

# INTERNATIONAL LEGAL THEORY



## Human Rights

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# Letter from the Chair

*Fernando Tesón*  
*Florida State University*

The last fifteen years or so have witnessed a true explosion of international legal theory; that is, a blending of traditional legal doctrine with various theoretical disciplines such as philosophy, economics, international relations theory, history, and even literature. This is a welcome development, and not just because readers of this letter are already sympathetic to theory. Current events highlight the continuing need to break from traditional doctrinal structures and incorporate the insights of the theoretical disciplines. No serious reflection on pressing international issues – such as the situation in Iraq, terrorism, globalization, and so forth – can omit reference to moral, political, or economic theory in order to understand central aspects of those events that legal doctrine alone cannot address.

Central among international topics of importance is that of human rights. Few other topics have been abused, politicized, degraded, and even distorted beyond recognition, as the topic of human rights. Some human rights activists seem to believe that only victims of right-wing governments deserve protection; others exactly the opposite. Some make excuses for vile re-

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gimes on account of supposed economic or other accomplishments. Only recently a life long member of Amnesty International privately complained to me about the alarming number of members of that venerable organization who defend the Cuban regime. Others in and out of government, demonize bothersome Middle Eastern regimes while saying nothing about Saudi Arabia. Yet many others manipulate human rights simply to help elect a political candidate (this is particularly egregious in the United States in this electoral year.) Last but not least, human rights have been used to defend protectionism and similar forms of predatory rent-seeking that harm large numbers of people, and the poor in particular. It is instructive to compare the rhetoric of sovereignty with the rhetoric of human rights. The language of sovereignty was turned from its noble original Enlightenment roots (national states as the realization of individual and political freedom) into “the last refuge of scoundrels.” Let us hope that the language of human rights does not meet similar fate.

Against such discouraging backdrop, Professor Rubin has written an erudite and sensible piece that tries to rescue human rights from the conceptual and political morass in which it is submerged and attempts to provide some intellectual order. His investigation into the historical and the philosophical roots of human rights, and his distinction between natural rights and protections against government will not be accepted by everyone, but it deserves

serious consideration. It is also relevant to contempo-

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rary debates about human rights. In this issue we are also fortunate to publish comments from scholars from several parts of the world. The critical comments by Professors Fan, Van Duffel, and Harel and contributions by Professors Lardy and Hoffman challenge Rubin's approach in different ways. We include a reply from Professor Rubin. I will leave of course to the reader to pick the winners and losers in this rich debate. This issue of *International Legal Theory* is an example of the importance of the vitality of robust debate on international legal issues that ASIL President Anne-Marie Slaughter commends in her editorial in the recent ASIL Newsletter. We hope to continue what is already a fine tradition in future issues of *International Legal Theory*.



# *ARTICLE*

## **Rethinking Human Rights**

*Edward L. Rubin*  
*University of Pennsylvania*

The issue of human rights has been at the forefront of the world's political agenda for last few decades at least, and perhaps since the end of World War II.<sup>1</sup> Until the late 1980s, it was overshadowed by the Cold War, and since September 11, 2001, has been overshadowed again, but the centrality of human rights considerations to both these dominant phenomena indicates the issue's continuing significance. The formulation of this issue, however, creates some fairly serious conceptual problems. Nearly everyone seems to agree that the idea of human rights includes such basic protections against government interference as free speech, freedom of religion, the prohibition of slavery, the prohibition of torture, and various limits on criminal prosecution. There is continuing controversy about whether so-called posi-

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<sup>1</sup> This article is partially based on one chapter of Edward Rubin's book, *Onward Past Arthur: Rethinking Politics and Law for the Administrative State*, forthcoming from Princeton University Press. Research for it was supported by the Smith Richardson Foundation.

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tive or affirmative rights, such as the right to subsistence, education, health care and housing belong in the same category, to say nothing of more exotic possibilities such as the right to leisure, or to equal pay for equal work.<sup>2</sup> Another area of controversy involves so-called collective rights, such as a group's rights to its language or culture.<sup>3</sup> Affirmative rights are often described as second generation rights, and collective rights as third generation rights, but what this quasi-biological categorization is supposed to mean is far from clear.

This essay suggests that some of the difficulties that have arisen in formulating the issue of human rights, and understanding exactly what is at stake, arise from the most basic aspect of the concept, that is, the identi-

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<sup>2</sup> See Susan Bandes, "The Negative Constitution: A Critique", 88 *Mich. L. Rev.* 2271 (1990); Isaiah Berlin, *Four Essays on Liberty* (New York: Oxford University Press, 1969), at 118-72; Frank Cross, "The Error of Positive Rights", *UCLA Law. Rev.* 48: 857 (2001); Alan Gewirth, *The Community of Rights* (Chicago: University of Chicago Press, 1996), at 33-38; Stephen Holmes & Cass Sunstein, *The Cost of Rights* (1999), at 39-43; Gerald MacCallum, "Negative and Positive Freedom", *Philosophical Rev.* (1976) 76:312; Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton, N.J.: Princeton University Press, 1980).

<sup>3</sup> See Ronald Garet, "Communitarianism and Existence: The Rights of Groups", 56 *S. Cal. L. Rev.* 1001 (1983); Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford, Eng.: Oxford University Press, 1995); Will Kymlicka, ed., *The Rights of Minority Cultures* (Oxford, Eng.: Oxford University Press (1995); Michael McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism", 4 *Canadian J. L. & Jurisprudence* 217 (1991) Vernon Van Dyke, *Human Rights, Ethnicity and Discrimination* (Westport, Conn., Greenwood Press, 1982); Vernon Van Dyke, "Human Rights and the Rights of Groups", 28 *Am. J. Pol. Sci.* 725 (1974); Jeremy Waldron, "Minority Cultures and the Cosmopolitan Alternative", 25 *U. Mich. J. L. Reform* 751 (1992).

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fication of protections against the government as rights. As stated, everyone agrees that certain types of protections against government lie at the core of the idea, that a theory of human rights that excluded freedom of speech or the prohibition of torture would be entirely unacceptable. But what precisely is the justification for identifying these core protections as rights? The terminology is so well entrenched that the question is rarely asked; rather the enormous scholarly literature on the subject begins with the assumption that rights are what is centrally at issue in such cases. More precisely, much of the literature begins by assuming that the core protections against government are rights, tries to develop a definition of this term, and then argues that the definition either includes or excludes second and third generation claims. But if there is no convincing justification for identifying the core protections, and their subsequent extensions, as rights, then these discussions may produce confusion, rather than clarity. It may be better to rethink the entire concept, and then approach our current controversies from a new perspective.

Part I of this essay discusses the origin of human rights, as a concept, and Part II discusses the origin of those protections against government that now represent the agreed-upon core of human rights. Taken together, they argue that the two concepts evolved separately, and did not merge until the late eighteenth century. This does not prove that protections against government should not be regarded as human rights, but it does open a conceptual space between the two, or, rather, it recaptures the conceptual space that existed when the two ideas developed. Part III then argues that con-

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temporary human rights theories incorporate many of the outmoded elements of natural rights theory, that is, elements of natural rights theory that are no longer persuasive in the contemporary context. This suggests that the conceptual space between natural rights and protections against government is worth maintaining. As a result, Part IV makes use of this conceptual space to suggest an alternative formulation. This alternative does not resolve the current controversies about human rights, but it does suggest a useful way to understand and the real issues that these controversies implicate.

### **I. The Origin of Human Rights**

Although the definition of human rights is a matter of controversy, the concept involves two generally acknowledged elements that will be sufficient for purposes of this discussion. First, human rights must be human, that is, they must be based on considerations common to all human beings, rather than on those specific to individuals or groups.<sup>4</sup> Roger's claim to Blackacre is not a human right, nor is the right of free-born Englishmen to liberty. Thus, human rights cannot be derived from any aspect of human beings other than their mere humanity, the traits that they possess in common. The American Bill of Rights grants protec-

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<sup>4</sup> Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, N.Y.: Cornell University Press, 1989), at 12-21; Louis Henkin, *The Age of Human Rights* (New York: Columbia University Press 1990), at 2-3; Michael Perry, "Is the Idea of Human Rights Ineliminably Religious?" In *Legal Rights* (Austin Sarat & Tomas Kearns, eds.). Ann Arbor, Mich.: University of Michigan Press (1997), at 205.

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tion of some sort to subsidiary governmental institutions, but these are not generally regarded as human rights, and, as Akhil Amar points out, the document has been reinterpreted in more familiar, human-oriented terms, since the Civil War.<sup>5</sup> It might be suggested, without being the slightest bit facetious, that the concept is homologous with that of animal rights. One can base a theory of animal rights on some feature that is inherent to all animals - that they are created by God, or that they are capable of experiencing pain<sup>6</sup>, but not on the usefulness of particular types of animals, or the ability of those with big brown eyes to elicit sentimental sympathy.

Second, human rights must be rights, that is, they must represent some claim or entitlement that can be asserted by the human beings in question. If they lack this structure, then they are better viewed as interests, concerns or attributes. Although human rights share this feature with legal rights, the two concepts are distinct. Legal rights are created by government enactment, and thus constitute the law that citizens are expected to obey, while human rights arise from the essential or non-governmental nature of human beings, and thus constitute the law that is supposed to be obeyed by government officials. There is virtually no controversy about this distinction. St. Thomas Aquinas, Hans Kelsen, and everyone in between them – which is

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<sup>5</sup> Akhil Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven, Conn.: Yale University Press, 1998).

<sup>6</sup> Peter Singer, *Animal Liberation: A New Ethics for Our Treatment of Animals* (New York: Random House, 1975).

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virtually everyone - subscribe to it.

The idea of claims that can be asserted by all human beings owes its origin to the doctrine of natural rights, and was known as natural rights until comparatively recent times. This concept of natural rights seems to have emerged from the interplay of two conceptual frameworks that dominated the medieval era - Christianity and feudalism. They were separate, although related, with their own hierarchies and their own ideologies; the extended struggle which they waged for dominance or independence constitutes a large proportion of medieval history. Feudalism generated the idea of personal rights, claims that a person could assert or entitlements that he possessed. In the absence of a centralized state and an effective system of civil order, these claims and entitlements, instantiated by physical force or litigation, defined a person's position in the world. Christianity then contributed the idea of natural law, and also of a pre-social era of human history when legal rights did not exist and only natural law prevailed. When these themes were combined, they led to the idea that human beings possess natural rights in their pre-social state, rights which stem from their mere identity as human beings and not from any system of positive law.

This idea appears to have acquired its specific contours during the thirteenth and fourteenth century debate over apostolic poverty, a debate initiated by the Franciscan order. St. Francis of Assisi was the child of a wealthy cloth merchant. He grew up reading the chivalric romances and sought to model himself on Sir

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Lancelot.<sup>7</sup> After some notably unsuccessful experiences as a knight, including a year's imprisonment at the hands of Assisi's enemy Perugia, he underwent a religious conversion marked by several dramatic episodes; in the final one, having been accused by his father of stealing cloth and clothes from him to finance the reconstruction of a church, Francis stripped off his own clothes, gave them to his father, and headed off into the forest. Now resolved to model his life on Christ, rather than Lancelot, he began traveling from town to town and preaching to the people. From Christ's injunction to the apostles to "Provide neither gold, nor silver, nor brass in your purses, Nor scrip for your journey"<sup>8</sup> he derived a commitment to live in total poverty, sleeping in caves or churches and receiving food - but never money - by begging or in exchange for work. An inspired preacher, he triggered what we would now call a religious revival throughout much of Italy, and soon was followed by thousands of disciples. Although he always maintained strictly orthodox views, and a complete respect for the Church hierarchy, he displayed a streak of paganism or pantheism; he preached to the birds and wrote prayers to Brother Sun, Sister Moon, and even Sister Death. It was asserted that he received the stigmata from a six-winged Seraph during an ecstatic vision, but that he took pains to con-

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<sup>7</sup> For St. Francis' life, see G.K. Chesterton, *St. Francis of Assisi* (Garden City, N.Y.: Image Books 1957); Father Cuthbert, *Life of St. Francis of Assisi* (London: Longmans 1960); Julien Green, *God's Fool; The Life and Times of St. Francis of Assisi*. (Peter Heinegg, trans.)(San Francisco: Harper & Row 1985); Ray Petry, *Francis of Assisi, Apostle of Poverty* (Durham, N.C.: Duke University Press 1941).

<sup>8</sup> Matthew 10:9-10

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ceal them for the duration of his life.

Pope Innocent III granted approval to St. Francis' order in 1209, and it grew rapidly thereafter.<sup>9</sup> Even during the Saint's lifetime, its organizational needs clashed with its commitment to total poverty; after his death, as the members of the Order became priests and established monasteries, this conflict led to continual debate and several schisms. The compromise, crafted by St. Bonaventure and acknowledged by Pope Nicholas III in 1279, was that the Franciscans could not exercise dominium, or property rights, over material objects, but could make use of them for their own sustenance.

This modified doctrine, though falling short of the Saint's self-abnegation, was not only pragmatic enough to permit the Franciscans to develop extensive monastic institutions, but also spiritual enough to serve as an implicit challenge to the established Church, with its extensive property and lavish wealth. In the 1320s, John XXII, the irascible Avignon Pope, turned against the Franciscans and issued a series of bulls and decretals condemning the entire Order.<sup>10</sup> He argued that any use of material objects amounted to an assertion of property rights –dominium - in these objects; thus Jesus and His

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<sup>9</sup> Kajetan Esser, *Origins of the Franciscan Order* (Aedan Daly & Irina Lynch, trans., Chicago: Franciscan Herald Press, 1970); John R. Moorman, *A History of the Franciscan Order from Its Origins to the Year 1517* (Oxford, Eng.: Clarendon Press, 1968).

<sup>10</sup> See Gordon Leff, *Heresy in the Later Middle Ages: The Relation of Heterodoxy to Dissent c. 1250 - 1450* (Manchester: Manchester University Press), at 51-255

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Apostles, in their use of objects, had asserted property rights in them. Such property rights were natural to human beings, having been granted by God and exercised by Adam in the pre-social condition. Consequently the Franciscan doctrine was heretical, and Pope Nicholas III's recognition of the Order was rescinded.

While Pope John was formulating this position, he summoned Michael of Cesena, the Minister-General of the Franciscans, to Avignon. There, Michael joined several other Franciscans who were already in Avignon defending their opinions, among them William of Ockham. Ockham, one of the towering figures in Western philosophy, had received his training at Oxford, but he had left, or been expelled, because of his unorthodox views before receiving his degree. By the time he was at Avignon, he had become one of the founders of the nominalist school and a sincere believer in the Franciscan position that monks should not own property, with the possible exception of a razor.<sup>11</sup> When Michael, who may not have been as smart as Ockham but was more politically astute, became convinced that there was no hope of prevailing on the Pope by force of argument, he fled from Avignon, taking Ockham with him, and sought refuge at the court of the excommunicated Holy Roman Emperor, Lewis of Bavaria, who was already host to the excommunicated Marsilius of Padua. There,

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<sup>11</sup> Arthur McGrade, *The Political Thought of William of Ockham: Personal and Institutional Principles* (Cambridge, Eng.: Cambridge University Press, 1974), at 7-14.

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William, who was quickly excommunicated as well,<sup>12</sup> wrote a series of political treatises that are regarded, by Georges de Lagarde, Michael Villey and others, as the first theory of natural rights.<sup>13</sup>

On the issue of apostolic poverty, Ockham argued that property rights - rights to control and transfer material objects - were products of human law alone, and not part of people's natural condition. The right to use material objects for one's sustenance, however, was natural, having been granted by God before human society began. Thus, the Franciscan's use of material objects was not a form of property, but an anterior, divinely-granted right.<sup>14</sup> The novelty in this position lies in connecting the division between natural and human law with the concept of rights. Pope John had argued that all property rights were natural to human beings, but this was only because any general legal principle was part of natural law, as St. Thomas had asserted. Ockham claimed that a particular right over material objects was natural, while other rights were created by human law, thus highlighting the distinctively natural character

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<sup>12</sup> William was excommunicated for fleeing Avignon and not for his works, on which Pope John never issued a final determination. Thus, unlike Marsiglio's writings, William's are not necessarily regarded as heretical by the Catholic Church.

<sup>13</sup> See Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge, Eng.: Cambridge University Press, 1979), at 22-24.

<sup>14</sup> William of Ockham, *A Short Discourse on the Tyrannical Government* (John Kilcullen, trans.) (Cambridge, Eng.: Cambridge University Press, 1992), at 88-92; McGrade, *supra* note 11.

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of certain rights as opposed to others.<sup>15</sup> This also established the pastoral, nostalgic character that the doctrine of natural rights, and human rights, would possess for ever after. In distinguishing natural rights from positive, or legal rights, Ockham identified them as existing before the Fall of Man, that is, in the primeval forest, the mystical correlative of the forest to which St. Francis retreated when he stripped off his father's clothes, and where his original hero, Sir Lancelot, encountered many of his wondrous adventures.

Two other themes in Ockham's work contribute to the view that he was the progenitor of natural rights theory; he asserts that government is created by the agreement of people who possess natural liberty, and second, that this natural liberty can be asserted against a tyrannical regime. Human beings are "born free and not subjected to anyone by human law;"<sup>16</sup> political authority is derived from the voluntary agreement of these free people, and its purpose is to serve the people's interests.<sup>17</sup> To be sure, contract theories about the source of royal authority were common in the Middle Ages, and the view that the monarch's purpose was to benefit

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<sup>15</sup> Ockham, *supra* note 14, at 88-92; Arthur McGrade, "Ockham and the Birth of Individual Rights", in Brian Tierney & Peter Linehan, eds., *Authority and Power: Studies on Medieval Law and Government Presented to Walter Ullman on His Seventieth Birthday* (Cambridge, Eng., Cambridge University Press, 1980)

<sup>16</sup> Quoted in Anthony Black, *Political Thought in Europe, 1250-1450* (Cambridge, Eng.: Cambridge University Press, 1992), at 73.

<sup>17</sup> See Philotheus Boehner, "Ockham's Political Ideas", in Philotheus Boehner, *Collected Articles on Ockham* (New York: St. Bonaventure, 1958), at 442.

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the people was widely accepted. But by deriving these principles from natural liberty, Ockham seems to have been adding something new. His general position was that human beings possess an inherent right to use material objects and an inherent liberty that can perhaps be regarded as a right. They then establish by means of human law, systems of property rights and political rights.

If the monarch violates natural law, Ockham proposed that any believing Christian may voice objection and invoke any supplementary authority in support of the objection.<sup>18</sup> Thus, an individual may invoke Papal authority against a tyrannical monarch, or monarchical authority against a heretical Pope, or the authority of learned men against either one or both. It is not difficult to see a certain measure of autobiography in this theory, since Ockham in fact invoked both Emperor Louis's authority and, in his writings, his own authority as a very learned man indeed, against Pope John XXII. It must also be recognized, as Anthony Black points out, that Ockham offers no test beyond self-evident truth for determining when to these appeals should be made.<sup>19</sup> The important point, however, is that Ockham definitively asserts that the individual is entitled to resist unjust authority, that is, authority exercised in violation of natural law. He refers at this juncture to natural law in general, not to the natural rights of use or natural liberty. Nonetheless, these rights are included

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<sup>18</sup> Black, *supra* note 16, at 72-74.

<sup>19</sup> *Id.* at 75-77.

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in the natural law, and so it is a fair implication of Ockham's theory that natural rights can be asserted by individuals against political authorities.<sup>20</sup>

Early Protestant thinkers did not find much use for the doctrine of natural rights. As Quentin Skinner recounts, they viewed political authority as divinely established and, once events began to turn against them, they viewed the right to resist that authority as derived from the same source.<sup>21</sup> But with the increasing secularization of political theory, and the resulting effort to derive both authority and resistance from natural law, the doctrine of natural rights became prominent once more. In particular, it filled an important role in social contract theory, for natural rights, derived from natural law, were the essential possessions of human beings in the pre-social condition.

