitz has pointed out, human rights play "the role of a moral touchstone—a standard of assessment and criticism for domestic institutions, a standard of aspiration for their reform, and increasingly a standard of evaluation for the policies and practices of international economic and political organizations." See "Human Rights as a Common Concern," p. 269.

48. Analyses of the content of the right to development have been presented in United Nations Development Programme, *Human Development Report 2000* (New York: United Nations, 2000); S. R. Osmani, "Human Rights to Food, Health, and Education," mimeographed, UNDP and the University of Ulster, 2000; Arjun Sengupta, "Development Policy and the Right to Development," *Frontline*, February 7–March 2, 2001; Arjun Sengupta, Asborn Eide, Stephen Marks, and Bård Anders Andreassen, "The Right to Development and Human Rights in Development," presented at the Nobel Symposium in Oslo on Right to Development, October 2003.

also be monitoring of violations of these rights and attempts to generate effective social pressure. The global NGOs have increasingly been involved in advancing human rights, through public discussion and support, on the one hand, and publicizing and criticizing violations, on the other. These efforts have come not only from dedicated human rights organizations, such as Human Rights Watch and Amnesty International, but also from broader organizations, such as OXFAM, Médecins Sans Frontières, the Red Cross, Save the Children, and Action Aid. The rights invoked in this “agitation route” may or may not have any legal status in the country in question, but advocacy and support are not necessarily rendered useless by the absence of legal backing.<sup>49</sup> Furthermore, even when some identified human rights have legal status, good *enforcement* of the relevant legislation may also call for public activism, which is to be distinguished from the process of *legislation* itself.

The third approach is, of course, that of “legislation.” As was discussed in Section III, even though the ethics of human rights must not be seen merely as “parents” of “human rights laws,” it is certainly the case that many such legislations have been encouraged or inspired by considerations of human rights. Many actual laws have been enacted by individual states, or by associations of states, which gave legal force to certain rights seen as basic human rights. For example, the European Court of Human Rights, established in 1950 following the European Convention, can consider cases brought by individuals from the signatory states against violations of human rights. This has been supplemented by the Human Rights Act of 1998, aimed at incorporating the main provisions of the European Convention into domestic law, with an overseeing role of the European Court to see “just satisfaction” of these provisions in

49. It is also worth noting that even when the agents involved in activist promotion of human rights do not have any special legal status, they can still make a difference to political, social and administrative practice through the use of existing laws, combined with seeking public disclosures and critical debates. For example, unlike the Indian and South African Human Rights Commissions, which are recognized in the respective national laws, the Pakistan Human Rights Commission is basically just an NGO, and yet under the visionary and courageous leadership of Asma Jahangir, I. A. Rehman, and others, it has been remarkably effective in identifying and resisting violations of human rights, and in defending vulnerable persons, including religious minorities and ill-treated women. For a good discussion of some of these supportive activities, see *The State of Human Rights, 2001* (Lahore: Human Rights Commission of Pakistan, 2002).

domestic judgments. Many other examples can be given from different parts of the world. The “legislative route” has had much active use.

There is an interesting question about the appropriate *domain* of the legislative route. It would be a mistake, I would argue, to presume in general that if a human right is important, then it must be ideal to legislate it into a precisely specified legal right. For example, recognizing and defending a wife’s moral right to be consulted in family decisions, even in a traditionally sexist society, may well be extremely important, and can plausibly satisfy the threshold conditions needed to qualify as a human right.<sup>50</sup> And yet the advocates of this human right, who emphasize, correctly, its far-reaching ethical and political relevance, can quite possibly agree that it is not sensible to make this human right into, in Herbert Hart’s language, a “coercive legal rule” (perhaps with the result that a husband would be taken in custody if he were to fail to consult his wife). The necessary change would have to be brought about in other ways. Because of the importance of communication, advocacy, exposure and informed public discussion, human rights can have influence *without* necessarily depending on coercive legislation.