According to the contract theory of government, people existed in some sort of pre-social or pre-governmental state, and voluntarily joined together to create a government or a society according to agreed-upon rules. In developing this idea, medieval people

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<sup>20</sup> Richard Tuck argues that Ockham's approach did not represent a significant step beyond Pope John's; the real creator of natural rights theory in his view, was Jean de Gerson, Chancellor of the University of Paris in the late fourteenth and early fifteenth centuries. According to Tuck, Gerson asserted that human beings have the power to do what they wish, and thus possess a natural right to liberty. Tuck, *supra* note 13, at 25-29.

<sup>21</sup> Quentin Skinner, *The Foundations of Political Thought*, vol 2: *The Age of Reformation* (Cambridge, Eng.: Cambridge University Press, 1978), at 239-41.

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were of course projecting the norms of their own society, or rather an idealized version of those norms, back onto the hypothesized pre-social world, or state of nature. They further projected the specific feature of their most important agreement, which was the feudal bond, back onto that world. Thus, in the constitutional contract theory of the Middle Ages, natural man was perceived as trading personal loyalty for monarchical protection.<sup>22</sup> Seventeenth century social contract writers preserved the theory's basic reliance upon promise-keeping, which was already out of date; they modernized it, however, by shifting the focus to the formation of society in general, and by altering the specific features of the agreement. As C.B. Macpherson describes, the developing concept of possessive individualism led people to change the model from the feudal bond to a commercial agreement.<sup>23</sup> Thus, contract theory no longer envisioned an act of fealty between a subordinate and a superior, but an exchange of possessions between equal parties.

The result of this change, however, was a conceptual difficulty; if the contract was now being viewed as a quasi-commercial exchange, what did people in the state of nature possess that could be traded? Either they

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<sup>22</sup> Ernst Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton, N.J.: Princeton University Press, 1975), at 193-272; Martyn Thompson, "Locke's Contract in Context", in David Boucher & Paul Kelly, *The Social Contract from Hobbes to Rawls* (London: Routledge, 1994), at 73.

<sup>23</sup> C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford, Eng.: Oxford University Press, 1962), at 46-61.

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had no possessions or, if they did, the whole point of entering the social contract was to protect those possessions, not to relinquish them in a primordial distress sale. What they possessed, of course, were their natural rights, specifically their right to liberty. Thus, the concept of natural rights enabled contract theory to evolve from the fully medieval idea of a personal bond to the partially modern idea of a quasi-commercial exchange by providing natural man with something to exchange.

This conception was common to all seventeenth century social contract thinkers. Their differences, which they debated with such great intensity throughout this period, involved the extent to which human beings relinquished their natural rights when forming a society. According to Hugo Grotius, people could relinquish all their natural rights, including their liberty to resist an unjust monarch. He based this conclusion on the concept of sovereignty, on the idea that individuals can sell themselves into slavery, and on the observation that society's civil order would be shattered if people could decide for themselves when to disobey.<sup>24</sup> In England, John Selden adopted a similar position; the unlimited natural liberty that people initially possessed included the ability to abandon this liberty, and establish an absolutist government with the power of life and death over its subjects.<sup>25</sup> Selden believed that the English people had not entered into such a contract, but only a

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<sup>24</sup> Hugo Grotius, *The Rights of War and Peace* (A.C. Campbell, trans.) (London: M. Walter Dunne, 1901), at 63-70 (I. III. 8-9)

<sup>25</sup> Tuck, *supra* note 13, at 82-100.

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more conditional one that imposed positive obligations on the sovereign. He sided with Parliament during the English Civil War on the ground that the King had violated these obligations. But this was the result of a particular agreement, that is, of positive law, not the result of natural rights that all members of a society necessarily retained.

Hobbes' view was generally the same as Selden's but his general approbation of absolute government was modified by his belief that a few natural rights survived the social contract. He argued that "[t]he right of nature . . . is the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life."<sup>26</sup> Being natural, this right cannot be relinquished: "[a] covenant not to defend my self from force, by force, is always void."<sup>27</sup> By a separate principle of natural law, as distinct from natural right, all men desire peace, he maintained. In the pre-social condition, however, there is no peace; rather there is a "war of every man against every man."<sup>28</sup> Consequently, each man is motivated to form a social contract by agreeing with each other man to relinquish his "right of governing" himself. This is the origin of "that great Leviathan, or rather (to speak more reverently) of that mortal god, to which we owe under the Immortal God, our peace and defense."<sup>29</sup> To form

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<sup>26</sup> Thomas Hobbes, *Leviathan* (Harmondsworth, Eng.: Penguin, 1981), at 189 (Ch. 14) (spelling and capitalization modernized).

<sup>27</sup> *Id.* at 199 (Ch. 14).

<sup>28</sup> *Id.* at 188 (Ch. 14).

<sup>29</sup> *Id.* at 227 (Ch. 17).

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this covenant, and create this mortal god, each man relinquishes the liberty “to do what he would” that he possesses in the state of nature.<sup>30</sup> Henceforth, his only liberties, or freedom from external impediments to action, are those permitted by the state<sup>31</sup>. But he has not relinquished his natural right of self-preservation. That right survives in civil society, despite the comprehensive nature of social contract and Leviathan’s all-embracing authority.<sup>32</sup>

Thus, Hobbes presents a genuine, although severely limited theory that natural rights continue to exist in civil society. He does not ground the right of self-preservation in the social contract itself, that is, he does not argue that the right of self-preservation continues after the social contract because self-preservation is the reason people enter the contract in the first place. The social contract is motivated by a natural law-based inclination to seek peace, not the desire for self-preservation.<sup>33</sup> The right of self-preservation continues after people have traded away their liberties because it is an inalienable natural right; derived from the nature

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<sup>30</sup> *Id.* at 189 (Ch. 14).

<sup>31</sup> *Id.* at 264-68 (Ch. 21).

<sup>32</sup> *Id.* at 192 (Ch. 14) (“And therefore there be some rights, which no man can be understood by any words, or other signs, to have abandoned, or transferred. As first a man cannot lay down the right of resisting them, that assault him by force, to take away his life; because he cannot be understood by aim thereby, at any good to himself. . . . And therefore is a man by words, or other signs, seem to despoil himself of the end, for which those signs were intended; he is not to be understood as if he had meant it, or that it was his will; but that he was ignorant of how such words and actions were to be interpreted.”)

<sup>33</sup> *Id.* at 223-28 (Ch. 17)

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of human beings themselves, it simply cannot be used as an element of exchange. This right, moreover, is not merely a philosophic abstraction for Hobbes; its continuation has the rather specific consequences that subjects cannot be ordered to kill themselves, although they may be executed, and that they are entitled to hire a substitute if they are drafted into the army.<sup>34</sup> Nor is self-preservation the only inalienable right, in Hobbes' view; the right against self-incrimination which was just beginning to be recognized in English courts,<sup>35</sup> is also inalienable, and can thus be asserted against Leviathan, because a criminal conviction is inevitably followed by punishment, "which, being force, a man is not obliged not to resist."<sup>36</sup> In short, while Grotius and Selden convert Ockham's natural liberty into a quasi-commodity which can be used as the basis of social contract theory, Hobbes bifurcates that natural liberty into an alienable component that is relinquished in the social contract, and an inalienable component - a little one, admittedly - that continues as specific rights against the state.

While the rights against self-immolation and self-incrimination are natural, and can be asserted against the sovereign, in Hobbes' view, property rights are purely a product of positive law and thus entirely within the sovereign's control.<sup>37</sup> Other seventeenth century

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<sup>34</sup> *Id.* at 268-70 (Ch. 21)

<sup>35</sup> See Leonard Levy, *Origins of the Fifth Amendment* (New York: Macmillan 1986).

<sup>36</sup> Hobbes, *supra* note 26 at 199 (Ch. 14); see also 269 (Ch. 21).

<sup>37</sup> *Id.* at 330-31 (Ch. 26) ("And of human positive laws, some are distributive, some penal. Distributive are those that determine the rights

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theorists, however, took issue with this view, thus transferring the property rights debate between William of Ockham and Pope John XXII into the context of social contract theory and inalienable rights. Among the first to argue that property rights were inalienable, ironically, were the so-called Levellers, specifically John Lilburne and Richard Overton,<sup>38</sup> but the most famous exponent of this view was Locke.<sup>39</sup> As Macpherson describes, Locke envisioned the state of nature as involving two separate stages of property relations.<sup>40</sup> According to both natural reason and divine authority - the two parallel sources of truth in seventeenth century natural law theory - God has given men the earth for their use and sustenance. They begin with property in their own persons; in the first stages of property relations, they acquire property over material objects by mixing their own labor with it.<sup>41</sup> But this appropriation of the earth's resources is limited to the amount that each man can actually use, for spoilage is prohibited by natural law. In the second stage, however, men agree to

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of subjects, declaring to every man what it is, by which he acquireth and holdeth a propriety in lands, or goods.")

<sup>38</sup> John Lilburne, "The Young Men's and the Apprentices' Outcry, in Andrew Sharp, ed., *The English Levellers* (Cambridge, Eng.: Cambridge University Press, 1998), at 179, 182-83; John Lilburne, William Walwyn, Thomas Prince & Richard Overton, *A Manifestation*, in *id.* at 158, 160-61, 175-76 (includes a protest against their designation as Levellers); Richard Overton, *An Arrow Against All Tyrants*, in *id.* at 54, 55-57; see Macpherson, *supra* note 23, at 137-42.

<sup>39</sup> John Locke, *The Second Treatise on Government* (Indianapolis, Ind.: Bobbs-Merrill, 1952).

<sup>40</sup> Macpherson, *supra* note 23, at 197-221.

<sup>41</sup> Locke, *supra* note 39, at 17-18 (§ 27).

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give value to imperishable objects such as gold and silver, which serves the monetary function of storing value. Still in the state of nature, they can then acquire property rights in more material possessions that they can use at any given time. Thus, “a man may fairly possess more land than he himself can use the product of, by receiving in exchange for the overplus gold and silver...This partage of things in an inequality of private possessions men have made practicable out of the bounds of society and without compact.”<sup>42</sup>

Locke can be regarded as mediating between William of Ockham and Pope John XXII. He agrees with William that mere use of material objects does not involve the acquisition of property rights, but he sides with Pope John in holding that property rights, and not mere use rights, could be acquired in the state of nature. Like William again, he treats these as genuine rights, which can be asserted by the individual. He thus arrives at a fully-developed doctrine of natural rights that includes the right to obtain and retain private property. He then goes on to argue, in the context of seventeenth century social contract theory, that such rights are not relinquished when men join together to form a society. That is not because these rights are inherently inalienable, as Hobbes argued with respect to rights against self-immolation and self-incrimination, but because no rational understanding of the social contract would eliminate them. By the same logic, Locke argues that the social contract must be interpreted to forbid certain

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<sup>42</sup> *Id.* at 29 (§ 50).

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governmental actions that could interfere with these retained property rights; thus, the government must “dispense justice and decide the rights of the subject by promulgated, standing laws and known authorized judges,”<sup>43</sup> and it “must not raise taxes on the property of the people without the consent of the people, given by themselves or their deputies.”<sup>44</sup> In effect, Locke rescues property rights from the all-encompassing agreement that earlier social contract theorists envisioned, and adds to these rights a variety of political protections, including representative government and protection against arbitrary rule. He thus transforms natural rights from a premise required to support social contract theory into a set of specific claims that individuals naturally possess, retain in civil society as a specific feature of the social contract, and can assert against the government.

In the eighteenth century, Rousseau made a distinctive contribution to the debate regarding the amount of freedom that people sacrifice when entering into the social contract.<sup>45</sup> He disputed Grotius’ claim that people could exchange the entirety of the natural liberty in establishing society; in fact, Rousseau argues, when people enter into a genuine social contract, when they create a government that embodies their individual wills, they do not give up liberty at all. To be sure, man loses

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<sup>43</sup> *Id.* at 77 (§ 136)

<sup>44</sup> *Id.* at 81 (§ 142).

<sup>45</sup> Jean Jacques Rousseau, *The Social Contract* (Willmoore Kendall, trans.) (Chicago: Henry Regnery, 1954)

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“his natural liberty, along with an unlimited right to anything that he is tempted by and can get.” However, he gains civil liberty, or “moral freedom,” since “obedience to self-imposed law is liberty.”<sup>46</sup> Duly-promulgated law is self-imposed, in his view, because it represents the general will of its individual members. Rousseau did not invent the concept of the general will, of course;<sup>47</sup> it was common to medieval corporatist thinking, and is reflected in modern statutes that enable a firm to incorporate itself and be treated as a legal person. But Rousseau combined the concept of the general will with social contract theory to generate a distinctive doctrine.<sup>48</sup> To create a society that embodies the general will requires “the total alienation to the whole community of each associate, together with every last one of his rights.”<sup>49</sup> This is necessary so that all members of the society are equal, so that individuals are never judges of their own claims, but most importantly so that the community acquires the character of a collective moral body. The result is a state that possesses an indivisible sovereignty, that can never commit error, and that holds the power of life and death over its

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<sup>46</sup> *Id.* at 26-27

<sup>47</sup> See Patrick Riley, *The General Will Before Rousseau: The Transformation of the Divine into the Civic* (Princeton, N.J., Princeton University Press, 1986)

<sup>48</sup> See Riley, *supra* note 47; J.B. Schneewind, *The Invention of Autonomy* (Cambridge, Eng.: Cambridge University Press, 1998), at 470-82; Judith Shklar, *Men and Citizens: A Study of Rousseau's Social Contract Theory* (Cambridge, Eng.: Cambridge University Press, 1969); Marizio Viroli, *Jean-Jacques Rousseau and the "Well-Ordered Society"* (Derek Hanson, trans.) (Cambridge, Eng.: Cambridge University Press, 1988).

<sup>49</sup> *Id.* at 19.

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members. In giving their lives for their sovereign, according to this theory, individuals are only protecting themselves; this is certainly more realistic than Hobbes' notion that citizens have a natural right to buy their way out of military service.

Rousseau is sometimes portrayed as a proto totalitarian,<sup>50</sup> but perhaps he is more properly regarded as a political mystic. He believes that people must relinquish all their natural liberties to the state, but only the particular kind of state that genuinely represents their interests. Precisely how this is to be accomplished is unclear; Rousseau says that the social contract "gives the body politic an absolute power over its members, like that which nature gives to a man over his limbs."<sup>51</sup> But he powerfully affected the concept of natural rights by his vivid assertions about natural liberty, and his stirring belief that this liberty could be instantiated, not abandoned or diminished, when people join together in a properly constituted, legitimate state.

Both Kant and Hegel are followers of Rousseau, although emphasizing different aspects of his doctrine. In the *Metaphysics of Morals*, Kant focuses on natural liberty, which he identifies as "the only original right belonging to every man by virtue of his humanity."<sup>52</sup> This one natural right is derived from reason and is lim-

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<sup>50</sup> See Bertrand Russell, *A History of Western Philosophy* (New York: Simon & Schuster, 1945), at 694-705.

<sup>51</sup> *Id.* at 41.

<sup>52</sup> Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor, trans.) (Cambridge, Eng.: Cambridge University Press, 1996), at 30.

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ited by reason, in the form of the categorical imperative that Kant introduced in his free-standing and more celebrated introduction to the *Metaphysics*.<sup>53</sup> Since Kant also bases the social contract on reason, rather than exchange, true freedom is not given up, in whole or part, when people enter civil society. Rather, each person “has relinquished entirely his wild, lawless freedom in order to find his freedom as such undiminished, in a dependence upon laws, that is, in a rightful condition, since this dependence arises from his own law-giving will.”<sup>54</sup> The laws, of course, enforce the same categorical imperative that limits human freedom in the natural state, Kant argues, however, that this moral principle cannot be implemented without civil governance.

A challenge to the entire natural rights tradition came from Hegel, who emphasized the general will component of Rousseau’s approach. Freedom, Hegel argued, is not something that human beings possess in their pre-social state and can exchange, or preserve, when they enter civil society. Rather, it is a goal, an inherent teleology of human history that expresses itself more fully in each successive historical epoch.<sup>55</sup> According to Hegel’s interpretation of history, the inspiring but unreflective unity of the Greek city-states was

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<sup>53</sup> Immanuel Kant, *Grounding for the Metaphysics of Morals*. 3<sup>rd</sup> ed. (James Ellington, trans.) (Indianapolis, Ind.: Hackett, 1993).

<sup>54</sup> Kant, *supra* note 52, at 93. (“In accordance with the original contract, everyone...within a *people* gives up his external freedom to take it up again immediately as a member of a commonwealth.”)

<sup>55</sup> G.W.F. Hegel, *The Philosophy of History* (J. Sibree, trans.) (New York: Dover Publications, 1956).

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shattered by its antithesis, which was the development of individuals with a subjectivist world-view. This opposition, Hegel argues, was resolved, or synthesized, in the Western world. Escaping the control of custom and tradition, Western people become capable of adopting reason as the regulative principle of their existence. The nation-state embodies this realization; as the political expression of reason or rationality, it unites people's individual wills into a general will; the general will then creates a polity where all citizens participate as equals, and where reason rules. It is only in this situation that people are truly free, for freedom consists of precisely this universal, historically-instantiated rationality.<sup>56</sup>

Like Kant, Hegel reinterprets Rousseau's theory through an emphasis on reason. For Kant, however, reason is an essentially individualized process, and the state represents the general will because it imposes general laws to which all rational people can, and must, agree. For Hegel, reason is a transcendental force which is not generated by individuals, but rather expresses itself through them. This force, which he describes as the World-Spirit - and somewhat weirdly associates with the Holy Ghost - constitutes human free-

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<sup>56</sup> *Id.* at 427-57 (Pt. IV, Sec. III, Ch. II & III); G.W.F. Hegel, *The Philosophy of Right* (T.M. Knox, trans.) (London: Oxford University Press, 1967), at 155-188 (§§ 257-286). He says: "The state is the actuality of concrete freedom. But concrete freedom consists in this, that personal individuality and its particular interests not only achieve their complete development and gain explicit recognition for their right (as they do in the sphere of the family and civil society), but, for one thing they also pass over of their own accord into the interest of the universal, and for another thing, they know and will the universal..." *Id.* at 160 (§ 260).

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dom.<sup>57</sup> Individuals are only free when they obey the laws that it establishes. Hegel is also accused a being a proto-totalitarian; according to Bertrand Russell his doctrine “justifies every internal tyranny and every external oppression that can possibly be imagined.”<sup>58</sup> Once again, however, he seems to be more of a political mystic, like Rousseau.<sup>59</sup> In any event, Hegel’s political philosophy essentially eliminates natural rights as an operative concept. Having been undermined by Rousseau’s striking claim that true freedom is realized only in properly constituted state, and attenuated by Kant’s abstract treatment of reason as the only natural right, natural rights themselves are then spirited away by Hegel, who views the properly constituted state as equivalent to reason, and thus as the sole source of freedom. This leaves the concept of natural rights without a role, and equally without a non-governmental source. The natural liberty that William of Ockham championed, and that was exchanged in whole or part, for civil peace by the social contract theorists becomes, with Hegel, an emergent phenomenon that can only exist in a culturally-advanced nation-state.

In light of this brief history of natural rights ideas, the problem of its indeterminacy, and the source of

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<sup>57</sup> *Id.* at 345 (Part IV, intro).

<sup>58</sup> Russell, *supra* note 50, at 742.

<sup>59</sup> Hegel’s description of the state - an equal mixture of genuine eloquence and Teutonic hoo-ha yields many interpretations, but he is entirely clear that obedience is equivalent to freedom only when a state embodies the absolute and liberating reason that is equally present in the consciousness of every citizen.

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doubt about the concept, can now be more effectively assessed. Of course, all words of general application, whether abstract or concrete, exhibit an unavoidable indeterminacy; the question is whether they also possess a coherent core that makes them useful for their intended purposes. Natural rights possessed a core meaning of this sort, but it was based – not surprisingly – on the political philosophy from which it emerged, and which is largely alien to current thinking. That philosophy was natural law, attributed to God in the Middle Ages and to reason in the seventeenth and eighteenth centuries. Natural rights were regarded as part of natural law; they reflected a direct distribution of power by the Almighty Himself. Thus, each individual can mediate between the divine and human worlds, each one, as the possessor of the God-given rights, can play the role that was previously played by the king or Pope. This explains the proto-Protestant flavor of Ockham's political theory, as well as the appeal of natural rights to the actual Protestants who followed.

The rights thus bestowed upon individuals, and that they possessed in the pre-social state, were both use rights and liberty rights. When these individuals constituted a government or civil society by some conscious, generally contractual process, their natural rights controlled the character of the government or society they formed. Theorists working within this framework could debate the relationship between natural use rights and positive law property rights, or natural liberty rights and positive law political rights. To modern ears, the debate about whether use rights constituted property, and thus violated apostolic poverty, sounds more solipsistic,

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more aridly scholastic, than the debate about whether liberty rights are surrendered or preserved in establishing a social contract. But both debates are equally meaningful to their participants, and equally remote from contemporary issues.

The problem with employing the idea of natural rights in a modern context, therefore, is that the idea depends on a well-developed theory of natural law. Without such a theory, the idea of natural rights loses its moorings, and becomes a rather gaseous, indeterminate concept, with little or no core meaning at all. To this concern may be added a more specific consideration that emerges from Hegel's critique of natural liberty, and manifests itself in the administrative state. Whatever one's opinion of Hegel's philosophical machinery, with its World-spirit, its Absolute, and its Thought thinking itself, his historical account of liberty seems unassailable in light of either standard history or modern anthropology. Surely liberty, in any political sense of that term, has increased between the Middle Ages and the present day. As Jeremy Waldron points out, Locke and other social contracts theorists are entitled to be read as philosophers, not anthropologists,<sup>60</sup> but this provides no answer to Hegel's critique of natural rights. For Hegel gives philosophical significance to history<sup>61</sup>; his argument is that liberty is not a naturally

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<sup>60</sup> Jeremy Waldron, John Locke, "Social Contract Versus Political Anthropology", in David Boucher and Paul Kelly, eds, *The Social Contract from Hobbes to Rawls* 51 (1994).

<sup>61</sup> Frederick Beiser, "Hegel's Historicism", in *The Cambridge Companion to Hegel* (Frederick Beiser, ed.) (Cambridge, Eng.: Cam-

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occurring concept in the human mind, but the product of an evolving social consciousness. Thus, to read our present concept of liberty back into the natural rights tradition is anachronistic; that concept emerged from a historical process in which we rejected that tradition, and fashioned the modern, instrumentalist morality of the administrative state.

To put the matter more concretely, one of the distinguishing features of the administrative state in which we live is its use of instrumental mechanisms to achieve consciously-selected social policies. Liberty is such a social policy. Far from being a natural condition, it appears as a complex, carefully-developed program, the result of an evolutionary process that includes married women's property acts, civil rights laws, voting laws, child labor laws and, depending on one's definition, a variety of social welfare legislation. Perhaps it is unfair to charge the proponents of natural rights with the toleration of slavery, the subordination of women, and the continued oppression of Jews, Roma and other racial minorities in Europe. But they can be exonerated only by conceding that they were products of their era, an argument which equally concedes the essential historicity of human liberty. One reason our era differs from its predecessors is that the conception of liberty has evolved, and part of that evolution is attributable to the policy initiatives of the administrative state. Liberty is no more natural than environmental protection; it is a

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bridge University Press, 1993), at 270.

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product of much effort, and many years of cultural and political development.

## **II. The Origin of Protections Against Government**

The uncontroversial core of contemporary human rights theory is a set of specific protections against government – freedom of speech, freedom of religion, the prohibition of slavery, limits on the prosecution and punishment of criminals, due process, equality of legal treatment, and, sometimes, non-interference with private property. Various more abstract, philosophic theories have been advanced to support these protections, but such theories are controversial. The list of protections, however, is a matter of consensus in contemporary thought and politics, although the specific contours of the individual protections are contested. Thus, the protections themselves, rather than any theory that attempts to unify them, may be taken as a starting point in the analysis.

We have become so accustomed to regarding specific protections against government as rights that it is difficult to describe them, or even imagine them, in any other terms. But this linkage is of relatively recent origin, except in the case of property rights. The right to preserve one's property is intimately connected with the natural rights tradition, and if one is satisfied to limit one's notion of human rights to property rights, one may continue to rely on that tradition. But all other human rights, as they originally developed in Western Europe, were not conceived as rights at all; rather their proponents argued for them in religious or pragmatic

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terms.<sup>62</sup> These protections were merged with the natural rights tradition in the latter part of the eighteenth century, just as the tradition was succumbing to the onslaught of the secular administrative state. As a result, proponents of those protections could clothe them with the transcendental dignity of natural rights and natural law, while those who felt social nostalgia for the natural law tradition could fill its empty shell with contents that were meaningful in the godless desert of modernity.

The independent origins of the protections that we now identify as human rights can be illustrated by considering free speech, freedom of religion, the prohibition of slavery, criminal procedure, punishment and due process of law.<sup>63</sup> Freedom of speech and religion, generally described as toleration, find their origin in the civic humanism of the Renaissance and the religious fanaticism of the Reformation. The humanists were instinctively tolerant, with their preference for concrete knowledge over abstract doctrine, their belief in people's essential similarity, and their enthusiasm for pa-

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<sup>62</sup> In some sense, virtually all pre-modern political thought, and certainly are natural law theory, was religiously based. As used here the term relates to issues involving personal salvation, as opposed to political ordering. It thus reflects St. Thomas's distinction between divine law, which involves salvation, and natural law, which involves relations among people. Given St. Thomas's influence, the categories here established were present in the minds of all pre-modern Europeans, including Protestants.

<sup>63</sup> Protections for those accused of a crime, such as a warrant requirement for police, or a privilege against self-incrimination, are sometimes regarded as elements of due process. For clarity, they will be treated separately in the following discussion.

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gan Greece and Rome;<sup>64</sup> the Protestants were decidedly intolerant at first, but the extremely educative experience of being brutally oppressed taught them the disadvantage of their original ideas.<sup>65</sup> Collectively, these movements generated four principal arguments for toleration. First was the belief, stated vividly in Jean Bodin's *Colloquium of the Seven About Secrets of the Sublime*,<sup>66</sup> that all religions share an essential core that is more important than their variations. Second was the religious view that genuine belief cannot be coerced, but must be an act of free will on the part of the believer. Third was a growing scepticism about the certainty of transcendental knowledge, and a recognition that it was barbarous to kill people over small, contestable variations in religious doctrine. Finally, and perhaps most important, was the pragmatic realization that only toleration could provide political or social peace in a religiously-fractured Europe; however much one hungered for the greater harmony of a populace that shared the same beliefs, the best one could hope for was the more mundane tranquility of pragmatic compromise that tolerated different ones.

A specific indication that these attitudes were regarded as separate from human rights theory prior to the

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<sup>64</sup> See John Hale, *The Civilization of Europe in the Renaissance* (New York: Atheneum, 1994), at 282-95; Paul Otto Kristeller, *Renaissance Thought and Its Sources* (New York: Columbia University Press, 1979), at 196-210; Skinner, *supra* note 21, vol. 2 at 244-49.

<sup>65</sup> See Skinner, *supra* note 21, vol. 2, at 189-348.

<sup>66</sup> Jean Bodin, *Colloquium of the Seven About Secrets of the Sublime* (Marion Daniels, trans.) (Princeton, N.J.) Princeton University Press, 1975).

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eighteenth century is illustrated by Locke's *Letter Concerning Toleration*.<sup>67</sup> In this essay, Locke makes virtually no reference to his elaborately developed social contract theory, but rests on religious arguments concerning personal salvation. Forcing another to adopt any religion, he asserts, is inherently un-Christian. "If the Gospel and the Apostles may be credited, no Man can be a Christian Without Charity, and without that Faith which works, not by Force, but by Love."<sup>68</sup> Consequently, "Care of Souls," or individual salvation is not the business of public authorities but of churches, which are voluntary organizations.<sup>69</sup> Moreover a public official who compels someone to follow a religion, even the true religion of Christianity, not only endangers his own soul, but also the soul of his subject. "Although the Magistrate's Opinion in Religion be sound...yet if I be not thoroughly persuaded thereof in my own mind, there will be no safety for me in following it."<sup>70</sup> Locke buttresses these religious arguments with pragmatic political ones. "What Power can be given to the magistrate for the suppression of an Idolatrous Church, which may not, in time and place, be made use of to the ruin of an Orthodox one?"<sup>71</sup> Locke's social contract theory was not connected with the argument for toleration until John Trenchard and Thomas Gordon wrote *Cato's Let-*

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<sup>67</sup> John Locke, *A Letter Concerning Toleration* (Indianapolis, Ind.: Bobbs Merrill, 1955).

<sup>68</sup> *Id.* at 23.

<sup>69</sup> *Id.* at 26-28.

<sup>70</sup> *Id.* at 38.

<sup>71</sup> *Id.* at 42.

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ters in the 1720s,<sup>72</sup> and did not become the standard view until considerably later; Blackstone, concededly a conservative but unquestionably a writer of enormous influence, still regarded natural liberty as something that was given up entirely when civil society was formed.<sup>73</sup> In short, freedom of speech and religion were not regarded as rights when they were first advanced, but as wise policies or consequences of true Christian doctrine.

The prohibition of slavery reveals a similar provenance in civic humanistic and religious thought, rather than in natural rights theory. Indeed, natural rights theory often provided a positive justification for slavery by treating human liberty, however natural, as fully alienable; Grotius and Selden, for example, base their arguments for the social contract's total termination of natural liberty on the morally self-evident position that individuals can sell themselves into slavery.<sup>74</sup> The initial attack on slavery came from the Spanish Thomists, most notably Bartolomé de Las Casas. Although they certainly believed in natural law and natural liberty, they did not draw their arguments against enslavement of the Indians from these philosophic principles. Rather, Las Casas argued that God has endowed the Indians with reason, and that forced conversion of rea-

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<sup>72</sup> John Trenchard & Thomas Gordon, *Cato's Letters, or, Essays on Liberty, Civil and Religious, and Other Important Subjects* (Ronald Hamowy, ed.) (Indianapolis, Ind.: Liberty Fund, 1995).

<sup>73</sup> William Blackstone, *Commentaries on the Laws of England* \*48-51.

<sup>74</sup> Grotius, *supra* note 24; Tuck, *supra* note 13, at 95-98.

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soning human beings is morally impermissible.<sup>75</sup> Similarly, the opposition of the English and American Quakers was based on religious considerations, not on natural law or natural rights.<sup>76</sup> As late as the nineteenth century, the drive for abolition was still being spearheaded by religiously motivated people such as Lord Wilberforce, William Lloyd Garrison and Harriet Beecher Stowe.<sup>77</sup>

Rousseau, one of the architects of natural rights theory, is often treated as an opponent of slavery, but his discussion in the *Social Contract* is not directed against slavery itself, but against Grotius' argument that since an individual can contract for his enslavement, a people can alienate all their liberty through the social contract. He begins by disputing Grotius' claim, which, as he says, was stated earlier by Aristotle, that slavery is justified because some people are naturally slaves.<sup>78</sup> They may indeed have servile dispositions, Rousseau says, in an argument subsequently echoed by Stanley Elkins, but that is because their life experience is one of slavery.<sup>79</sup> This preserves Rousseau's assertion that all men

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<sup>75</sup> Lewis Hanke, *All Mankind is One* (DeKalb, Ill.: Northern Illinois University Press, 1974), at 86-89; see also Hugh Thomas, *The Slave Trade* (New York: Simon & Schuster, 1997), at 125-27. This argument proved persuasive and was adopted in theory, although not in practice, by the Spanish crown.

<sup>76</sup> Thomas Drake, *Quakers and Slavery in America*. New Haven, Conn.: Yale University Press (1950); Thomas, *supra* note 70, at 458-61.

<sup>77</sup> Thomas, *supra* note 75, at 449-557.

<sup>78</sup> Rousseau, *supra* note 45, at 4-5.

<sup>79</sup> Stanley Elkins, *Slavery: A Problem in American Institutional and Intellectual Life* (New York: Grosset & Dunlop, 1963).

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are born free, but does not actually create an individual right against enslavement in civil society. Having established freedom as an initial condition, Rousseau goes on to argue that a contract in which the people trade all their freedom for civil peace is a bad deal. The people have received nothing in return, he argues; because the all-powerful ruler can oppress them, the only peace they have obtained is the quiet of the dungeon.<sup>80</sup> This provides the basis for Rousseau's argument that the social contract must reflect the general will, but it still does not create an individual right against enslavement.<sup>81</sup>

Among the protections for those accused or convicted of crimes, the abolition of torture is probably the most dramatic, and may be taken as illustrative. In the Middle Ages, the standard punishment for crime was physical torture ending in death. This sanguinary practice was gradually abandoned for pragmatic reasons. First, the state no longer needed to demonstrate or secure its authority with public displays of gruesome force. Second, the state's greater range of activities created new uses for the convicted; they rowed galleys in France, manufactured textiles in the Netherlands, and populated dreary and otherwise uninhabitable English

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<sup>80</sup> Rousseau, *supra* note 45, at 8-10.

<sup>81</sup> Rousseau states that "[t]here is no quid pro quo that can be given to him who renounces all. Such a renunciation is incompatible with the nature of man." *Id.* at 10. While the language certainly can be read as opposition to slavery, its context remains a response to Grotius. Rousseau is arguing that people enter the social contract to make themselves free, not to relinquish their freedom, but he does not specifically argue that this contract includes a prohibition against the enslavement of individuals.

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colonies in Georgia and Australia.<sup>82</sup>

The other major use of torture in Western Europe was to elicit a confession, or a disclosure of information that incriminated others. As John Langbein has discussed, it became standard in continental Europe after the abolition of trial by ordeal in 1215 by the Fourth Lateran Council.<sup>83</sup> In England this event led to the development of jury trials. Continental states, however followed the Roman-Canon law of proof that required two eyewitnesses or a confession by the accused for crimes punishable by death. Thus, torture was often necessary to obtain a confession, and a confession was necessary to obtain conviction in the substantial proportion of cases where two witnesses were lacking. With the development of alternative sentences to death, such as the galleys, the workhouse or transportation, it became possible to avoid the stringent rules for conviction of a crime, and rely on circumstantial evidence as evaluated by a judge. This, in turn, eliminated the need for judicial torture and allowed humanitarian concerns

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<sup>82</sup> Norval Morris & David Rothman, eds. *The Oxford History of the Prison : The Practice of Punishment in Western Society* (New York : Oxford University Press, 1995); Pieter Spierenburg, *The Spectacle of Suffering: Executions and the Evolution of Repression : From a Preindustrial Metropolis to the European Experience* (Cambridge, Eng.: Cambridge University Press, 1984). See also Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan, trans.) (New York: Vintage, 1979). Foucault's claim that torture was abolished in order to establish more impersonal and comprehensive control of individuals is allied to this position, in that it also treats the abolition of punitive torture as being motivated by ideas that were unrelated to the concept of natural rights.

<sup>83</sup> John Langbein, *Torture and the Law of Proof* (Chicago: University of Chicago Press, 1976).

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to take effect. While such concerns may not have been powerful enough to abolish a practice that was seen as merely barbarous, they possessed sufficient force to abolish one that was regarded as both barbarous and unnecessary. And since the practice was always unnecessary in England, where juries could convict on the basis of circumstantial evidence, judicial torture never became standard there.

The process leading to the abolition of torture was thus somewhat different than the ones leading to toleration or the abolition of slavery. Christianity, which not only made extensive use of torture here on earth, but also consigned much of humanity to it after death, did not play a leading role, and humanistic concerns, through present, were of secondary significance. The dominant factor seems to have been pragmatic, and manifested itself in the recondite, technicalities of criminal procedure. In any case, these developments, like others now associated with human rights theory, were not conceived in terms of natural rights, or indeed, in terms of rights at all.

Due process is the most complex protection associated with human rights, and some of its components were definitely conceived in terms of rights. One need only consider the Magna Carta, which was promulgated in 1215, the same year as the Fourth Lateran Council.<sup>84</sup> Its guarantee of due process was regarded as a right

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<sup>84</sup> J.C. Holt, *Magna Carta*, 2<sup>nd</sup> ed. (Cambridge, Eng.: Cambridge University Press, 1992)

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from the beginning, a view that was clarified and glorified with each successive iteration of the document. But these rights were not natural rights; they were the particularistic rights of the Middle Ages that defined, and were defined by, the rights holder's status. Different social groups had different rights; Magna Carta's famous right to a jury of one's peers was originally limited to the nobility. As the nobility sold its soul and its daughters to the merchant class and serfdom sank into desuetude, this right, and others, were extended to the entire population. But they were the rights of freeborn Englishmen, not of humanity in general, and were conceived as originating in customary, not in natural law. Rights though they were, they were not part of the natural rights tradition.

This lack of connection between natural rights and due process protection is illustrated by one of the leading Leveller tracts, written in 1646 by Richard Overton during one of his many periods of imprisonment. Its title is a paragraph long; the refreshingly visceral first sentence reads: "An arrow against all tyrants and tyranny, shot from the prison of Newgate into the prerogative bowels of the arbitrary House of Lords and all other usurpers and tyrants whatsoever."<sup>85</sup> The tract, which argues for due process, begins with a classic statement of natural rights: "To every individual in nature is given an individual property by nature not to be invaded or usurped by any."<sup>86</sup> But this does not lead to

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<sup>85</sup> Overton, *supra* note 38.

<sup>86</sup> *Id.* at 55.

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due process; rather it leads to the principle that the ruler may only exercise the authority he was granted by the social contract. Like Selden, Overton then argues that England's social contract includes the Magna Carta and that this document, as a matter of positive enactment, grants all Englishmen due process rights.<sup>87</sup> In fact, as Leonard Levy describes, the Levellers played a central role in securing protection against self-incrimination, but their arguments in favor of this protection were religious ones, derived from their uncompromising Protestantism, and not from the theory of natural rights.<sup>88</sup>

Some forty years later, Locke made a closer approach to treating due process as a natural right. In his *Second Treatise on Government*, he recognizes a number of limitations on the supreme, or legislative power of the state, most of which are designed to protect the natural right to property that survives the formation of the social contract. One such limitation is that the state cannot take property away from its subjects, nor can it impose taxes – a form of property confiscation – without the consent of the citizens as their representatives.<sup>89</sup> To this limitation, which relates to the overall structure

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<sup>87</sup> *Id.* at 57-59. The first several paragraphs are very general, and argue only that the powers of the king and legislature is restricted to those granted by the social contract. The first specific issue that Overton raises is “that contrary to all precedents, the free commoners of England are imprisoned, fined and condemned by [the Lords] . . . against the express letter of Magna Carta chapter 29.” *Id.* at 57-58.

<sup>88</sup> Leonard Levy, *Origins of the Fifth Amendment* (New York: Macmillan 1986).

<sup>89</sup> Locke, *supra* note 39, at 75-82 (§§ 134-141).

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of the government,<sup>90</sup> Locke adds the additional restriction that the government may act only by promulgated, established laws, not to be varied in particular cases.<sup>91</sup> This is clearly a due process-related natural right, but Locke, interestingly, does not make the connection. Rather, he treats the requirement that the government act only through general rules as a necessary adjunct to the protection of property, without linking it to the more general right established by the Magna Carta.

Virtually all the themes now associated with human rights received prominent and highly influential expression in Montesquieu's *Spirit of the Laws*, published at the mid-point of the eighteenth century.<sup>92</sup> The entire structure of the work, with its empathetic, unprejudiced account of different legal systems, exudes the spirit of tolerance. Its condemnation of slavery, though circumspect, was clear, and virtually unprecedented among political writers. With respect to African slavery, an enormously remunerative business at the time, he says

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<sup>90</sup> Locke's limitations on governmental structure are less extensive than they might appear at first. There is nothing to prevent people from creating a social contract in which they are ruled by one man or by an oligarchy. The restriction is that these rulers cannot take property away from their citizens, nor impose taxes, without the consent of the citizens or their representatives. This combination of autocratic and representative government seemed more plausible at the time when European monarchs wielded extensive authority, but were often required to convene representative assemblies in order to impose new taxes.

<sup>91</sup> *Id.* at 77-78 (§ 136). According to Locke, the purpose of this generalization requirement is to "avoid these inconveniences which disorder men's properties in the state of nature."