Similarly, the moral or political entitlement, which can easily be seen as a human right, of a somewhat slow speaker not to be snubbed in an open public meeting by a rudely articulate sprinter may well be important both for the self-respect of the leisurely speaker and for public good, but it is not likely to be a good subject for punitive legislation. The protection of that human right would have to be sought elsewhere. The effectiveness of the human rights perspective does not rest on seeing them invariably as putative proposals for legislation.<sup>51</sup>

#### VIII. ECONOMIC AND SOCIAL RIGHTS

I turn now to criticisms that have been particularly aimed against extending the idea of human rights to include economic and social rights, such as the right not to be hungry, or the right to basic education or to medical attention. Even though these rights did not figure in the

50. The importance and social reach of woman’s participation in family decisions is discussed in my *Development as Freedom*, ch. 8, “Women’s Agency and Social Change.”

51. For an early advocacy of a much broader approach, see Mary Wollstonecraft, *A Vindication of the Rights of Woman: with Strictures on Political and Moral Subjects* (1792).

classic presentations of rights of human beings in, say, the U.S. Declaration of Independence, or French “rights of man,” they are very much a part of the contemporary domain of what Cass Sunstein calls the “rights revolution.”<sup>52</sup> The legitimacy of including these claims within the general class of human rights has been challenged through two specific lines of reproach, which I shall call, respectively, the *institutionalization critique* and the *feasibility critique*.

The institutionalization critique, which is aimed particularly at economic and social rights, relates to the general issue of the exact correspondence between authentic rights and precisely formulated correlate duties. Such a correspondence, it is argued, would exist only when a right is institutionalized. Onora O’Neill has presented this line of criticism with force:

Unfortunately much writing and rhetoric on rights heedlessly proclaims universal rights to goods and services, and in particular “welfare rights,” as well as to other social, economic and cultural rights that are prominent in international Charters and Declarations, without showing what connects each presumed right-holder to some specific obligation-bearer(s), which leaves the content of these supposed rights wholly obscure. . . . Some advocates of universal economic, social and cultural rights go no further than to emphasize that they *can* be institutionalized, which is true. But the point of difference is that they *must* be institutionalized: if they are not there is no right.<sup>53</sup>

In responding to this significant criticism, we have to invoke the understanding, already discussed, that obligations can be both perfect and imperfect. Even the classical “first generational” rights, like freedom from assault, can be seen as yielding imperfect obligations on others, as was illustrated with the example of the case of assault on Kitty Genovese in public view in New York. Depending on institutional possibilities, economic and social rights may similarly call for both perfect and imperfect obligations. There is a large area of fruitful public discussion and possibly effective pressure, concerning what the society and the state, even

52. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State*.

53. Onora O’Neill, *Towards Justice and Virtue*, pp. 131–32. See also her *Bounds of Justice* (Cambridge: Cambridge University Press, 2000).

an impoverished one, can do to prevent violations of certain basic economic or social rights (associated with, say, the prevalence of famines, or chronic undernourishment, or absence of medical care).

Indeed, the supportive activities of social organizations are often aimed precisely at institutional change, and these activities can be seen as part of imperfect obligations that individuals and groups have in a society where basic human rights are violated. Onora O'Neill is right to emphasize the importance of institutions for the realization of "welfare rights" (and even for economic and social rights in general), but the ethical significance of these rights provide good grounds for seeking realization through institutional expansion and reform. This can be helped through a variety of approaches, including demanding and agitating for appropriate legislation, and the supplementation of legal demands by political recognition and social monitoring. To deny the ethical status of these claims would be to ignore the reasoning that motivates these constructive activities.

The *feasibility critique* proceeds from the argument that even with the best of efforts, it may not be feasible to arrange the realization of many of the alleged economic and social rights for all. This would have been only an empirical observation (of some interest of its own), but it is made into an allegedly powerful criticism of the acceptance of these claimed rights on the basis of the presumption, largely undefended, that recognized human rights must, of necessity, be wholly accomplishable. If this presumption were accepted that would have the effect of immediately putting many so-called economic and social rights outside the domain of possible human rights, especially in the poorer societies.