<sup>92</sup> Montesquieu (Charles Louis de Secondat), *The Spirit of the Laws* (Anne Cohler, Basia Miller & Harold Stone, trans.) (Cambridge, Eng.: Cambridge University Press, 1989).

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“the peoples of Europe, having exterminated those of America, had to make slaves of those of Africa in order to use them to clear so much land.” He then adds, rather acidly, “It is impossible for us to assume that these people are men because if we assumed they were men one would begin to believe that we ourselves were not Christian.”<sup>93</sup> Montesquieu also insists on the virtue of fair trails<sup>94</sup> and condemns torture and harsh penalties in general. “Let us follow nature,” he says, “which has given men shame for their scourge, and let the greatest part of the penalty be the infamy of suffering it.”<sup>95</sup> Yet even at this late date, his arguments against intolerance, slavery and torture are humanistic and pragmatic. He does give natural law a perfunctory embrace at the beginning of the book,<sup>96</sup> but then ignores this dowdy, too familiar figure and moves on to the novel experience of comparative, proto-sociological analysis.<sup>97</sup>

A related observation, going beyond the limits of theoretical discussion and published texts, is that almost all the protections against government that we currently associate with human rights were products of social

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<sup>93</sup> *Id.* at 250 (Bk. 15, ch. 5)

<sup>94</sup> *Id.* at 72-83 (Bk. 6, chs. 1-10).

<sup>95</sup> *Id.* at 85 (Bk. 6, ch. 12), see also *id.* at 86-95 (Bk. 6, chs. 13-21).

<sup>96</sup> *Id.* at 6-7 (Bk. 1, ch. 2).

<sup>97</sup> His analysis, with its insistence that each nation's laws have their own character or “spirit” could also be seen as proto-nationalistic, a precursor to Herder and Hegel, and thus opposed to universal protections against government. But this association does not exist for Montesquieu because protections against government were not yet associated with universal rights, by him or anyone else. In his view, rather, the protections themselves arose in particular legal systems, and were unrelated to the universal natural rights tradition.

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movements that were unrelated to natural rights theory. The study of social movements is a recent scholarly development, and the recognition that these movements are not merely collective tropisms to some immediate stimulus like an increase in the price of bread, but are often well-organized, thoughtfully-led and resolutely-sustained efforts, is still more recent.<sup>98</sup> While much interesting work has been carried out on modern movements such as environmentalism,<sup>99</sup> earlier efforts need to be explored in greater detail. It seems clear, however, that abolitionism is properly characterized as a social movement, one that overlapped with various religiously-based social movements such as Quakerism and evangelism.<sup>100</sup> The Levellers, who played a central role in securing both religious liberty and protection against self-incrimination, clearly qualify as such a

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<sup>98</sup> See, e.g., Jean Cohen, "Strategy or Identity: New Theoretical Paradigms and Contemporary Social Movements", 52 *Soc. Res.* 663 (1985); Donatella Della Porta & Mario Diani, *Social Movements: An Introduction* (Oxford, Eng.: Blackwell, 1999); Dieter Rucht, ed., *Research in Social Movements: The State of the Art* (Boulder, Colo.: Campus Verlag/Westview, 1991).

<sup>99</sup> See, e.g., Russell Dalton, *The Green Rainbow: Environmental Groups in Western Europe* (New Haven, Conn.: Yale University Press, 1994); Mario Diani, *Green Networks: A Structural Analysis of the Italian Environmental Movement* (Edinburgh: Edinburgh University Press, 1995); Andrew Szasz, *Ecopopulism: Toxic Waste and the Movement for Environmental Justice* (Minneapolis: University of Minnesota Press, 1994).

<sup>100</sup> David Brion Davis, *The Problem of Slavery in the Age of Revolution* (Ithaca, N.Y.: Cornell University Press, 1975); Lawrence Friedman, *Gregarious Saints: Self and Community in American Abolitionism, 1830-1870* (Cambridge, Eng.: New York: Cambridge University Press, 1982); Edward Magdol, *The Antislavery Rank and File: A Social Profile of the Abolitionists' Constituency* (New York: Greenwood Press, 1986); Hugh Thomas, *The Slave Trade* (New York: Simon & Schuster, 1997), at 449-557.

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movement.<sup>101</sup> Support for the abolition of torture was more diffuse and less emotive, but one must not be misled by Foucault's fashionable cynicism to ignore the sincere efforts of private persons that contributed to the final result.

There were, to be sure, a few areas, apart from property rights where the considerations we now identify as human rights were grounded in natural rights theory. Hobbes, as discussed above, identified protection against self-incrimination as a element of natural liberty at the same time that it was being adopted in English courts on pragmatic grounds. For Locke, natural rights included the requirement that government may act against individuals only in accordance with general rules adopted in advance. These are fairly isolated correspondences, however; what seems surprising is not that they occur, but that they occur so rarely given that the same people were often addressing both subjects, sometimes within a single work.

The link between the protections that we now associate with human rights and the natural rights tradition is largely a product of the late eighteenth century. By then, reference to natural liberty had become so secularized and so abstract that this long-accepted concept

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<sup>101</sup> On the Levellers, see Theodore Pease, *The Leveller Movement: A Study in the History and Political Theory of the English Great Civil War* (Gloucester, Mass., Peter Smith, 1965); David Wooton, "The Levellers", in John Dunn, ed., *Democracy: The Unfinished Journey* (Oxford Eng.: Oxford University Press, 1992). See also Macpherson, *supra* note 23, at 107-59.

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could be pressed into service in the enlightenment campaign for legal reform. Voltaire made this connection, although more of his rhetoric was still humanistically inspired, and so did Beccarica in his influential treatise on criminal law, although Montesquieu remains his major inspiration. But the connection was not established in any definitive way until the American Bill of Rights and the French Declaration of the Rights of Man were enacted by the legislatures of these nations.<sup>102</sup> What appears to have happened, once again, is that late eighteenth century thinkers quailed at the onset of the secularized administrative state. Their social nostalgia made them cling to outmoded terminology and attach it to the new situation they confronted in an effort to deny its newness. Just as they described policy as law, they described protections against government as rights. They did so because the natural rights conception was losing it force and revealing government as a purely human and potentially unconstrained creation. Under those circumstances, it was reassuring to describe the protection that they championed as rights, rights that were related to the natural rights that people possessed in their pre-social condition. It became possible to envision a right to speak, to worship freely, to be free of slavery or torture, and to be tried by due process of law. Such rights, like natural rights, could be conceived as possessions, borrowing, by virtue of their form, the sac-

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<sup>102</sup> See Keith Baker, "The Idea of a Declaration of Rights", in Dale Van Kley, ed., *The French Idea of Freedom* (Stanford, Cal.: Stanford University Press, 1994); Dale Van Kley, "From the Lessons of French History to Truths for All Times and All People: The Historical Origins of an Anti-Historical Document", in *id.* at 72.

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erdotal quality of their God-given predecessors. Like natural rights, these possessions existed independently of government, and controlled the government's proper relationship to individuals.

This new conception of protection against government was generally described as the Rights of Man, following the terminology of the French Declaration, for more than a century. The term human rights appears to have gained general currency immediately after World War II.<sup>103</sup> It appears in the Charter of the United Nations, promulgated in 1945, and triumphs in the Universal Declaration of Human Rights, adopted by the U.N. General Assembly in 1948.<sup>104</sup> The shift from "man" to "human" would seem, from our contemporary perspective, to reflect the desire for gender neutrality, and the preamble to the U.N. Charter does indeed follow the term human rights by affirming "the equal rights of men and women." The Universal Declaration speaks in terms of "everyone," and contains the substantive provision that everyone "has the right to equal pay for equal work,"<sup>105</sup> but it does not provide any explicit statement of women's rights, and it lapses into

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<sup>103</sup> See Henkin, *supra* note 4; Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999)

<sup>104</sup> For the text of these documents, see Ian Brownlie, ed., *Basic Documents in International Law* (Oxford, Eng.: Clarendon Press, 1967); Louis Henkin, Richard Pugh, Oscar Schacter & Hans Smit, *Basic Documents Supplement to International Law: Cases and Materials*, 2<sup>nd</sup> ed. (St. Paul: West Publishing Co., 1987).

<sup>105</sup> *Universal Declaration of Human Rights*, Art. 23, cl. 2; see Brownlie, *supra* note 104, at 136.

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gendered language at certain points, such as the statement that “[e]veryone who works has the right to just and favourable remuneration ... for himself and his family.”<sup>106</sup> A more notable departure of the Universal Declaration from the pre-existing Rights of Man formulation is the inclusion of positive or affirmative rights, such as the right to an education, the right to rest and leisure, and the right to “social security.”<sup>107</sup> Consequently, the term human rights is sometimes interpreted as betokening this broader concept. A less ambiguous nomenclature describes affirmative rights as second generation rights, based on their later recognition, and uses the shift from man to human to signal the recognition of women’s rights, positive or negative. Our apparently innate trinitarianism then induces us to designate the next new category of rights, namely, rights asserted by groups or rights to collective benefits, as third generation rights.<sup>108</sup> This captures the temporal sequence with some accuracy, but one must keep in mind that generations of rights do not behave in quite the same way as generations of men, or humans. Third generation rights can follow directly from the first generation rights as well as from the second; thus, an ethnic

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<sup>106</sup> *Id.*, Art. 23, cl. 3. See also Art. 25, cl. 1; Brownlie, *supra* note 104, at 136 (“everyone has the right to a standard of living adequate for the health and well-being of himself and his family”).

<sup>107</sup> *Id.*, Art. 22 (social security), Art. 24 (rest and leisure), Art. 26 (education). See also Art. 28 (“Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”); Brownlie, *supra* note 104, at 136-37.

<sup>108</sup> Donnelly, *supra* note 4, at 143-44; Jeremy Waldron, “Can Communal Goods Be Human Rights?”, in *Liberal Rights: Collected Papers 1981-1991* (Cambridge, Eng.: Cambridge University Press, 1993), at 339.

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minority can claim a collective right to affirmative efforts by the state to preserve its language, but also to the negative right to be protected from assimilationist efforts.

### **III. Current Human Rights Theories and their Debt to Natural Rights**

In short, the protections against governmental action that we identify as human rights were born as part of a political or religious program for government reform and became widely associated with the concept of rights only in the latter half of the eighteenth century. That categorization, however well-ensconced at present, lacks explanatory value; it succeeds only in invoking a natural rights tradition that was previously unrelated to these protections against government, and offers little insight into their present content or operation. Contemporary theories of human rights, despite their thoughtful exploration of our prevailing political morality, display this same lack of explanatory value. The problem is that these theories rely on the concept of natural liberty that generated natural rights, and consequently suffer from a similar disconnection from modern government. The point can be illustrated by considering the theories advanced by Rawls, Nozick and Habermas; while many other theories have been developed, these will be regarded as illustrative for present purposes.

Rawls uses a standard social contract argument to generate his list of necessary human rights. In a hypothetical pre-social condition - behind the veil of ignorance - people rationally agree to certain principles

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which will govern political life.<sup>109</sup> The first such principle, Rawls argues, is that “each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.”<sup>110</sup> Such liberty includes liberty of conscience, equality in political participation, due process, and freedom from impossible or retroactive criminal laws.<sup>111</sup> Few people in contemporary society would argue with this list, but whether Rawls’ approach really adds anything to our general and intuitive consensus on this subject is an open question. Ronald Dworkin points out that Rawls’ theory depends upon an underlying premise of human equality.<sup>112</sup> A second premise that is equally crucial for Rawls’ theory is that people are free to choose their form of government.

The element of choice in Rawls’ theory is essentially the Ockham-Locke-Rousseau concept of natural liberty. Unless people have such liberty, unless they begin the contractual process by possessing freedom from political control that they can promise to relinquish or restrict, their choice lacks the moral value that Rawls wishes to ascribe to it. But precisely why are people regarded as possessing freedom of this sort? Ockham provided an answer that for him, and virtually all his contemporaries, was entirely convincing. God

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<sup>109</sup> John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press, 1971), at 118-42.

<sup>110</sup> *Id.* at 60.

<sup>111</sup> *Id.* at 195-257.

<sup>112</sup> Ronald Dworkin, *Taking Rights Seriously* 75-81 (Cambridge, Mass.: Harvard University Press, 1977).

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gave human beings this freedom, as the Bible clearly demonstrates and faith confirms, so that they could choose between good in evil in both their personal and their political lives. Grotius, Locke and Rousseau found this same freedom in the natural order, which places God at a greater remove but still claims Him as its author. On what basis, however, can Rawls advance an equivalent assertion? Surely, our prevailing conceptions of anthropology and history run counter to any notion of natural liberty and favor Hegel's view that liberty is socially constructed. It is simply not possible for modern people to imagine a pre-social world in any intuitive way, even as a thought experiment. Nor can Rawls justify his assertion in philosophic terms, for it is the initial premise of his political philosophy. He presents the natural liberty that people possess behind the veil as a condition of rational thought about governmental structure. But it is rational to begin the analysis from this position only if one assumes that there is such a thing as natural liberty, and that one can imagine oneself as free to choose the entire structure of the government under which one ultimately lives. It is indeed possible to imagine doing so, but only by reproducing the conceptual framework of the pre-modern natural law tradition.

Although Nozick speaks frequently of contracts in *Anarchy, State and Utopia*, he is largely exempt from any criticism that can be leveled at social contract theory.<sup>113</sup> Contract theorists, from Grotius to Rawls, rely on

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<sup>113</sup> Robert Nozick, *Anarchy, State and Utopia* (Basic Books, 1974).

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a universal idea of rationality, asserting that the same arguments will appeal to all the relevant individuals and that they will consequently agree on the identical form of government. According to Nozick, however, different people have different preference sets; some will favor tranquility, social welfare or cooperation more than others. The only government to which they will all agree is one that is limited to satisfying their minimal demand for security; this government is a mutual protection association, a “night-watchman” state.<sup>114</sup> Thus, Nozick does not really envision a single social contract that depends upon a promise-keeping norm, but a series of more specific agreements among people that provide them with the particular benefit of police and military protection, and that can be enforced by ordinary legal means. He then derives his theory of human rights from these agreements, arguing that any compulsion beyond mutual protection is morally unjustified. The state may not redistribute income or require school attendance because some people would not voluntarily agree to these measures, and would thus be subjected to unjustified coercion.<sup>115</sup>

Nozick’s theory, while free of the contractarian dependence upon promise-keeping, depends entirely on the related, and equally outdated concept of natural liberty. Unless people begin with natural, or inherent liberty, state programs do not represent any particular in-

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<sup>114</sup> *Id.* at 12-25.

<sup>115</sup> *Id.* at 149-82. Indeed, Nozick goes so far as to say that “[t]axation of earnings from labor is on a par with forced labor.” *Id.* at 169.

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trusion on their will. It is true, of course, that some people oppose redistributive taxes or public education, but these is no reason to count their preferences more heavily than the preferences of the programs' advocates unless one asserts that freedom from these programs is the starting point – the baseline, in Cass Sunstein's terms.<sup>116</sup> And this is precisely what Nozick asserts; in the hypothetical, or potential state of nature, people possess an "invaluable right to exclusive dominion."<sup>117</sup> He identifies this dominion as a being's "ability to regulate and guide its life in accordance with some overall conception it chooses to accept"<sup>118</sup> and the only justification that he offers for it is the individual creation of meaning.<sup>119</sup> Virtually no one who has addressed this matter during the past century, however, believes that meaning is created individually. As Husserl pointed out, it is created intersubjectively; while people certainly make life plans as individuals, their ability to do so, and the meaning that attaches to it, is part of a social process.<sup>120</sup> The conception of individual liberty that Nozick takes as his philosophical starting point cannot be justified by the kinds of psychological considerations he invokes; rather, that conception simply reiterates the traditional idea of natural liberty, now cut off from its medieval, sacerdotal context.

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<sup>116</sup> Cass Sunstein, *The Partial Constitution* 68-92 (1993).

<sup>117</sup> Nozick, *supra* note 113, at 23.

<sup>118</sup> *Id.* at 49.

<sup>119</sup> *Id.* at 50-51.

<sup>120</sup> Edmund Husserl, *The Crisis of the European Sciences and Transcendental Phenomenology* (David Carr, trans.) (Evanston, Ill.: Northwestern University Press, 1970), at 103-14, 161-74.

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Habermas dispenses entirely with any form of contract, and relies instead on deliberative discourse to generate the political system.<sup>121</sup> For him, a moral government is essentially a government to which people will agree after following the rules that ensure communicative action, which he defines as speech designed to reach mutual understanding.<sup>122</sup> Unlike Rawls or Nozick, Habermas's essentially procedural model allows a variety of political systems to satisfy his standard, provided that the rules of discourse are obeyed when these systems are designed. The common thread that unites the various results that these rules of discourse produce is they involve a system of laws, which must be both moral and coercive; that is, they must mediate between the facts of social control and the norms of moral action. In order for the rules of discourse to generate a system of laws, certain rights must be recognized among people. The first are "[b]asic rights that result from the politically autonomous elaboration of the right to the greatest possible measure of equal individual liberties."<sup>123</sup> But such rights, Habermas observes, are imposed on people in order to satisfy the demands of the discourse principle. If the people are to apply this principle for themselves, they must be able to recognize whether the laws they make satisfy the discourse prin-

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<sup>121</sup> Jürgen Habermas, *Between Facts and Norms* (William Rehg, trans.) (Cambridge, Mass.: MIT Press, 1996).

<sup>122</sup> *Id.* at 1-27. For a full account of the concept, see Jürgen Habermas, *The Theory of Communicative Action*, vol 1 (Thomas McCarthy, trans.) (Boston: Beacon Press, 1984).

<sup>123</sup> *Id.* at 122 (emphasis in original).

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ciple, and this mechanism must be legally guaranteed.<sup>124</sup> Political rights fulfill this role because they “guarantee participation in all deliberative and decisional processes relevant to legislation and . . . do so in a way that provides each person with equal chances to exercise communicative freedom to take a position on criticizable validity claims.”<sup>125</sup>

This theory possesses many virtues; it dispenses with the hypothetical machinery of promise keeping, states of nature and contractual agreements, allows for a wide range of morally acceptable outcomes, and grants moral significance to the ongoing practice of politics. In its derivation of human rights, however it relies on the same pre-empirical assumption about natural, or inherent rights as does Rawls, Nozick, or Grotius. Human beings, Habermas asserts, possess inherent liberty. His specific source for this assertion is Kant’s idea that freedom is the only natural right, and like Kant, he never explains the rationale for this assumption, apart from some vague references to human nature.<sup>126</sup> Having invoked this concept of human rights to generate his political system, he can then demonstrate that rights of political participation are necessary for that system to survive. But this is fairly standard; it is easy enough, as Robert McCloskey demonstrated, to derive some standard human rights, such as freedom of political speech or the right to vote, from the demands of a democratic

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<sup>124</sup> *Id.* at 126.

<sup>125</sup> *Id.* at 127.

<sup>126</sup> *Id.* at 92-94, 122.

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system. Many other human rights, such as freedom of non-political speech, protection against torture, or even protection against slavery, cannot be so derived. To define those protections as rights, and to justify the democratic system from which he then derives political rights, Habermas returns to the same definitional starting point that seemed inconvertible in the pre-modern world of natural law, but continues as an unexamined reverberation of that world, a product of our nostalgia for St. Francis' forest.

The contingent and contestable character of the natural liberty on which Rawls, Nozick and Habermas all rely becomes apparent if one performs a figure-ground reversal between the contending forces of personal liberty and social control. Instead of beginning from the assumption that people are naturally free, and voluntarily submit to social control in return for the benefits of civil order, one can begin from the assumption that people are comprehensively controlled by a dense multiplicity of social and political prescriptions. Liberty, according to this view, is not something they are given, something that they naturally possess, but something they must struggle to create. It is a clearing, to use Heidegger's term,<sup>127</sup> an open space for self-determination that people produce by opposing both the external forces that impinge upon them and the internal projections that those forces generate by means of ideology and convention. It is not something we are given

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<sup>127</sup> Martin Heidegger, *Being and Time* (John Macquarrie & Edward Robinson, trans.) (San Francisco: Harper, 1962) at 169-209.