Maurice Cranston puts the argument thus:

The traditional political and civil rights are not difficult to institute. For the most part, they require governments, and other people generally, to leave a man alone. . . . The problems posed by claims to economic and social rights, however, are of another order altogether. How can governments of those parts of Asia, Africa, and South America, where industrialization has hardly begun, be reasonably called upon to provide social security and holidays with pay for millions of people who inhabit those places and multiply so swiftly?<sup>54</sup>

54. Cranston, "Are There Any Human Rights?" p. 13.

In assessing this line of rejection, we have to ask: why should complete feasibility be a condition of cogency of human rights when the objective is to work towards enhancing their actual realization, if necessary through expanding their feasibility? The understanding that some rights are not fully realized, and may not even be fully *realizable* under present circumstances, does not, in itself, entail anything like the conclusion that these are, therefore, not rights at all.<sup>55</sup> Rather, that understanding suggests the need to work towards changing the prevailing circumstances to make the unrealized rights realizable, and ultimately, realized.<sup>56</sup>

It is also worth noting in this context that the question of feasibility is not confined to economic and social rights only; it is a much more widespread problem. Even for liberties and autonomies, to guarantee that a person is “left alone,” which Cranston seems to think is simple to guarantee, has never been particularly easy. That elementary fact, easily seen always, cannot but be rather clearly recognized now, at least since September 11, 2001 (and more recent events). If the current feasibility of guaranteeing complete and comprehensive fulfillment were made into a necessary condition for the cogency of every right, then not only economic and social rights, but also liberties, autonomies and even political rights may well fall far short of cogency.

#### IX. THE REACH OF PUBLIC REASONING

How can we judge the acceptability of claims to human rights and assess the challenges they may face? How would such a disputation—or a defense—proceed? I would argue that like the assessment of other ethical claims, there must be some test of open and informed scrutiny,

55. For this reason, I would argue, it would be a misapplication to invoke the familiar principle “ought implies can” to suggest that claims that are not yet fully realizable cannot be taken to be rights at all. To see the ethical force of some claims is also a demand to consider what one should do to make them realizable, for example through working for the development of new institutions.

56. This corresponds to what Charles Beitz calls the “practical conception” of human rights: “To say something is a human right is to say that social institutions that fail to protect the right are defective” with the implication that “international efforts to aid or promote reform are legitimate and in some cases may be morally required.” (“Human Rights and the Law of Peoples,” in *The Ethics of Assistance: Morality and the Distant Needy* ed. Deen Chatterjee [Cambridge: Cambridge University Press, 2004], p. 210. See also Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* [Princeton: Princeton University Press, 1980; 2nd ed., 1996].)

and it is to such a scrutiny that we have to look in order to proceed to a disavowal or an affirmation. The status of these ethical claims must be dependent ultimately on their survivability in unobstructed discussion.<sup>57</sup> In this sense, the viability of human rights is linked with what John Rawls has called “public reasoning” and its role in “ethical objectivity.”<sup>58</sup>

Indeed, the connection between public reasoning and the formulation and use of human rights is extremely important to understand. Any general plausibility that these ethical claims, or their denials, have is dependent, on this theory, on their survival and flourishing when they encounter unobstructed discussion and scrutiny, along with adequately wide informational availability. The force of a claim for a human right would be seriously undermined if it were possible to show that they are unlikely to survive open public scrutiny. But contrary to a commonly offered reason for skepticism and rejection, the case for human rights cannot be discarded simply by pointing to the fact (even when that is the case) that in politically and socially repressive regimes, which do not allow open public discussion, many of these human rights are not taken seriously at all. Uncurbed critical scrutiny is essential for dismissal as well as for defense. Even as far as use is concerned, the fact that monitoring of violations of human rights and the procedure of “naming and shaming” can be so effective (at least in putting the violators on the defensive) is some indication of the reach of public reasoning when information becomes available and ethical arguments are allowed rather than suppressed.

However, it is important not to confine the domain of public reasoning to a given society only, especially in the case of human rights, in view of the inescapably non-parochial nature of these rights, which are meant to apply to all human beings. This is in contrast with Rawls’s inclination,

57. Even though this requirement has a largely procedural form, the very insistence on open public discussion from which no one is excluded involves an acceptance of equality, which has substantive implications also for the content of the deliberation. On the substantive aspects of deliberative democracy, see Joshua Cohen, “Procedure and Substance in Deliberative Democracy,” in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib (Princeton: Princeton University Press, 1996), pp. 95–119.

58. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), and *Political Liberalism* (New York: Columbia University Press, 1993), esp. pp. 110–13. On related matters, see also Amy Guttmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, Mass.: Harvard University Press, 1996), and *Democracy and Difference*, ed. Seyla Benhabib.

particularly in his later works, to limit such public confrontation within the boundaries of each particular nation (or each “people,” as Rawls calls this regional collectivity), for determining what would be just, at least in domestic affairs.<sup>59</sup> We can demand, on the contrary, that the discussion include, even for domestic justice (if only to avoid parochial prejudices and also to examine a broader range of counterarguments), views also from “a certain distance.” The necessity of this was powerfully identified by Adam Smith:

We can never survey our own sentiments and motives, we can never form any judgment concerning them; unless we remove ourselves, as it were, from our own natural station, and endeavour to view them as at a certain distance from us. But we can do this in no other way than by endeavouring to view them with the eyes of other people, or as other people are likely to view them.<sup>60</sup>

The universalist nature of Adam Smith’s approach raises the question whether distant people can, in fact, provide useful scrutiny of local issues, given what are taken to be “uncrossable” barriers of culture. One of Edmund Burke’s criticisms of the French declaration of the “rights of man” and its universalist spirit was concerned with disputing the acceptability of that notion in other cultures. Burke argued that “the liberties and the restrictions vary with times and circumstances, and admit of infinite modifications, that cannot be settled upon any abstract rule.”<sup>61</sup> The argument that, for this, or some similar, reason, the universality that underlies the notion of human rights is profoundly mistaken can be found in many other writings as well.

59. See particularly John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999). See also Rawls’s formulation of the original position in *Political Liberalism*, p. 12: “I assume that the basic structure is that of a closed society: that is, we are to regard it as self-contained and as having no relations with other societies. . . . That a society is closed is a considerable abstraction, justified only because it enables us to focus on certain main questions free from distracting details.” If my reasoning is right, the Rawlsian restrictions eliminate much more than the influence of “distracting details.”

60. Adam Smith, *The Theory of Moral Sentiments* (1759; rev. ed., 1790; republished, Oxford: Clarendon Press, 1976), III, 1, 2, p. 110. The Smithian perspective on moral reasoning is pursued in my “Open and Closed Impartiality,” *The Journal of Philosophy* 99 (2002): 445–69.

61. Quoted in Steven Lukes, “Five Fables about Human Rights,” in *The Human Rights Reader*, ed. Micheline R. Ishay (London: Routledge, 1997), p. 238.

For example, Rosa Luxemburg, a leading Marxist thinker and political leader in the early twentieth century, invoked a similar line of criticism of what she called the “metaphysical cliché of the type of ‘rights of man’ and ‘rights of the citizen.’”<sup>62</sup> However, a scrutiny of Rosa Luxemburg’s real concerns brings out the remarkable fact that she persistently invoked universalist principles herself, as is quite standard in the Marxist tradition (consider: “from each according to his ability, to each according to his needs”). Rather, Luxemburg was keen on emphasizing that the *substantiation* of these principles must depend on specific circumstances that obtain. Shorn of the rhetoric, there is, in fact, no particular difficulty in using basic universalist principles in general, while taking note of Luxemburg’s pointer to the relevance of local circumstances and regional conditions in appropriately contingent, or parametric, specification of the exact demands of human rights.