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and must give away, in whole or part, in order to live decent lives, but something we create for ourselves, amidst a dense tangle of social and political control, and that we must struggle to maintain against encroachment by the ever-threatening fecundity of that control.

There is much to be said in favor of this alternative assumption. From an historical perspective, it is much more accurate. Instead of being required to continually remind the reader that one's state of nature arguments are hypothetical, and not intended to reflect the course of societal development, one can present arguments that really do reflect societal development, and thus make contact with reality in a way that may possess theoretical significance. From a moral perspective, it gives credit to those who have sacrificed their lives or livelihoods for things we value, and emphasizes the continued need for political vigilance. Instead of focusing on the stupidity or cowardice of those who have given too much of their natural liberty away, it pays homage to the dissidents, protestors and nonconformists who have seized liberty from the forces of repression.<sup>128</sup> From a

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<sup>128</sup> For the quote in the footnote, see Levy, *supra* note 88, at 276-77. When John Lilburne, the Leveler, was convicted of contempt for his refusal to take the oath, he was sentenced to stand in the pillory and to be whipped continuously on his way there from Fleet prison, a distance of two miles. "Tied to the back of a cart and stripped to the waist," Leonard Levy writes, "he was lashed every few steps with a three-thonged whip tied full of knots... Lilburne's shoulders 'were swelled almost as big as a penny loaf' and the 'wales in his back ...were bigger than tobacco pipes.' The [pillory] hole for his neck was so low that he was forced to stand stooped over, unprotected from an 'exceedingly hot' sun. Despite his pain, Lilburne addressed the sympathetic crowd ... for about half an hour" until commanded to stop by the Warden of the Fleet. He

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philosophical perspective, it avoids the assertion that liberty is a pre-social reality that exists “out there”, and treats it as a human construct, whose character and contours must be determined by reflection. It cannot be said, of course, that these arguments are definitively right, and the opposing view definitively wrong. The point, rather, is that the natural liberty of human beings is not a self-evident starting point for political theory; it is a theoretical construct, and, like all such constructs, must be justified by argument.

To conclude, modern theories of human rights offer no response to the doubt that the entire conception engenders. Protection against government oppression or abuse is unquestionably one of our deepest emotional commitments, but characterizing these protections as human rights is unconvincing. Returning to the definition stated at the beginning of this essay, human rights, if the term is to have any meaning at all, must be human and they must be rights. That is, they must depend only on some universal feature of human beings, and they must state definitive claims, which must include claims that can be asserted against the government. But the notion of a human being’s universal features only makes sense in the religious, sacerdotal context from which natural law and natural rights originally emerged. We have, at present, no such theory. Similarly, the idea that protections against governmental action can be use-

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refused to do so, answering that “he would declare his cause though he were to be hanged for it.”

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fully stated as moral claims against the government results from the conflation of the natural rights prospective, during the latter part of the eighteenth century, with independently developed reform efforts. It has survived because these reform efforts, now characterized as rights, became positive enactments, or campaigns for positive enactments, which could be enforced by legal claims that were asserted in a court.

#### **IV. Rethinking Human Rights as Moral Demands on Government**

The issue that underlies the concept of human rights is the government's treatment of its citizens, and more specifically the moral aspect of that treatment. At the most basic level, a moral position regarding government treatment of its citizens could assume one of two possible forms, with, of course, virtually infinite variations; either the government is morally required to take a particular action, or it is morally forbidden to do so. For most people, as a matter of their own critical morality, many signals will fall into neither category. These may be so-called rules of the road, such as whether traffic should bear left or how to file a secured financing statement, they may involve supererogatory governmental action, such as sending a robot to the moons of Saturn or adding organic chemistry to the fourth grade curriculum, or they may implement important policies that are nonetheless regarded as subject to purely political determination, such as controlling air pollution or subsidizing some antiquated industry. But there will be at least some signals, and generally a great many, that most people in our society will regard as either required

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or prohibited, on the basis of their personal, or critical, morality. The expectation is that these signals will be shielded from the ordinary political process, that they will not be subject to the majoritarian decision making that governs rules of the road, supererogatory actions and policy initiatives.

Moral demands that government adopt a particular course of action can be described, in ordinary language, as governmental obligations. Moral demands that the government must avoid a particular result or a particular procedure can be described as constraints. Thus, the moral aspect of the manner in which government treats individuals, the issue that is now conceptualized in terms of human rights, can be alternatively described as the obligations and constraints that are imposed on governmental units.

Obligations and constraints are only characterizations, not pre-established, mutually exclusive categories. In some cases, the two terms represent distinctly different types of governmental actions. Providing education only be described as a moral obligation; to say that the government is constrained from failing to educate its citizens tortures the English language for no useful purpose. Conversely, the prohibition against providing education in a discriminatory manner is best described as a constraint; while one could say that the government is obligated to provide equal, or non-discriminatory education, it facilitates discussion if the service is separated from the manner in which it is provided. In other cases, however, the usages will tend to merge. Due process may be readily regarded as a con-

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straint on the manner in which the government makes factual determinations regarding individuals, but as Jerry Mashaw, Frank Michelman and Tom Tyler point out,<sup>129</sup> it is also an affirmative benefit, valuable for its own sake, that the government should be regarded as being obligated to provide.

Recharacterizing human rights as the moral demands imposed on government effects another figure-ground reversal. Instead of viewing the moral aspect of government-citizen relations as primarily controlled by a feature of the citizens, that is, by the rights that humans naturally possess, it views the matter as primarily controlled by a feature of government, that is, by the obligations and constraints that are imposed upon its units. Of course, people have not been subtracted from the equation; clearly, the obligations and constraints that are imposed on government depend on the moral attitudes of the citizens. Those attitudes retain the deontological origin that is generally associated with human rights. But in an approach that focuses on government, as opposed to citizens, the moral attitudes of the citizenry will be determined by their own views, their overlapping consensus in Rawls' terms,<sup>130</sup> rather than by a philosophic inquiry into the real nature of human beings.

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<sup>129</sup> Jerry Mashaw, "The Supreme Court's Due Process Calculus for Administrative Adjudication in *Mathews v. Eldridge*: Three Factors in Search of a Theory of Value", 44 *U. Chi. L. Rev.* 28 (1976); Frank Michelman, "Formal and Associational Aims in Procedural Due Process", XVIII *Nomos* 126 (1977); Tom Tyler, *Why People Obey the Law* (New Haven, Conn.: Yale University Press 1990).

<sup>130</sup> Rawls, *supra* note 109, at 387-88.

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The idea that every right generates a corresponding duty effects a similar reversal, since it suggests that every right possessed by individuals implies a duty incumbent upon government. Richard Fallon, Robert Goodin and Robert Nozick have advanced this idea in various forms,<sup>131</sup> and Nozick uses the term side constraints to describe the character of rights. The United States Constitution seems to adopt this perspective; the First Amendment, for example, states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . .” As Joseph Raz points out, however, the correspondence is an incomplete one because many rights, such as a right to public safety or to education, can only be provided by complex governmental programs that are not reducible to duties.<sup>132</sup> This problem can be solved by adding obligations to constraints, an emendation that may or may not be comprised by the term duty. The crucial question, however, is not whether the concept of human rights can be formulated in a different way – of course it can – but whether there is any advantage to replacing so familiar and important an idea with a neologism, even within the delimited area of scholarship and policy analysis.

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<sup>131</sup> Richard Fallon, “Individual Rights and the Powers of Government”, 27 *Ga. L. Rev.* 343 (1993); Robert Goodin, *Political Theory and Public Policy* (Chicago: University of Chicago Press, 1982); Robert Nozick, *supra* n. 113, at 26-53.

<sup>132</sup> Joseph Raz, *The Morality of Freedom* 183-86 (Oxford, Eng.: Clarendon Press, 1986).

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In fact, the recharacterization of human rights as moral demands on government resolves three conceptual problems, related to the three identified generations of human rights, that have long bedeviled the entire subject: the role of state action, the distinction between positive and negative rights, and the character of community or communal rights. In resolving these problems, the recharacterization also dispenses with the taxonomy of the three generations, replacing it with a four-box grid of constraints and obligations that operate in favor of either individuals or groups. This can only serve as an additional advantage; the generational terminology contains an unanalyzed implication that the second or third generation are parvenus, and that there is some unspecified virtue in returning to the older and more pure conception of rights.

First generation, or negative rights, are almost always addressed to the state, that is, to the government. Freedom of speech, freedom of religion, freedom from self-incrimination, due process, the prohibition of torture and the prohibition of slavery necessarily relate to state action. It is, of course, possible to include analogous claims against private persons in the concept of human rights. The freedom to speak, to say what one wants without fear of reprisal, can be restricted by one's employer, one's parents or the members of one's church as readily as by the state; indeed, these private restrictions are typically more frequent and often more severe. Even for those who make such claims, however, the state plays an essential role in implementing these freedoms. One can address a claim for freedom of speech

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to a private employer, but, as an empirical matter, some employers will respond and others will not. In order for this right to be universally secured, therefore, the claimant must also address the government, insisting that it compel all employers to comply. At this point, the claims addressed to the government might be characterized as positive rights, rather than negative ones. The important point, for present purposes, is that the government is an essential actor in all theories of negative rights or their private party analogues.

The concept of human rights, however, fails to incorporate this necessary, and perhaps exclusive relationship to government. When we speak of a person having a right, the image is one of an independent, self-contained possession that she can take wherever she goes, not of a relationship between her and the government. The concept, in other words, provides no intrinsic way to separate the generally-accepted subject matter from broader questions of inter-personal morality. Elaborate arguments are then required to explain why the concept of human rights generally does not include the right to be treated with respect by one's children or to be told the truth by one's friends, while it does include contextual relationships with government such as the right of a news reporter to resist a subpoena or the right of a welfare recipient to an oral pre-termination hearing. The concept of government constraints and obligations puts the focus where it belongs – on the government and its relation to its citizens.

The status of second generation rights, that is, positive rights such as the right to sustenance or to an edu-

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cation is probably the most controversial issue in contemporary human rights theory. Vast rhetorical resources have been invested in establishing the distinction between these two types of rights or liberties,<sup>133</sup> and arguing for the superiority of one over the other. Proponents of negative rights, generally political conservatives, argue that positive rights are vague, that they cannot be translated into enforceable entitlements, and that they attenuate the protections that negative rights provide.<sup>134</sup> Isaiah Berlin goes further, asserting that positive liberty is a concept that justifies totalitarianism, because it allows the state to compel people to realize its own notion of their aspirations.<sup>135</sup> In contrast, proponents of positive rights, generally political progressives,<sup>136</sup> claim that negative rights encourage alienation and self-absorption, that they diminish our sense of community, and that they codify inequality by erecting presumptions against state intervention.<sup>137</sup> Negative liberty, they argue, is the freedom to perpetuate historically established and currently unjustified advantages at

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<sup>133</sup> For arguments that there is no analytic distinction between the two, see Bandes, *supra* note 2; Holmes & Sunstein, *supra* note 2; MacCallum, *supra* note 2; Shue, *supra* note 2. For arguments in favor of the distinction, see Cross, *supra* note 2; Gewirth, *supra* note 2, at 33-38.

<sup>134</sup> Maurice Cranston, *What Are Human Rights* (New York: Basic Books, 1964); Nozick, *supra* n. 112; Cross, *supra* note 2.

<sup>135</sup> Isaiah Berlin, *Two Concepts of Liberty, in Four Essays on Liberty* (Oxford, Eng.: Oxford University Press, 1969), at 118.

<sup>136</sup> The term progressive is intended as a neutral one, to identify the opposing position to conservatism. The ordinary language term is liberalism, but it is unusable in this context, since it identifies the precise philosophy associated with negative rights.

<sup>137</sup> Donnelly, *supra* note.4; Gewirth, *supra* note 2; Carlos Nino, *The Ethics of Human Rights* (Oxford, Eng.: Clarendon Press, 1991).

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the expense of genuine liberty. It treats human beings as self-contained, disconnected, deculturated, disaffected individuals, and thereby exalts this dreary vision to the status of a norm. What is needed, in Alan Gewirth's phrase, is a community of rights, a collective effort to fulfill people's needs and provide them with the conditions for a meaningful existence.<sup>138</sup> The conservative response, of course, is that the government's compassionate embrace is likely to become the python's grip.

This debate has produced some illuminating insights, but it is generated largely by pre-modern concept, specifically the imposition of natural rights concepts on a separate, and more relevant tradition of reform. The strands which comprise it can be disentangled by recharacterizing negative rights as constraints on governmental action, and positive rights as affirmative governmental obligations. Thus, political morality has two separate components, or more correctly, two separate moods. In some cases, our consensus political morality demands that the government take certain actions, that various governmental units produce signals that are designed to achieve specified effects. In other cases, morality demands that certain constraints on governmental action must be programmed into the software of governmental units. The precise scope of these obligations and constraints must be argued for, in moral terms. There is no clear distinction between the two sets of demands, and certainly no fixed allotment of

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<sup>138</sup> Gewirth, *supra* note 2.

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political morality that requires a zero-sum division between these alternative approaches. It may happen, of course, that one means of implementing an affirmative obligation is precluded by a well-established, deeply-felt constraint; it may even happen that an entire obligation is thereby prohibited. But such conflicts only remind us that we live outside the Garden, that our desires do not neatly fit into a tessellated plane, but grind against each other on occasion or with frequency. This does not reveal any systematic or intrinsic conflict, nor does it require us to choose between two conceptually incompatible regimes.

The conceptual advantages of displacing the debate about positive and negative rights by reconceiving human rights as moral demands on government can be illustrated by considering contemporary constitutions. These constitutions, unlike their pre-modern predecessors, generally provide a variety of social guarantees, such as adequate food, housing, health care and education. They often state such guarantees in terms of rights, since rights are thought to be the things that a constitution protects, and that comprise the sum total of the guarantees provided in the U.S. Constitution, the ur-constitution of the modern era.<sup>139</sup> But to declare a right

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<sup>139</sup> A verbal indication of the U.S. Constitution's progenerative status is that so many modern, that is, post-War constitutions begin with the phrase "We the people," or a variant of that phrase. See Belarus (1994), Preamble; Cambodia (1993), Preamble; Congo Republic (1992), Preamble (follows a one-paragraph account of the nation's history); Eritrea (1996), Preamble; India (1950), Preamble; Japan (1946), Preamble; Mongolia (1992), Preamble; Russia (1993), Preamble ("We the multinational people"); South Africa (1996), Preamble; South Korea (1948),

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to something such as housing or education forces the concept into ill-fitting verbal garb, and makes it look vaguely ridiculous. How is a right of this kind to be provided? Who will supply the resources? To what extent will the demand for these resources be balanced against other demands? Perhaps most importantly, since they cannot be provided equally or universally, as a practical matter, how can we say that they are ever truly implemented? The problem is that social guarantees are not properly conceived as constraints on government, the way free speech or religious freedom are. They are better viewed as affirmative obligations that the government must fulfill. Being social programs, they cannot be provided with complete equality, but that does not exempt the government from the obligation to keep trying.

There may be some rhetorical advantage to disguising affirmative guarantees as traditional constraints, and trying to thereby slip them past conservatives, but this is not an advantage that either scholars or conscientious policy analysts should strive to secure. It leads to formulations that are at best confused, and frequently deceptive. For example, the South African Constitution, a model of the modern type, begins by declaring that “everyone has the right to have access to adequate housing,”<sup>140</sup> and then goes on to say that “the state must take reasonable legislative and other measures, within

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Preamble; Zambia (1991), Preamble.

<sup>140</sup> *Constitution of South Africa*, Section 26(1).

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its available resources, to achieve the progressive realization of this right.”<sup>141</sup> This is a convoluted way to say that the government must take legislative and administrative measures to ensure that everyone has access to adequate housing; the term rights serves no useful function in this formulation.<sup>142</sup> At worst, the South African provision may be deceptive; it may be an attempt to satisfy people with a heroic declaration of their rights, and avoid the difficult, expensive task of providing them with houses. At best, it creates confusion, because it implies that an individual has a legal right to enforce the moral right to adequate housing in court. But if judicial enforcement is intended, the remedy that the courts would be expected to provide is certainly not adequate housing, that is, housing financed and constructed by the court. It is an instruction to other governmental units, such as the legislature or the housing authority, to establish the required benefits. The judiciary’s authority to provide such a remedy is established by making the constitution as a whole judicially enforceable, not by characterizing each of its substantive provision in terms homologous with legal rights.

Third generation rights involve community or communal claims, such as the right to preservation of a lan-

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<sup>141</sup> *Id.*, § 26(2).

<sup>142</sup> It cannot be argued that the provision, stated in terms of rights, incorporates the idea that public housing is available to everyone on an equal basis. To whatever extent the rights formulation contains that implication, the alternative formulation does so as well. Moreover, neither does so adequately, and South Africa, recognizing this, has a separate constitutional provision forbidding government discrimination.

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guage or a culture. Traditionally, rights are regarded as possessions of the individual. To favor human rights, it is said, is to choose the individual over the group, to recognize some region of human action that is immune to collective demands. On this point, the proponents of negative and negative rights often stand united; whether human rights are taken to include only such negative demands as the right to be free to speak or worship as one pleases, or whether they also include the right to be fed and educated, both contending camps agree that they are necessarily claims advanced by the individual in her own individual interest. The idea of communal rights represent a challenge to this view. Even assuming, pace Wittgenstein, that there can be a private language, a person's ability to indulge his linguistic idiosyncrasies is fully protected by the individual right of free speech. But the right to the preservation of a minority language cannot be protected by these means. What is at issue, as Will Kymlicka points out, is not whether any individual has the right to speak the language, but whether the community of language speakers can demand that the government support its continued existence, as a community, by negatively restricting social programs that would assimilate the speakers of the language into the majority culture and positively, or affirmatively, providing public education in the communal language.<sup>143</sup> A right of this kind can only be asserted by a group of people, and can only be granted to that group, because the essence of the right is not the

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<sup>143</sup> Kymlicka, *Multicultural Citizenship*, *supra* note 3, at 34-48. See also Garet, *supra* note 3; Waldron, *supra* note 3.

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individual's freedom but the group's continued existence.

From the moral perspective, the difficulty with communal rights is that they often conflict with the rights asserted by individuals within the group. The essence of the group's right is its authority over individuals who, if left to their own devices, might choose to leave the group and assimilate into the majority culture. From the conceptual perspective, the difficulty is that these important claims fit poorly with prevailing idea of human rights as a claim that individuals assert on the basis of their common humanity. Where does the right reside, and who exactly claims it? How can this claim count as a human right if it is based on the group's particularity, the traits that distinguish it from other groups? We grant rights, legal rights for the most part, to corporate entities such as business firms by reconceiving them as a unified individual that speaks with a single voice, but an unorganized group of language speaker cannot be so conceived. Yet despite these moral and conceptual impediments, communal rights represent an important theme in contemporary political thought, and an insistent demand, by groups such as the French Canadians, the Basques, the Flemish and the Welsh who are not satisfied with the freedom of speech that their nations provide.<sup>144</sup>

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<sup>144</sup> The number of people in the world who advance such claims is quite large. The examples selected here, for purposes of clarity, involve groups advancing language claims within a nation whose level of protection for speech is acceptable by the standards of leading human rights organizations.