However, a belief in uncrossable barriers between the values of different cultures has surfaced and resurfaced repeatedly over the centuries, and they are forcefully articulated today. The claim of magnificent uniqueness, and often of superiority, has sometimes come from critics of “Western values,” varying from champions of regional ethics (well illustrated by the fuss in the 1990s about the peerless excellence of “Asian values”), or religious or cultural separatists (with or without being accompanied by fundamentalism of one kind or another). Sometimes, however, the claim of uniqueness has come from Western particularists. A good example is Samuel Huntington’s insistence that the “West was West long before it was modern,” and his claim that “a sense of individualism and a tradition of individual rights and liberties” are “unique among civilized societies.”<sup>63</sup> Similarly, no less a historian of ideas than Gertrude Himmelfarb has argued that ideas of “justice,” “right,” “reason” and “love of humanity” are “predominantly, perhaps even uniquely, Western values.”<sup>64</sup>

62. Rosa Luxemburg, “The National Question and Autonomy,” *The Human Rights Reader*, p. 291.

63. Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon and Schuster, 1996).

64. Gertrude Himmelfarb, “The Illusions of Cosmopolitanism,” in *For Love of Country: Debating the Limits of Patriotism / Martha Nussbaum with Respondents*, ed. Joshua Cohen (Boston: Beacon Press, 1996), pp. 74–75.

I have discussed these diagnoses elsewhere.<sup>65</sup> Contrary to cultural stereotypes, the histories of different countries in the world have shown considerable variations over time as well as between different traditions within the same country. The championing of open public discussion, tolerating and encouraging different points of view, has a long history in many countries in the world. Indeed, some of the earliest open general meetings aimed specifically at settling disputes between different points of view took place in India in the so-called Buddhist councils, the first of which was held shortly after Gautama Buddha's death twenty-five hundred years ago. The grandest of these councils, the third, occurred under the patronage of Emperor Ashoka in the third century BCE. Ashoka also tried to codify and propagate what must have been among the earliest formulations of rules for public discussion, a kind of ancient version of the nineteenth-century *Robert's Rules of Order*. He demanded, for example, "restraint in regard to speech, so that there should be no extolment of one's own sect or disparagement of other sects on inappropriate occasions, and it should be moderate even in appropriate occasions." Even when engaged in arguing, "other sects should be duly honoured in every way on all occasions."

To consider another historical example, in early seventh-century Japan, the Buddhist Prince Shotoku, who was regent to his mother, Empress Suiko, produced the so-called constitution of seventeen articles, in 604 AD. The constitution insisted, much in the spirit of the *Magna Carta* to be signed six centuries later in 1215 AD: "Decisions on important matters should not be made by one person alone. They should be discussed with many."

When, in the twelfth century, the Jewish philosopher Maimonides had to flee an intolerant Europe to try to safeguard his human right to stick to his own religious beliefs and practice, he sought shelter in Emperor Saladin's Egypt (via Fez and Palestine), and found an honored position in the court of this Muslim emperor. Several hundred years later, when, in Agra, the Moghul emperor of India, Akbar, was arguing, and legislating, on the government's duty to uphold the right to religious

65. See my *Development as Freedom*, ch. 10. Also "Human Rights and Asian Values," *The New Republic*, July 14 and 21, 1997, pp. 33-40; "The Reach of Reason: East and West," *The New York Review of Books*, July 20, 2000, pp. 33-38; "Democracy and Its Global Roots," *The New Republic*, October, 2003, pp. 28-35.

freedom of all citizens, the European Inquisitions were still going on, and Giordano Bruno was burnt at the stake in Rome, in 1600.

In his autobiography, *Long Walk to Freedom*, Nelson Mandela describes how he learned about democracy and individual rights, as a young boy, by seeing the proceedings of the local meetings held in the regent's house in Mqhekezweni:

Everyone who wanted to speak did so. It was democracy in its purest form. There may have been a hierarchy of importance among the speakers, but everyone was heard, chief and subject, warrior and medicine man, shopkeeper and farmer, landowner and laborer.<sup>66</sup>

Not only are the differences on the subject of freedoms and rights that actually exist between different societies often much exaggerated, but also there is, typically, little note taken of substantial variations *within* each local culture—over time and even at a point of time (in particular, right now). What are taken to be “foreign” criticisms often correspond to internal criticisms from non-mainstream groups. If, say, Iranian dissidents are imprisoned by an authoritarian regime precisely because of their heterodoxy, any suggestion that they should be seen as “ambassadors of Western values” rather than as “Iranian dissidents” would only add serious insult to manifest injury.

This issue is particularly important in determining what may be taken to be culturally “partisan” in a world of many cultural differences. Charles Beitz rejects, rightly, the plausibility of seeing the use of human rights as emanating from a “supposedly symmetrical relationship to the conception of political justice or legitimacy to be found in the world's cultures,” and he goes on to seek their justification in terms of “the role they play in international relations.”<sup>67</sup> But how should this “role” be judged in terms of its acceptability, and in what sense should such an evaluation be culturally “partisan”? If the reasoning presented here is right, then we must distinguish between (1) the values that are dominantly favored in a society (no matter how repressive it is), and (2) the values that could be expected to gain wider adherence and support when open discussion is allowed, when information about other

66. Nelson Mandela, *Long Walk to Freedom* (Boston: Little, Brown & Co, 1994), p. 21.

67. Beitz, “Human Rights as a Common Concern,” pp. 279–80.

societies becomes more freely available, and when disagreements with the established views can be expressed and defended without suppression and fear.

Being “non-partisan” requires respecting the participation of people from any corner of the earth, which is not the same thing as accepting the prevailing priorities in existing societies when information is extremely restricted and discussions and disagreements are not permitted. Widespread *acceptability*, which must be distinguished from pre-existing ubiquitous *acceptance*, is an important issue in any social evaluation, even in dealing with the role that human rights play in international relations.

There does, of course, exist considerable variation in the balance of manifest opinions and observed preconceptions in different countries and different societies. These opinions and beliefs often reflect, as Adam Smith noted in a powerfully illuminating analysis, strong influence of existing *practices* in different parts of the world, along with a lack of broader intellectual engagement. The need for open scrutiny, with unrestrained access to information (including that about practices elsewhere in the world and the experiences there), is particularly great because of these connections. Which is precisely why Adam Smith’s insistence on the necessity of viewing actions and practices from a “certain distance” is so important for substantive ethics in general and the understanding of human rights in particular.

In a chapter entitled “On the Influence of Custom and Fashion upon the Sentiments of Moral Approbation and Disapprobation,” Smith illustrated his contention:

... the murder of new-born infants was a practice allowed of in almost all the states of Greece, even among the polite and civilized Athenians; and whenever the circumstances of the parent rendered it inconvenient to bring up the child, to abandon it to hunger, or to wild beasts, was regarded without blame or censure. . . . Uninterrupted custom had by this time so thoroughly authorized the practice, that not only the loose maxims of the world tolerated this barbarous prerogative, but even the doctrine of philosophers, which ought to have been more just and accurate, was led away by the established custom, and upon this, as upon many other occasions, instead of censuring, supported the horrible abuse, by far-fetched considerations of public utility. Aristotle talks of it as of what the magistrates ought upon many

occasions to encourage. Plato is of the same opinion, and, with all that love of mankind which seems to animate all his writings, no where marks this practice with disapprobation.<sup>68</sup>