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Reconceiving human rights as moral demands on government resolves the conceptual difficulty with communal rights and clarifies the moral one. What is really at issue is not some special feature of the individual, nor is it some mystical construct that hovers over the group as an emergent entity. Rather, the issue is the moral aspect of the government's policy toward minority cultures. Is the government constrained from aggressive assimilationist efforts, such as outlawing the group's sartorial or dietary practices, or requiring its children to attend public schools that forbid the use of the minority language and scorn the minority culture? Is it obligated to engage in affirmative efforts to protect the culture, such as training teachers in the minority language or allowing exceptions to neutral statutes and regulations on its behalf? The answer may depend upon empirical facts about the minority culture – is it indigenous, can it sustain itself, does it produce good music – but the basic moral question involves kind of government we want to have, the limits that it must obey and the policies it must enact. The fact that these constraints and obligations involve groups of people, rather than individuals, presents no conceptual difficulty; if there is a moral argument for the protection of groups, then such protection becomes a constraint on government, just as protection of individual speech is a constraint. Kymlicka's leading analysis of the problem, which favors protection for minority culture as long as

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the culture does not oppress its members, is stated in terms of rights, but most of the analysis turns on his conception of liberalism, essentially a code of government behavior.<sup>145</sup>

To thus efface the distinction between individual and collective rights might appear to undermine the feature that makes rights distinctive, namely, that they are claims advanced by individuals, and trigger duties owed to individuals. The point, however, is not that collective rights must be recognized, but rather that the debate about their recognition should be pursued on the basis of moral considerations, rather than being decided, or at least distorted, by one-sided definitions. If people want to argue that the government should not try to preserve a minority language, they should do so on the basis that this disadvantages the minority or wastes government resources, not because there is some inherently individual character to any moral demand on government. Effacing this distinction offers the further conceptual benefit of reflecting the mixture of individual and collective considerations in the actual history of what we now call human rights. Traditionally, most protections against government were indeed asserted on behalf of individuals, but, as noted above, they were the products of social movements. Their proponents were not demanding freedom of speech, or religion, or the abolition of slavery or torture for themselves, but rather they demanded a general system of free speech and religion, and the abolition of slavery and torture as general sys-

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<sup>145</sup> Kymlicka, *Multicultural Citizenship*, *supra* note 3, at 107-30.

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tems. Positive rights have an even stronger collective element; the rights to sustenance or education were not only championed by social movements, but also they can only be provided, in modern mass society, as large scale administrative systems. The effort to place these moral demands on government into the individual or collective box can only breed confusion.

### **Conclusion**

Obviously, we are not going to abandon the concept of human rights, and this essay is not intended to suggest that we do. Rather, its intention is to question whether human rights are a useful analytic category, or whether it may be preferable to think in other terms when analyzing the issue to which this category now refers. The history of human rights, as a concept, and the history of the protections against government that now form the unquestioned core of this concept, are in fact quite separate, and the two were not combined until the late eighteenth century. Consideration of this history opens a conceptual space for us between these concepts, and enables us to think about alternative formulations of the issue. One possible alternative is suggested here – that we think in terms of moral demands upon government, the obligations and constraints to which government should be subject, rather than thinking in terms of the rights that human beings possess. Other alternatives are undoubtedly possible. The main point is that we do not need to be enslaved to our inherited categories of thought, that we can make use of the historical contingency of these categories to free ourselves

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from their grasp, and evaluate them from a critical distance.

# *COMMENTS*

## **On the Two Sides of Human Rights**

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Too often discussions of human rights concentrate exclusively on the rights themselves, without considering their corresponding moral obligations. Yet the ultimate source of human rights is respect for human dignity, which also imposes obligations towards others. Some positive rights and obligations can only be fulfilled through state action. These positive rights deserve equal consideration in developing a theory of universal human rights.

### **I. Human Rights as Moral Rights**

If scholars agree about anything concerning human rights, it is on their basis in human dignity. Human beings require certain conditions in order to thrive and without these necessities an individual cannot be fully human. Thus human rights belong to all humanity, and rest on the

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concept of human equality, rooted in universal human nature.

Human beings are social animals and human dignity cannot exist in a vacuum. Humans will need the freedom to think for themselves and to communicate their views to other members of society. The freedoms of opinion and of speech lead to truth through deliberation, to the benefit of society as a whole.

Freedom of speech and opinion, however, are not enough in themselves. People will also need the resources to survive and guarantees of personal security against lawless violence and arbitrary government activity. All humans have a right to life, but also to the basic necessities of life, such as food clothing and adequate housing. These necessities depend in turn upon the right to work for a living and to social support by the state when work becomes impossible. Without the necessities of life, one cannot be fully human.

Property is the laborers' right to the fruits of his labor and is the most basic material condition for survival. In a society in which property can be arbitrarily invaded by the state, the right of survival cannot be guaranteed and life becomes very precarious.

The right to housing reflects the right to property and to privacy. The residence should not be invaded except after due process of law. There should be no searches except by judicial order. These restrictions make private life and relaxation possible, by keeping the state at a distance. Improper violations of private space threaten hu-

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man dignity by exposing personal affairs to public ridicule. The house should be sacrosanct.

The rights to food, housing and clothing would be meaningless if there were not also a general right to personal liberty – to act and speak freely in pursuit of ones own private desires.

These are the fundamental rights, which should be enjoyed equally by every human being. Denying anyone the rights to free speech, free opinion, life, food, housing, property, privacy, or world liberty would diminish their humanity.

Immanuel Kant recognized human dignity as the basis of all other human rights. Poverty or illness may deprive a person of life, but the state and his fellow citizens owe him a basic equality of concern and respect as a human being. This was the fundamental principle of the American Declaration of Independence in 1776, the French Declaration of the Rights of Man and the Citizen in 1789, and the Universal Declaration of Human Rights in 1948.

The rights of free thought, speech, life, property, liberty and equality are necessary preconditions of a life of dignity, and therefore moral rights, whether or not they are recognized by law.

Human rights are rights that belong to every human being in virtue of her or his common humanity. They are also moral entitlements, which individuals may claim or assert against others. Unlike legal rights, human rights

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exist whether or not the government recognizes them. They are binding against government and the state.

It is confusing to speak of collective rights as human rights, because they do not arise as directly from human nature. Corporations and other groups do not enjoy rights in the same way that individuals do. Rights in communities arise from the attributes that community members have in common. These exclude some humans by including others. Such rights are not human rights, but membership rights.

Rights not based on human nature are not human rights. Human rights cannot be derived from any aspect of human beings other than their mere humanity, because universal human nature generalizes human rights, while groups develop to divide human beings. Social, economic, and cultural rights exist to advance human dignity. In modern society, if a person loses social, economic, and cultural rights, he will not be able to live a decent life, or fully realize his human nature. Rights exist primarily to protect individuals against the state rather than against other individuals. Individuals typically have rights against groups, but groups do not have rights against individuals. Collective "rights" are usually little better than excuses for violating individual rights. Broadening rights vocabulary to include groups will undermine the conception of rights that developed with such difficulty out of the fight against feudalism.

Group rights also threaten the distinction between human rights and legal rights. Human rights are moral rights that exist independent of the state, while legal rights

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are creatures of the state. Group rights are created by association, and lack the independent authority of universal human rights.

Human rights and legal rights differ in their power to obligate their subjects. Legal rights have no more validity than the legal system which created them, while human rights are universally true. Human rights follow from the nature of humanity while legal rights are transient and contingent.

Scholars in China divide human rights into three categories: due human rights, legal human rights, and actual human rights. This is a mistake. All human rights are “due” to all human beings, so the adjective is unnecessary. “Legal” human rights are simply those rights which have been recognized by law. What makes human rights human is their underlying moral validity, not recognition by the law. Human rights justify legal rights and not vice versa. “Actual” human rights should be those rights that citizens enjoy in practice, whether or not the law has played a part in securing them. The law only legitimately exists to secure the rights of the people.

Human rights are moral rights that exist whether governments recognize them or not, but from a practical perspective, it is very important to get the governments to recognize these demands.

## **II. Human Rights as Moral Obligation**

Human rights as moral rights belong to every human being. Human rights as moral obligations have a narrower

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subject, which is to say, the state. Only the state can violate human rights. Karl Marx called the United States Declaration of Independence “the first declaration of human rights in the world,” and that document was addressed to government, which had the duty of securing its subjects’ life, liberty, and happiness. Governments that fail in this duty deserve to be removed. The French Declaration of the Rights of Man and the Citizen of 1789 attributed all public misery to government ignorance of universal human rights. The Universal Declaration of Human rights of 1948 was also a response to governmental violations; in this case the Nazi crimes against humanity. The Universal Declaration makes it clear that these rights are a common standard of achievement for all peoples and nations, which is to say the governments of all the existing states in the world. Governments have obligations, but their citizens have rights. When governments fail to fulfill their obligations they lose the legitimate power to rule.

Since human rights create moral obligations for governments, the government’s attitude toward rights helps to determine its legitimacy. This applies not only to the government’s negative obligation not to violate rights, but also its positive obligation to realize human rights for all citizens. The government has a duty to act to secure the rights of its citizens.

Most of the well-known civil and political rights are negative rights, in the sense that they will be secure so long as government takes no action to violate them. The United States Bill of Rights of 1791 concentrates, for example, on negative protections of religion, speech and so

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forth. This does not mean, however, that the state may not also take active steps to make such rights secure.

Most “economic, social and cultural rights,” on the other hand, will require government intervention before they can be fulfilled. Such so-called “positive” rights as those protected by the International Covenant on Economic, Social and Cultural Rights will not be realized unless states “take steps” to achieve progressively their full implementation. Positive rights are claims against government and government has a moral obligation to secure these rights for its subjects. Some positive rights can be secured through the courts, but this approach limits the government’s flexibility. The government’s moral obligation to secure positive human rights should guide its whole program of action and legislation.

The proliferation of the human rights to embrace so-called “third generation” rights to solidarity may undermine some of the negative and positive rights recognized by the Universal Declaration of Human Rights. The old concept of rights assumed a separation between society and the state and the priority of the individual. Rights claimed on the basis of group solidarity are no longer human rights because they shut some humans out. Collective rights threaten individual rights. Defining human rights as Professor Rubin suggests, to emphasize the government’s moral obligations, makes it easier to accommodate collective needs to such third-generation goods as environmental rights, rights to peace, and to development.

Understanding human rights in terms of the government’s obligation to its subjects, as Professor Rubin sug-

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gests, will solve several problems created by the old terminology. Since many positive rights can only be fulfilled by state action, it makes sense to think of rights as obligations and constraints on government, rather than a form of property that individual human beings possess.

# How (and Whether) to Rethink Human Rights

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In a fascinating historical survey, Edward Rubin argues that human rights as understood today are the by-product of a radical change in our conceptual framework that took place in the eighteenth century.<sup>1</sup> More particularly, he believes that two distinctive ideas merged to create a new hybrid: the idea that individuals have natural rights and the conviction that governments are morally constrained from acting in certain ways and morally obligated to act in others. The most basic protections against the government such as the protection of free speech, freedom of religion and the prohibition on torture were not conceptualized as natural rights. Instead, it is shown persuasively by Rubin that constraints on governments often emerged from pragmatic or religious considerations. The sacred “right” of freedom of religion, for instance, was

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<sup>1</sup> I wish to thank Yuval Abrams, Eyal Benvenisti, David Enoch, David Heyd, Michael Otsuka and Edward Rubin for discussing these issues with me.

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founded, among other reasons, on the religious conviction that genuine beliefs cannot be coerced, but must be an act of free will on the part of the believer. Forcing a person to adopt a religion is perceived as inherently unchristian. Similarly the abolition of torture can be explained in pragmatic terms. It is technicalities of evidence law that explain the abolition of this practice rather than new understandings of human nature or deep appreciation of human dignity. The justificatory foundation for the most fundamental “rights” was therefore not grounded in the natural rights tradition – a tradition that emphasizes what human beings possess in common, namely their humanity. Instead the protections against government – protections that include both governmental obligations and governmental constraints - are products of social movements that have nothing to do with natural rights theory. It is only in the eighteenth century that these protections against government have been explained or justified in terms of individual rights shared by all human beings – rights that are the heritage of a different conceptual framework originating in Christianity. The result was the creation of the hybrid – the concept of human rights understood primarily as protection of individuals against the government – a concept that Rubin wishes to call into question.

Rubin’s challenging historical insights are not meant merely to provide us with a new understanding of the historical roots of our political institutions. Rubin also urges us to consider the possibility of transforming the discourse of human rights in light of these historical findings. He boldly suggests that: “Consideration of this history opens a conceptual space for us... and enables us to think about alternative formulations of this issue” (pg. 72) and he fur-

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ther asserts that this conceptual space is worth maintaining (p. 7). More particularly, Rubin believes that we ought to shift our attention from the concern for human rights – a concern that is focused on the pre-existing nature of individuals - to a concern about the moral demands imposed on governments. Such a shift would, in Rubin’s view, have important advantages; most important, it would serve to eradicate the artificial distinctions currently drawn between negative, positive and communal rights and the fruitless controversies resulting from these distinctions.

This comment will primarily concern Rubin’s effort to provide a new conceptual framework to replace the concern for human rights. I will start, however, by raising one major concern relating to Rubin’s innovative understanding of the historical evolution of the concept of human rights.

Rubin sets out to demonstrate that the concept of natural rights and the origins of the protections against government are distinct. His analysis also presupposes a period of transition into the modern era – a transition that was characterized by the merging of the natural rights tradition and the political conviction that governments are morally constrained from acting in certain ways and obligated to act in certain others. In describing the process leading to the merging of these two ideas, Rubin says:

These protections were merged with the natural rights tradition in the latter part of the eighteenth century, just as the tradition was succumbing to the onslaught of the secular administrative state. As a result, proponents of those protections could clothe them with the

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transcendental dignity of natural rights and natural law, while those who felt social nostalgia for the natural law tradition could fill its empty shell with contents that were meaningful in the godless desert of modernity. (pg. 33)

Later on, Rubin reiterates this claim in greater details and says that:

[L]ate[r] eighteenth century thinkers quailed at the onset of the secularized administrative state. Their social nostalgia made them cling to outmoded terminology and attach it to the new situation they confronted in an effort to deny its newness...They did so because the natural rights conception was losing its force and revealing government as a purely human and potentially unconstrained creation. Under those circumstances, it was reassuring to describe the protection that they championed as rights.... Such rights, like natural rights, could be conceived as possessions, borrowing, by virtue of their form, the sacerdotal quality of their God-given predecessors. Like natural rights, these possessions existed independently of government, and controlled government's proper relationship to individuals. (pp. 46-7)

Rubin's description suggests that the historical transition and in particular the conviction that the protection against the government are "rights" was a superficial phenomenon on the part of eighteenth century thinkers motivated partly by nostalgia and partly by concerns over the growing power of the state. In order to bolster the newly emerging recognition that governments are morally constrained, eighteenth century theorists exploited an anach-

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ronistic tradition that still held rhetorical power – the natural rights tradition. Rubin’s understanding of the evolutionary process as superficial serves the normative purpose underlying his paper. It demonstrates that the merger of these two distinct traditions is not grounded in compelling logical, conceptual or ethical considerations. Instead it is a mere accident of history that an old Christian and feudal tradition could be combined with the newly emerging urge to constrain the powers of the state. Characterizing the transition as a historical accident reinforces Rubin’s conclusion that “Considerations of this history opens a conceptual space for us between these concepts, and enables us to think about alternative formulations of the issue.” (pg. 72) At the same time characterizing the eighteenth century transition as a superficial historical accident raises doubts about the explanatory force of Rubin’s historical understandings. Is it plausible to believe that rhetoric aimed at exploiting an anachronistic tradition – the natural rights tradition - to serve new concerns could be sustained for a few centuries and provide the basis, not only for the major theorists of the liberal tradition such as Rawls, Nozick and Habermas, but also for the design of constitutional law and even for the formation of the newly emerging international order? What made this superficial rhetoric so powerful in the history of the evolution of the concept of human rights? Rhetoric could be instrumental in facilitating conceptual transitions of the type described by Rubin, but in itself, it cannot explain why the new conceptual frameworks emerging in the eighteenth century were so successful in structuring contemporary normative reasoning.

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This challenge suggests that Rubin faces a dilemma. The more artificial the merger between the natural rights tradition and the basic protections against government is, the more it supports Rubin's normative conclusions that there is a "conceptual space" between the two concepts and that perhaps one ought to revise our concepts in light of this "conceptual gap". At the same time, the more artificial the new hybrid is, the more difficult it becomes to explain the persistence and robustness of this hybrid. Rubin seems to have chosen to strengthen his normative framework by describing the transition as an artificial phenomenon at the cost of raising concerns about the validity of his historical understanding.

The historical description of the emergence of the concept of human rights provides support for Rubin's main normative claim that the discourse of human rights ought to be radically transformed. More particularly, Rubin believes that the main concern of human rights theorists should shift from the traditional concern for individuals and their shared human essence to an examination of the nature and the scope of the moral demands imposed upon the government – demands which consist of both obligations and constraints. In his view: "[T]he moral aspect of the manner in which the government treats individuals, the issue that is now conceptualized in terms of human rights, can be alternatively described as the obligations and constraints that are imposed on government units" (pg. 59). My reservations concerning Rubin's view will be divided into two. First I shall briefly argue that Rubin's characterization is both too broad and too narrow to capture the concerns of human rights discourse. Second, I shall suggest that Rubin's important concerns can

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be addressed without abandoning the conventional human rights discourse. Last I shall offer a modification of Rubin's proposal that may serve to explain some of its intuitive appeal.

Rubin's characterization of human rights as: "moral demands imposed on governments" is both too narrow and too broad. Governments have a moral obligation to curb corruption. A government that fails to fight against corruption violates its obligation towards its citizens. But violating this obligation is not typically characterized as a human rights violation and it does not raise the same type of sentiments and resentment accompanying the violation of human rights. Governments are also obliged to respect the law. A government that violates the law or a government that systematically fails to enforce the law violates its obligations towards its citizens. But, it seems that such a failure on the part of the government is not always or even typically, a human rights violation and it ought not to be equated with the type of violation characterized as human rights violations. A government that fails to enforce its own tax laws or planning laws violates its duties to its citizens, but this violation is of a different type than discriminating against minorities, conducting arbitrary arrests or committing genocide. Intuitively it seems to me that this is part of what explains the division between administrative and constitutional law. Administrative law is much broader because it aims to constrain the government wherever it acts even when it impacts public interests, while constitutional protections are much narrower in scope. In order to explain the difference between these two types of protections against government, it is natural to resort to the type of reasoning that Rubin wishes to

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avoid, and to examine which among the governmental obligations and constraints are grounded in our shared humanity, dignity or personhood.

Is Rubin's characterization too narrow? Can non-governmental organizations also commit human rights violations? Rubin is clearly on firmer grounds when he states that:

The concept of human rights, however, fails to incorporate this necessary and perhaps exclusive relationship to government. When we speak of a person having a right, the image is one of an independent, self-contained possession that she can take wherever she goes, not of a relationship between her and the government. The concept, in other words, provides no intrinsic way to separate the generally-accepted subject matter from broader questions of interpersonal morality. Elaborate arguments are then required to explain why the concept of human rights generally does not include the right to be treated with respect by one's children or to be told the truth by one's friends, while it does include contextual relationships with government such as the right of a news reporter to resist a subpoena or the right to of a welfare recipient to an oral pre-termination hearing. (pg. 63)

Rubin is right that governments and not individuals are typically the agents who are accused of violating human rights. At the same time, it seems that the discourse of human rights often attributes violation of human rights to non-governmental organizations. Multi-national corpo-

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rations that employ workers in appalling conditions in the third world are often described in human rights reports as violating human rights.<sup>2</sup> Similarly, terrorists are often also accused of violations of human rights. Accusing non-governmental organizations of committing human rights violations may be described as confused, inaccurate or even manipulative. It is possible to maintain for instance that multi-national corporations should be described as facilitating, assisting or exploiting the human rights violations conducted by the government. But it may also suggest that agents that commit human rights violations need not be governments. It is false therefore to assert that the concerns that are now “conceptualized in terms of human rights, can be alternatively described as the obligations and constraints that are imposed on government.” (pg. 59)

The mere fact that Rubin deviates in some respects from the conventional discourse of human rights is not a reason to reject his challenging claims. Rubin may believe that the discourse of human rights should be revised in light of his normative concerns. Let me examine therefore what his concerns are.

One underlying important and valuable theme is Rubin’s conviction that Hegel was right when he suggested that: “liberty is not a naturally occurring concept in the human mind, but the product of an evolving social

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<sup>2</sup> A recent series of reports that were issued by Human Rights Watch is devoted exclusively to these violations. See Human Rights Watch website <http://hrw.org/doc.?t=corporations>.