What are taken to be perfectly “normal” and “sensible” in an insulated society may not be able to survive a broad-based and less limited examination once the parochial gut reactions are replaced by critical scrutiny, including an awareness of variations of practices and norms across the world.<sup>69</sup>

Scrutiny from a distance may have something to offer in the assessment of practices as different from each other as the stoning of adulterous women in Taliban’s Afghanistan and the abounding use of capital punishment (sometimes with mass jubilation) in parts of the United States. This is the kind of issue that made Smith insist that “the eyes of the rest of mankind” must be invoked to understand whether “a punishment appears equitable.”<sup>70</sup> Ultimately, the discipline of critical moral scrutiny requires, among other things, “endeavouring to view [our sentiments and beliefs] with the eyes of other people, or as other people are likely to view them.”<sup>71</sup>

The need for interactions across the borders can be as important in rich societies as they are in poorer ones.<sup>72</sup> The point to note here is not so much whether we are *permitted* to make cross-boundary scrutiny, but that the discipline of critical assessment of moral sentiments, no matter how locally established they are, *demand*s that such scrutiny be undertaken.

## X. A CONCLUDING REMARK

I have tried to present, in this article, the elements of a theory of human rights, which sees them as pronouncements in social ethics, sustainable

68. Adam Smith, *The Theory of Moral Sentiments* (rev. ed., 1790, V.2.15; republished, Oxford: Clarendon Press, 1976), p. 210.

69. I have discussed this issue in “Open and Closed Impartiality,” *Journal of Philosophy* 99 (2002): 445–69.

70. Adam Smith, *Lectures on Jurisprudence*, ed. R. L. Meek, D. D. Raphael and P. G. Stein (Oxford: Clarendon Press, 1978; reprinted, Indianapolis: Liberty Press, 1982), p. 104.

71. Smith, *The Theory of Moral Sentiments*, III, 1, 2, p. 110.

72. The treatment of prisoners held by the United States in the so-called war against terrorism raises important issues of human rights, and the analysis of the prevailing practice can be helped by more wide-ranging public discussion and a fuller understanding of the nature of global concerns on this issue.

by open public reasoning. They may or may not be reflected in a legal framework through, say, specific “human rights legislation,” but there are also other ways of implementing human rights (including public recognition, agitation and monitoring).

Since the main themes developed in this article were specifically noted in Section II, I shall not try to provide a further summary in this concluding section. I should, however, emphasize that the understanding and viability of human rights are, in this perspective, intimately linked with the reach of public discussion, between persons and across borders. The viability and universality of human rights are dependent on their ability to survive open critical scrutiny in public reasoning. The methodology of public scrutiny draws on Rawlsian understanding of “objectivity” in ethics, but the impartiality that is needed cannot be confined within the borders of a nation.

The fact that authoritarian orders are typically quite afraid of uncensored news media and of uncurbed public discussion, which make them resort often enough to suppression (including censorship, intimidation, incarceration, and even execution), provides some indirect evidence that the influence of public reasoning can indeed be quite large. That influence also lies behind the effectiveness of the interactive ways and means, including social recognition, informational monitoring and public agitation, which human rights activists tend to use. There is certainly a need for a fuller understanding of the associative nature of the acceptability of values, and this requires us to go well beyond lazy reliance on the given mores of the dominant social groups in the respective societies.

To conclude, despite their practical preoccupations, human rights activists have reason enough to pay attention to the skepticism that the idea of human rights generates among many legal and political theorists. These doubts have to be—and can be—addressed. But it is also important to note that the conceptual understanding of human rights, in turn, can benefit substantially from considering the reasoning that moves the activists and the range and effectiveness of practical actions they undertake, including recognition, monitoring and agitation, in addition to legislation. Not only is conceptual clarity important for practice, the richness of practice, I have argued, is also critically relevant for understanding the concept and reach of human rights. There is, I must conclude, no great deficit in the balance of trade between theory and practice.