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consciousness.” (pg. 31) Rubin continues to elaborate this claim and states that:

To put the matter more concretely, one of the distinguishing features of the administrative state in which we live is its use of instrumental mechanisms to achieve consciously selected social policies. Liberty is such a social policy. Far from being a natural condition, it appears as a complex, carefully developed program, the result of an evolutionary process that includes married women’s property acts, civil rights laws, voting laws, child labor laws and, depending on one’s definition, a variety of social welfare legislation...Liberty is no more natural than environmental protection; it is a product of much effort, and many years of cultural and political development. (pp. 31-32)

He reiterates this important point later and says:

Liberty, according to this view, is not something they are given, something that they naturally possess, but something they must struggle to create... It is not something we are given and must give away, in whole or part, in order to live decent lives, but something we create for ourselves, amidst a dense tangle of social and political control, and that we must struggle to maintain against encroachment by the ever-threatening fecundity of that control. (pg.56)

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The idea conveyed in this paragraph is that liberty is not a pre-social construct; it depends on societal practices and institutions. Human rights discourse thus simplifies complex social reality by attributing to individuals pre-social, natural liberty existing independently of social structures. Hence, by talking about rights, one reinforces the misleading image of “an independent, self contained possession” which the person can take “wherever she goes, not of a relationship between her and the government.” (pg. 63)

The evidence for the claim that liberty is created within society, rather than existing independently of and prior to society is the fact that the scope of protected liberties constantly shifts and changes in light of social circumstances and cultural practices. Hence the reference to “women’s property acts, civil rights laws, voting laws, child labor laws and, depending on one’s definition, a variety of social welfare legislation” is particularly important. These practices seem to be related to liberty, but at the same time they seem to be specific to certain historical circumstances. It seems therefore that the assertion that liberty emerges only in society is corroborated by the fact that the practices that sustain liberty are specific to different societies and to particular historical circumstances. Natural rights theories ignore the complexity of governmental duties towards citizens resulting from the different institutional settings and social circumstances and they fail to account for the shift in the nature and scope of duties owed to citizens.

This accusation makes a highly important and valuable point against some natural rights theorists. Yet, more

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sophisticated rights-based theorists are immune to this criticism. Rights in general and human rights in particular often provide broad guidelines, rather than a detailed set of precise duties. Contemporary theorists of rights often regard rights as *the grounds for the imposition of duties*.<sup>3</sup> Consequently, one could assert the existence of a right, without specifying who the duty holders are, even without specifying what the nature of the duties whose fulfillment is necessary for honoring the right, are, as long as one is willing to assert that certain duties, yet unspecified, should be imposed if the right is to be honored. By stating that a child has a right to education, one need not commit oneself to identifying whether it is the state or the parents who have a corresponding duty; neither is one committed to saying whether this right is fulfilled by teaching the child languages, art or religion. This view explains the “dynamic aspect of rights”, i.e., their inherent potential to create new duties or new duty-holders.<sup>4</sup> In other words, it explains the inherent ability of rights to maintain their identity even when the duties and the duty-holders are altered to accommodate new circumstances.<sup>5</sup>

Moreover, modern rights theorists also acknowledge that social and cultural practices can radically influence

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<sup>3</sup> See Neil MacCormick, “Children’s Rights: A Test Case” in *Legal Right and Social Democracy* ed. Neil MacCormick 154-166 (Clarendon Press, Oxford, 1983); Raz, *The Morality of Freedom* 167 (1986).

<sup>4</sup> See Raz, *supra* note 3 at 171.

<sup>5</sup> For a survey of this view, see Alon Harel, *Theories of Rights* (forthcoming in Blackwell Guide to the Philosophy of law and Legal Theory, Martin P. Golding & William A. Edmundson, eds., 2004. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=459960](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=459960)).

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the scope and content of rights. The dependence of values on social practices can be used to explain the diversity of governmental duties and their changing scope and content. A person can have a “natural right” to autonomy but the particular ways in which autonomy can be realized may differ from one society to another. Human rights theorists can talk about natural rights to liberty, autonomy and equality without precluding the possibility that the social and institutional practices that sustain liberty, autonomy or equality could radically differ in different societies. Social practices influence, therefore, the scope and content of duties designed to guarantee the fulfillment of rights. Every society develops its own autonomy - enhancing activities and grants them protection. Precisely as artistic practices shift and develop without precluding the possibility of identifying underlying artistic values, so the practices that sustain autonomy can differ between societies without precluding the existence of a “natural right” to autonomy.<sup>6</sup> Rubin could argue that natural rights understood in this way are too abstract and indeterminate to be useful. Yet, in order to substantiate this accusation, he needs to address in greater detail the particular theories that purport to explain the flexibility of governmental duties and their dynamic nature.

Rubin provides three additional specific justifications for his proposal to focus on state’s obligations and constraints. First, he says that first generation rights are al-

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<sup>6</sup> I tried to develop this view in Alon Harel, “Rights-Based Judicial Review”, 22 *Law and Philosophy* 269-275 (2002) and in Harel, *supra* note 5 section II A.

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most always addressed to the state. While he agrees that employers can violate various rights, he continues and says that:

Even for those who make such claims, however, the state plays an essential role in implementing these freedoms. One can address a claim for freedom of speech to a private employer, but as an empirical matter, some employers will respond and others will not. In order for this right to be universally secured, therefore the claimant must also address the government, insisting that it compel all employers to comply. (pp. 62-3)

This justification seems inadequate. We all know that some individuals violate the rights of others. The state often plays an essential role in implementing these freedoms. But the state alone cannot fulfill the task. We call upon the state to enforce rights that are violated by individuals but we also call upon individuals to remedy or minimize violations of rights conducted by the government itself. Precisely as the state has an essential role in implementing rights violated by the state, so individuals play an essential role in implementing freedoms violated by the government. It is only the joint effort of both that can succeed in protecting human rights.

Rubin attacks the artificial distinctions between the different generations of rights. He argues persuasively that these distinctions enhance the conviction that first generation rights are somehow more authentic than second or third generation rights and that these distinctions help to sustain fruitless debates as to whether the provision of a

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certain good is a right when the real question is whether the government has compelling reasons to act in a certain way. Governments have both obligations and constraints, but the precise scope of these, Rubin believes, has to be argued for on the basis of normative considerations, rather than on the basis of some preconceived notions of what rights are and to what generation they belong. Similarly, he is right to point out that third generation rights – communal rights – are important features of our social world and that these rights often generate tensions with more traditional views of rights. Communal rights, Rubin argues, seem to conflict with the traditional idea that rights are individualistic. Replacing the discourse of human rights with a discourse of governmental obligations and constraints could serve to focus attention on the real normative issues rather than on these superficial distinctions.

Yet, from a philosophical point of view, eradicating the artificial distinctions between first, second and third generation rights does not require abandoning the discourse of rights or replacing it with the language of governmental obligations or constraints. Advocates of second-generation rights have always tried to demonstrate the similarities between first and second generation rights, and even liberal theorists committed to individualism often demonstrate why the individualistic flavor of rights does not preclude the possibility of providing a justification for communal or collective rights.<sup>7</sup> Rubin is perhaps

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<sup>7</sup> See, e.g., Alon Harel, "Revisionist Theories of Rights: An Unwelcome Defense" XI *Canadian Journal of Law and Jurisprudence* 227 (1998).

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right that the language of rights has an ineradicable individualistic flavor, but its individualistic flavor does not preclude the efficacious protection of communal interests.

More importantly, Rubin's radical proposal eradicates an important distinction drawn among different types of governmental constraints or obligations as well as fails to account for the important similarities among some governmental and non-governmental constraints and obligations. Respecting human rights is not simply an obligation or a constraint imposed on the state; it is an urgent obligation and its urgency stems from certain reasons, in particular, from reasons identified by the natural rights traditions, regarding the sacredness of individuals. By eradicating this distinction, an important function of human rights discourse cannot be satisfactorily fulfilled, which is to draw attention to particular commonality among different hideous governmental practices as well as commonalties among hideous governmental and non governmental practices. Lastly, by eradicating this distinction, Rubin's proposal fails to account for the fundamental differences among different types of governmental duties in accordance with the reasons underlying these duties, e.g., between government's duty to curb corruption and its duty to protect its citizens from murder.

At the same time, Rubin's analysis identifies an important characteristic of human rights, namely the fact that violation of human rights is associated with certain entities – entities that are the potential perpetrators of human rights violations. I argued earlier that non-governmental entities could also be accused of human rights violations. Yet, it is not the case that any entity can be accused of

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human rights violations. Multi-national corporations and paramilitary groups are natural candidates for accusations of this type, but individuals, including hideous criminals are not typically accused of human rights violations. A rapist is not described as violating the *human* rights of his victim to sexual autonomy, but a state that encourages rape is violating human rights. It seems to me that the current use of the language of human rights draws attention to an important normative component that Rubin's paper identifies. Human rights violations are typically characterized by large disparity of power between the perpetrator of the violation and its victim and consequently by structural helplessness of the victim. Human rights violations are conducted by agents who are capable of committing persistent and systematic injustice against victims who are typically helpless. If what counts is a great disparity of power, persistence of injustice and helplessness on the part of the victim, the state is indeed a paradigmatic agent that can commit human rights violations, but, as was suggested earlier, not the only one. Lastly, while huge disparity of power is a necessary condition, it is not sufficient. It is not simply the existence of a duty on the part of the state, or other powerful entities, that is crucial, but also the underlying values that justify the imposition of these duties. It is these underlying reasons that give human rights discourse its particular importance and salience in contemporary world affairs. Rubin's article draws attention to an important and often neglected feature of human rights discourse, namely the special normative status of powerful organizations and institutions and the special obligations that this power imposes on them. Yet, I believe that human rights are indeed an important category and that the discourse of human rights ought not to be transformed to a

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discourse concerning government obligations and constraints.

# Human Rights and Political Liberty

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Edward Rubin's call to rethink human rights comes, it would seem, at just the right moment: their constitutional manifestation, the Universal Declaration of Human Rights, is now well into its second half-century, the international human rights treaty system has continuously expanded and deepened, the end of the Cold War has seen an unprecedented expansion of constitutional Bills of Rights, and in the course of all this, the concept itself has evolved into its (arguably) fourth generation. Human rights as a discourse seem, in sum, to be omnipresent and, indeed, hegemonic, or as Eduardo Rabossi fittingly put it in a phrase popularized by Richard Rorty, they are now simply 'a fact of the world'<sup>1</sup>. Yet, at the same time as their discourse appears so dominant, their concrete realisation

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<sup>1</sup> Ernesto Rabossi, "La Teoria de los Derechos Humanos Naturalizada", in *5 Revista del Centro de Estudios Constitucionales*, 1990; cited also in Richard Rorty, Rorty, R., "Human rights, Rationality and Sentimentality", in Shute, S./Hurley, S. (eds): *On Human Rights - Oxford Amnesty Lectures 1993*, New York: Basic Books, 1993.

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continues to be very far off in many places. What is more, the tragic events of September 11 may turn out to have occasioned a watershed for the concept as such, counterposing it to such alternative and (as of 9/11) competing discourses as public security and counter-terrorism, and, in part, delegitimizing the international mechanisms through which they have been promoted. Hence, at their seemingly greatest discursive expanse, human rights would appear to face the steep challenge of an older, state- and *ordre publique*-centered logic which leaves their future role uncertain.

For many human rights defenders, this is, of course, the moment to rally the troops and prepare to defend one's turf on the basis of a smallest common denominator consensus, rather than to rethink what human rights actually are, where they come from, and what they can do for us (or not). Rubin is not merely timely, but also courageous to abstain from a formulaic incantation of 'human rights v. the rest of the world' and, instead, to insist on a deep and complex reading of the concept. The result is both enlightening and puzzling. It is enlightening in its unrelenting historicization of the concept, and the consequent effort to reach through the anachronising veil of contemporary accounts of human rights, with a view to untying the many different conceptual strings that have, whether rightly or wrongly, been amalgamated into that which we today refer to as 'human rights'. This is a rare posture, and the more so as it does not come from a professional historian writing for a niche audience, but from a lawyer and socio-legal theorist very much engaged in contemporary rights debates. For, somewhat strangely, in the vast body of literature on human rights, their historical dimension

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has played at best an ambivalent, and at worst a paradoxical role. Austin Sarat and Thomas Kearns have written of an “unfortunate schizophrenia in which abstract normative treatments of rights have been divorced from analyses of the way rights are shaped by, and emerge from, particular social and cultural contexts”<sup>2</sup>. Yet, while it true that the conceptual or positivistic treatment of rights rarely interacts with the specialist historical one, a certain schizophrenic dichotomy is already apparent in the way ‘history’ is referred to in the non-historical literature. On the one hand, most references to human rights attempt to ‘back up’ their conceptions by referring to rights’ supposed historical roots. Yet, on the other hand, there is a strange reluctance in the non-specialist-historical literature to fully admit this historicity, notably by evading any specifically ‘historical’ engagement with the subject matter. Historical references are usually as hazy as they are frequent, employing a highly stylised vocabulary that glorifies the ‘fathers of human rights’<sup>3</sup>, who are taken to have ‘invented’ the essential core of what is now known as human rights.

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<sup>2</sup> Austin Sarat and Thomas Kearns, “Editorial Introduction” in Sarat, A./Kearns Th.R.[ed.]: *Legal Rights: philosophical and historical perspectives*, Ann Arbor: University of Michigan Press, 1996, p. 2.

<sup>3</sup> As is both usual and unfortunate, ‘mothers’ are as yet seen as much less prominent in this context, though especially the more recent history of rights features some definite candidates, such as the suffragettes, and womens rights activists in general; see, however, *inter alia*, Karen Engle, “Female Subjects of Public International Law: Human Rights and the Exotic Other Female”, in 26 *New England Law Review*, (1992): 1509; *ibidem*, “International Human Rights and Feminism: When Discourses Meet”, Michigan 13 *Journal of International Law*, (1992): 517; Dorothy Thomas, *Women's Human Rights: From Visibility to Accountability*. 69 *St. John's Law Review* (1995): 217-230; and, of course, always Catharine MacKinnon, *Toward a Feminist Theory of the State*, Cambridge (MA): Harvard University Press, 1989.

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Such historical references do not serve as much to put human rights into historical context, as they do to show their supra-contextual validity. Haakonssen and Lacey have observed that this discourse tends to elevate “truths supposed to be above the flux of history - something more fixed and universal, permanent and reliable as a guide to action than the particularities of history can of themselves disclose”<sup>4</sup>. As such, most uses of historical reference in the general (human) rights literature are mythological in nature, i.e. projecting a contemporary interpretation of rights onto an imaginary historical screen so as to bestow onto it the rhetorical authority of that which is valid across time (and often space)<sup>5</sup>. There seems to be a deep-seated, if usually unacknowledged, fear of surrendering the normative core of human rights to historical contingency, which is often equated to post-modern cynicism, with its alleged rejection of moral objectivity.

On this count, Rubin manages admirably to combine a thoroughly historical (and historicist) perspective with the argumentative horizon of a contemporary rights theorist. In fact, this appears to be his overall objective, to dissect the concept of human rights in history, and show that it consists of two, in his view, incompatible strings: natural

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<sup>4</sup> K. Haakonssen and M.J. Lacey (eds.): *A Culture of Rights*, Cambridge: Cambridge University Press, 1991, p. 7f.; see also David Kennedy, “The International Human Rights Movement: part of the problem”, in 14 *Harvard Human Rights Journal* (2001): 101-127, p. 111f, and Martti Koskenniemi, “The Effect of Rights on Political Culture”, in Philip Alston, Mara Bustelo and James Heenan, *The EU and Human Rights*, Oxford: Oxford University Press, 1999.

<sup>5</sup> Austin Sarat and Thomas Kearns, “Editorial Introduction” in Sarat, A./Kearns Th.R. [ed.]: *Legal Rights: Philosophical and Historical Perspectives*, Ann Arbor: University of Michigan Press; *passim*.

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rights and the protection of individual and collective liberty against governmental infringement. These, he argues, developed out of quite distinct concerns and in rather different historical settings, and only became merged in the late eighteenth century through the revolutionary concept of *droits de l'homme*/rights of man and its latter day conceptual successor, human rights. In this development, however, the fundamental tension between natural rights and (political) liberty was not overcome, and it continues to characterise much human rights discourse. Many of the seeming paradoxes of human rights today stem, in Rubin's eyes, from the impossible attempt to reconcile very different objectives through a single, overstretched concept.

Yet, Rubin's historical conclusions do not necessarily clarify this confusion. While Rubin legitimately tries to identify the core historical stepping stones for both natural rights and political liberty, the reasons for allocating particular sources to either string is not always transparent, nor is his starkly differentiated reading of either tradition. Rubin correctly singles out the feudal relationship, the scholastic (Aristotelian) natural law tradition, the debates on apostolic poverty, as well as conciliarism and early constitutionalism –especially in relation to the incipient rights of citizens- as key factors in the emergence of the concept of natural rights. And he correctly discusses the influence of balance of power and judicial due process debates from Montesquieu up to the Federalist Papers, as well as social contractarian attempts to protect a sphere of personal liberty against public (governmental) encroachment. Yet, his treatment of the seventeenth-century debate on toleration, the anti-slavery movement, and the turn against torture in criminal trials as belonging exclusively

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to the political liberty tradition is unpersuasive, as is his mention of Kant and Hegel as part of the natural rights tradition. The two traditions were not as separate as Rubin supposes. To look, for instance, at the anti-slavery debate purely from a political liberty, and not also from a natural rights perspective is to unduly disassemble arguments originally conceived in a more holistic way. It is similarly difficult to judge whether, for example, the rights certified in *Magna Carta* were seen as protections against royal interference, or as the personal entitlements of their bearers. It seems more sensible to consider them as both, not least since both natural rights and political liberty draw in large part from the same conceptual vocabulary, and were, in fact, developed by the same thinkers. The more general point is, of course, that both ideas cannot be seen as so starkly different, but rather as interrelated aspects of the same overall historical tradition. This arose, as Rubin is well aware, from the encounter between feudalism and Roman law-inspired ideas of imperium, played out through the conflict between *ius naturalis* and *ius gentium*, which is related, in turn, to the very influential re-discovery of Aristotle, as well as the complicated relationship between natural and civil law, on one hand, and the concept of natural and legal rights, on the other hand. Ultimately, these various debates revolved around what would become the core concepts of political and legal theory, notably the state, citizenship, political authority, and rights.

Rubin rightly stresses the complexity of these foundational debates, exposing much of the contemporary (non-specialist) account of the history of rights as a set anachronistic myths, but his reading of the sources is itself too

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modern, i.e. clear-cut and dichotomic. The mediaeval and Renaissance debates about rights and political authority, as continued in the seventeenth and eighteenth centuries, were not so neatly divided into separate traditions. These early debates did not yet conceive of rights as held by individuals against a communal, state-like entity, but rather viewed public authority, as well as individual claims, as forms of authority over people and land, both of which had, at that stage, an individual dimension. This implies, in turn, that the general world-view not only of such thinkers as William of Ockham, or Francisco de Vitoria, but also of men such as John Locke and James Madison, was much less recognizably modern, and much less in line with the contemporary notions of negative and positive liberties, and (human) rights than is commonly assumed. The careful historical reading Rubin engages in does not show a separation, but rather the thorough interconnectedness of the idea of political liberty with that of natural rights in pre-modern and early modern thought. It shows the concept of human rights as ultimately much more closely tied up with the contingent historical trajectory of Europe and North America, than the modern, universalist understanding of rights is prepared to admit. And, likewise, it shows European and North American societies as, historically, much less premised on the stark contrast between rights-holding monads and some state or governmental Leviathan than many of the dominant political narratives suggest. Instead, the picture that emerges is one of political communities in which claims for individual (property) rights and legitimate political authority intersect in a dynamic way, in a process which may involve paradoxes, but not incompatibilities. Hence, the history of human rights is not about overcoming the supposed con-

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trast between individuals and the state, or individuals and community, as supposed by such modern philosophers as Nozick, Rawls or Habermas, nor is it, as Rubin himself would have it, about the progressive dysfunctionality of human rights on account of the insuperable tension between natural rights and political liberty. Instead, that tension is one of the productive forces of human rights, a point of fusion through which (human) rights attain their specific identity and which is, thus, an integral and valuable part of the concept of rights.

A second, if closely related observation concerns Rubin's use of the term "human rights". By his own account, Rubin equates human rights with moral rights and, thus, distinguishes them from legal rights, even though the political liberty component of human rights is mostly manifest in (ordinarily) legally enforceable constitutional Bills of Rights. He also draws a fairly direct line from natural rights to human rights, without accounting for the now frequent association of the term "human rights" with their international legal protection regime. The general point here is that the term "human rights" is far from straightforward and self-evident, and that some conceptual reflection on what human rights actually are, whether they are legal or moral, domestic or international, or all of these, ought to inform the historical reading in which Rubin engages.

A starting point could be a distinction between three lines of historical developments: first, there is the history of the idea of what is now often termed 'moral rights', i.e. the attribution of innate subjective faculties to human beings in virtue of their shared humanity; this history com-

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prises the *ius naturalis* of the Middle ages, the ‘natural rights’ of the Renaissance and Reformation period, the ‘rights of man’ and ‘*droits de l’homme*’ of the English, American, and French revolutions, the rights language used in the anti-slavery, and women's suffrage movements, and up to the Universal Declaration and the Nuremberg principles<sup>6</sup>. Second, there is the history of the concept of ‘legal rights’, i.e. claims against others, the community, or the sovereign which are, at least theoretically, held to be enforceable by appropriate institutions. This includes the first precursors in classical Roman law, the medieval feudal ‘contract’ and other fields such as property and legislation, the famous early rights documents, such as the *Magna Carta*, the Petition of Right, the (English) Bill of Rights of 1689, the Virginia Declaration and the American Declaration of Independence, both of 1776, and the United States Constitution’s Bills of Rights of 1791, and the further ‘domestication’ of rights in subsequent constitution-making. It is primarily a history about the development of what has come to be termed constitutional, fundamental, or basic rights within nation states, though, to some extent, it also includes the history of general international law, which has, of course, attempted to transpose the domestic constitutional structure onto an imaginary international society of states. And third, there is the history of what could be called the ‘human rights movement’, i.e. the self-conscious reference to human rights within the context of different political

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<sup>6</sup> See, for an introductory overview of the human rights ‘movement’ Philip Alston and Henry Steiner, *International Human Rights In Context*, 2<sup>nd</sup> ed., Oxford: Oxford University Press, 2000

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struggles, and the gradual (moral) ‘legitimation’ and ‘legalisation’ of the claims made in these contexts. This history includes the well-known ‘constitutive moments’ of human rights that ultimately led to the Universal Declaration, beginning, inter alia, with the anti-slavery movement, the struggle for women’s rights and universal adult suffrage, and the fight for labour rights and rights of democratic participation. This would also comprise the history of the gradual ‘differentiation’ of international human rights law into a distinct sub-field of general international law, through such developments as international humanitarian law, international minimum standards for the treatment of aliens, minorities protection, the emergent notion of genocide and crimes against humanity, international trusteeship and decolonisation, and the anti-apartheid struggle.

A slightly closer look at the terminological histories of each of these lines of development might provide some further clues on the conceptual identity of human rights. The term itself is, as Rubin also observes, of recent coinage, having been introduced with the UN Charter and the Universal Declaration. Its predecessors were the ‘rights of man’ and, of course, ‘natural rights’ – *ius naturale* and *lex naturalis*. The former emerged as *droits de l’homme* in French physiocrat and philosophes circles, and culminated in the revolutionary *Declaration des Droits de L’Homme et du Citoyen* of 1789; the then generic *homme* -‘human’<sup>7</sup>- having been chosen as a supposedly non-theist

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<sup>7</sup> It is, of course, a still persistent myth that the inventors and subsequent users of the generic term ‘man’ –denoting today’s human being– were unaware of its male-centeredness; although the modern feminist critique should not be smuggled into the late 18<sup>th</sup> century, it is equally

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alternative to the older ‘natural rights’<sup>8</sup>. The *Declaration* had a strong influence among English radicals, including Thomas Paine whose ‘Rights of Man’ was written in reply to Burke’s critique of the revolution<sup>9</sup>. In their core meaning, the *droits de l’homme* did not fundamentally differ from ‘natural rights’ in that both expressed subjective claims based on the universal characteristics of human beings, but they came to have slightly different connotations. The ‘rights of man’ and ‘natural rights’ were used contemporaneously in different fora. ‘Natural rights’ remained the term of choice in moral philosophy, whereas the ‘rights of man’ came to be associated with constitutionalism and political theory. There is, of course, a subtle difference between the two terms, notably in their approach to universality; while both allude to the innate faculties of human beings as such, ‘natural rights’ have a distinctly metaphysical, if not theistic, undertone to them, in which ‘nature’ connotes the necessary and non-contingent character of rights which are neither creations of, nor subject, to human will<sup>10</sup>; the ‘rights of man’, in

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mistaken to ascribe some form of serene innocence to authors of that time; ‘man’ was then, as now, defined in contradistinction to ‘woman’, with the prototype of the individual being the former, rather than the latter: see Joan Scott, *Only Paradoxes to Offer: French Feminists and the Rights of Man*, Cambridge (MA): Harvard University Press, 1996; see also Costas Douzinas *The End of Human Rights*, Oxford: Hart Publishing, 2000, p. 97f.

<sup>8</sup> See, for example, Condorcet’s statement that natural rights belonged to abstract man, as they were “defined as a sensitive being...capable of reasoning and of having moral ideas”; cited in Douzinas (2000), n. 7, p. 97.

<sup>9</sup> Thomas Paine, *The Rights of Man*, Mineola (NY): Dover Publications, 1999.

<sup>10</sup> Douzinas (2000), n. 7, p. 85ff.

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turn, while still clearly derived from 'natural rights', nonetheless already point to a 'community of men', a form of citizenship of humanity, membership in which is simply the primary attribute of 'men', with any metaphysical cause being of secondary importance.

It is, arguably, this incipient distinction between humans and citizens, clearly articulated in the French Declaration, that also marks the gradual differentiation of moral and legal rights. The rights of 'men' remain on the level of abstract, universalistic morality, whereas those of citizens are linked to a concrete and particular sovereign defined with reference to a specific population, and not to divine grace<sup>11</sup>. Although, within the latter sphere, the effective interlinking of what Habermas calls (human) rights and popular sovereignty occurred only very gradually, already the original split between 'man' and citizen represented an irreversible turn towards secularization and positive law. Yet, the roots of legal rights extend further back: as was seen, the idea of special and, importantly, concrete and 'useable' entitlements goes back at least to the late mediaeval Italian city states, if not, in a more limited way, to the mentioned mediaeval charters such as the *Magna Carta*. Both contexts illustrate the features of such concrete legal rights: they were ultimately bestowed by, and existed in relation to, a sovereign community, and they contained certain clearly defined entitlements for the members of the group of rights holders. Parallel private rights of commerce and economic production had already existed throughout the Middle Ages, and before, as soon

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<sup>11</sup> Douzinas (2000), n. 7, p. 103 and 117

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as societies separated the state from the economy, dividing public from private law<sup>12</sup>. It is from these roots that the continental, and especially German, term ‘subjective rights’ developed, referring to the legal recognition of an inviolable sphere of individual autonomy upon which relations between individuals are premised. This, originally Kantian, ‘private law’ perspective of rights seems to coincide with the Anglo-American use of the term ‘rights’, except that the latter essentially constitutes the law as such, and hence has included relations to public political authority, whereas the former excludes what forms, in continental civil law systems, public and administrative law. However, while the original Kantian conception of (private) law had as its source the moral conception of individual autonomy, once that conception was lost in the process of modernisation and social differentiation, the source of law came to be located not in individual subjectivity, but in the objective, institutionalised legal order. Subjective rights, hence, became derivative of objective law - empirically, not deontologically, valid - and lost their connection not only to the moral subject, but also to the natural person, as the legal system came to be seen as self-contained in its own legal fictions or its code. This change in the source of validity of subjective rights corresponds, of course, to the move from a concept of law intimately linked with morality, to a positivist one, in which it is entirely autonomous<sup>13</sup>.

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<sup>12</sup> Jürgen Habermas, *Faktizität und Geltung*, 4<sup>th</sup> ed., Frankfurt a.M.: Suhrkamp, 1994, p. 112ff. Habermas (1997), n. 7, p. 132.

<sup>13</sup> *Ibid.*, p. 132.

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That the positivization of rights in the domestic sphere was intimately linked with the emergence of the sovereign, later liberal, and yet later democratic nation-state also meant, of course, that legally, human rights had to take the shape of international rights, conceded by nation-states with respect to acts suffered by individuals (and later groups) within their national boundaries. The innovation here was not the often alleged expansion of domestic rights regimes to a supranational one, but the extension of (some) citizenship rights to non-citizens, and, only very gradually, the creation of international institutions to serve, in the best of cases, as last appeal chambers for cases that failed in domestic jurisdictions. The international sphere recognised by the law is, in its classical design, derivative of the national, and, thus, in stark contrast with the universal aspirations which the moral conceptions of (human) rights continued to have. The Universal Declaration is, of course, a hybrid creature, speaking to a moral universe of humankind, but having been negotiated and enacted through the mechanisms of international law, granting moral human rights to all persons irrespective of their citizenship and in virtue of their humanity, while not imposing any international legal obligations on the states who signed it. To an extent, this ambiguity between moral universality and legal internationality has marked human rights ever since, even in those cases in which states have consented to positivise them domestically and internationally.

Although the preceding reflections are merely a rough sketch of the different conceptual layers of human rights, they suffice to show that the concept cannot be reduced to mere equivalence with natural rights. Indeed, it is hard to

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fathom the ultimate purpose of Rubin's argument. He sets out to disentangle the idea of (human) rights from the idea of (political) liberty, to identify the aims which different types of rights pursue in relation to political liberty, and to replace complicated and potentially paradoxical rights claims with supposedly more straightforward "moral demands on government". Yet, the practical implications of this change in viewpoint remains unclear. Does "rethinking" human rights merely reduce the content of human rights to some form of human ontology, i.e. to descriptions of the fundamental (natural) characteristics of human beings, which should be considered entirely separate from issues concerning the way political community is organised? If so, the debate on political liberty would no longer be framed in rights-terms, but in the form of claims of state or governmental obligation. Perhaps Rubin's 'rethinking' implies a more fundamental critique of the very concept of human rights. If rights are no longer to be part of political discourse, they would necessarily have to be seen as belonging somewhere in the private sphere, as contingent self-descriptions meant to express someone's particular conception of personal autonomy. Public political debate would, then, be conducted purely in policy terms, i.e. essentially concern the balancing of interests with a view to the fulfilment of certain basic goals, such as communal survival, general prosperity etc., which would be, as Rubin suggests, formulated in terms of moral obligations on government. While this may be a defensible political theory, it does not really address the question of the continuing relevance of human rights. If rights-language is relegated to private descriptions of personal autonomy by those who choose to employ it, rights vocabulary would lose all distinctiveness and become just

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one private language game among many. Hence, even this prima facie more moderate ‘rethinking’ would amount, in the last instance, to a declaration of the irrelevance of (human) rights, and, thus, to a fundamental critique of the concept.

Such denigrations of rights have a long history, embracing the utilitarian (liberal) critique of natural/moral rights initiated by Bentham and Mill. This viewpoint had an echo not just in contemporary utilitarian critiques, but also generally in policy-based approaches. Unlike conservative (Burkean) and Marxist rights critiques, the policy-oriented one has not so much based itself on a positive deconstruction of the allegedly metaphysical/superstructural ‘ideology’ of rights, but rather on the claim, reflected in Rubin’s argument, that rights are a suboptimal way of framing and arguing about public policy. Indeed, policy-oriented approaches would go as far as claiming that rights and rights arguments are really about policy choices, and not about personal (or collective) entitlements at all. For Rubin, policy-choices would, of course, be constrained by the moral obligations which replace the older rights talk. While this would be a valid position, it nonetheless leaves open the question of the nature of that constraint in the absence of any ‘rights as trumps’ logic. Would this not imply that all individual and collective claims would need to be considered as no more than divergent interests to be balanced by the government in terms of its overall policy preferences? And would this, then, not transfer the accountability and critique function fulfilled, inter alia, by rights claims, entirely into the discretion of the existing government? For who, in the absence of rights language, could possibly be the final arbi-

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ter of moral demands on government except for the government itself? These are, of course, large questions, which by far exceed the scope of this comment, but which may point to a more general issue: is Rubin not slightly too easily prepared to trade the logic of human rights for that of (democratic) policy-making in balancing competing moral demands?

Perhaps, despite, or, indeed, because of all its inherent contradictions, the concept of human rights remains an indispensable rhetorical tool against any form of dominance and attempted hegemony, whether emanating from one's neighbour, one's political community, or one's government. The language of human rights can be used by everyone and everywhere, not necessarily with success in relation to the originally pursued aim, nor, in fact, with any predetermined outcome. The world –and one's political community, in particular- is, thus, not made less complex and contradictory by human rights, but nor is it allowed to forcibly reduce the irreducible complexity of those who live in it. In this sense, the 'essence' of human rights could, in fact, be taken to be their power of enabling transgression: no hegemonic imposition, no rationality, no law, no judgement<sup>14</sup>, no argument is ever safe from being challenged by the many uses of human rights<sup>15</sup>. Such a

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<sup>14</sup> On this point, in particular, see Julie Ringelheim and Florian Hoffmann, "Beyond the Universality v. Relativity Debate: Dealing with Cultural Diversity in Human Rights' Practice --the case of the European Court of Human Rights - ", conference paper produced for 2<sup>nd</sup> *Conference on Theoretical Issues in Human Rights*, Khom University (Mofid, Iran), May 2003 (to be published in the Proceedings).

<sup>15</sup> See also Florian Hoffmann, *Are Human Rights Transplantable? - reflections on a pragmatic theory of human rights under conditions of*

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conception of human rights need not make the sweeping metaphysical claims against which Rubin rightly inveighs, but it does assert a central role for a rhetorical construct which is uniquely suited to humanize the impersonal workings of the Leviathan. It is, in any case, not a position in fundamental contrast with Rubin's historicist reading of human rights, and one that can happily espouse his very welcome call to break open the chains of inherited categories of thought and to grasp their historically contingent nature.

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*globalization*, unpublished doctoral dissertation defended at the European University Institute [EUI], 2004 [to be published / available at EUI Library].

# Translating Human Rights into Moral Demands on Government

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Professor Rubin provides a stimulating critique of the concept of human rights, offering a new vocabulary which he hopes will avoid the unstable foundations of the idea. Rubin argues that the current conceptions of human rights would be better conceived as moral constraints and demands on government. This alternative conception of rights is designed to resolve some of the conceptual incoherence of traditional approaches. Rubin's reformulation would require us to revise our understanding of the "moral aspect of the manner in which government treats individuals".

Translating human rights into the language of moral demands on government as Rubin suggests, might not, however, be the most appropriate means of challenging the character of human rights as "objects of devotion,

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rather than calculation”.<sup>1</sup> Further, not all existing human rights are capable of being translated into Rubin’s new formula without some adjustment, either to that formula or to our understanding of the content of existing catalogues of human rights.

### **Individuals, Human Rights and State Obligations**

Rubin proposes that we view human rights as moral constraints and demands upon government. This description presents the government as the relevant actor – the agent which is bound from or to certain deeds. The relation of the individual person (human being) to those restrictions, and to the government, is masked. The stress is on state action, not on the pursuit of moral or legal claims by individuals. This shift of emphasis from the individual rights-holder to the notion of government obligation is, to some extent, an attractive one. It would certainly be helpful to ensure that the individual was no longer the primary focus of the manner in which moral aspects of government were phrased. It would be less helpful, however, to lose entirely the perspective of the individual in the presentation of moral constraint and demands on government.

Human rights ideology is not limited to the expression of moral constraints and demands upon government as claims which individuals may pursue. It has an additional function, what might be termed the declaratory role of

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<sup>1</sup> David Kennedy, “The International Human Rights Movement: Part of the Problem”, *E.H.R.L.R.* 245 (2001) at 246.

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human rights. A person who possesses a human right is the recipient of a declaration of her status as a rights-holder, and by definition of her membership in a class of similarly entitled persons. This class is not necessarily co-extensive with that comprising all human beings, despite the description of the rights in question as “human”. This is not just to say that the rights may be limited on certain specified grounds (in times of emergency, or of conflict with other rights etc). It is to note that there are always some humans to whom certain rights are denied entirely for reasons inherent in the structures of the rights themselves. In such cases, it is part of the definition of the human right that it is granted to only a subset of human beings. This feature of human rights ideology can be illustrated with reference to, for example, the human right to non-discrimination. While this may be conceived at the abstract level of a universal right to equal treatment, it operates as a human right only for those humans who can demonstrate that they are members of a group defined by a particular criterion - racial, sexual, health-related, linguistic etc.- which entitles them to protection. Such criteria define the classes of persons which possess the human right to non-discrimination; they are not simply limitations on the manner of application of a genuinely universal right.

Another prominent human right which follows this pattern is the right to vote. The notion that voting is a human right, a universal moral entitlement of all human beings, became established, along with most other human rights claims, after World War II. The right to vote was

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one component of the charters of international rights formed after the war.<sup>2</sup> Interestingly, the European Convention on Human Rights, Protocol 1, Article 3 is phrased as a moral demand upon governments to hold free elections, language which was eventually transmuted by the Court of Human Rights into a human right. From being the central civil and political liberty, voting has become a human right. Yet this has never implied, either conceptually or as a matter of politico-legal practice, that every human being possesses a moral entitlement to vote. The human right to vote has never aspired to genuine universality. The ideology of human rights has comfortably embraced – and continues to accommodate – extensive disenfranchisements, characterizing these, not as failures to attain the standard of universality implicit in the notion of human rights, but as the acceptable limits of universality in the context of electoral democracy. So, in the period during which suffrage has been subject to human rights doctrine, women, distinct racial groups, non-citizens and children have been and – and in some cases continue to be – denied their “human right” to vote.<sup>3</sup> The idea of genuine universality of voting rights does not apply even within a single democracy, let alone to the community of democratic states, and still less to the population of human beings as a whole. This being so, the declaratory role of the human right to vote – declaring who possesses the status of member of the electorate and who does not – is an im-

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<sup>2</sup> Gregory H. Fox, “The Right to Political Participation in International Law” 17 *Yale J. Int’l. L.* 539 (1992).

<sup>3</sup> Andre Blais, Louis Massicotte, Antoine Yoshinaka, “Deciding Who Has the Right to Vote: A Comparative Analysis of Election Laws”, 20 *Electoral Studies* 41 (2001).

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portant feature. Those who possess the human right to vote in a democracy constitute a group – the electorate – with immense social and political significance. Membership of this group, generated by the award of the right to vote, represents a distinct consequence of the possession of the right, separate from the particular legal and political protections which the institution of the right to vote guarantees to their franchise.

Possessing the human right to vote, then, marks an individual's membership in a group – the subset of humans entitled to the right in question– and that function of the right may be as important to the individual – or to the principles of social organisation - as its role as a means of guaranteeing the activity in question. Such rights may be termed pure 'constitutive' rights.<sup>4</sup> Because of the discriminations which such rights perform between humans who have them and those that do not, they require ongoing and intense scrutiny. Justifications must be provided for the deviations from universality which such human rights sanction. Too often, human rights theory has failed in this task, accepting, for example, outrageous and entirely unjustifiable discriminations between those granted the right to vote and those denied it. Yet the commitment to universality implicit in the idea of human rights has at least served to make our toleration of such distinctions uncomfortable. We are pressed into providing some explanation for the denial of this human right to some human beings and inadequate reasons may ultimately be exposed and

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<sup>4</sup> Eric J. Mitnick, "Constitutive Rights", 20 *O.J.L.S.* 185 (2000) at 200: "At the heart of constitutive rights is official acknowledgement of group difference".

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displaced by the universalizing tendency of human rights thought.

Human rights theory may have failed as yet to develop a rigorous and comprehensive account of the moral justifications for the distinctions which it draws between human beings with full rights and those without full rights, but it does at least have the potential to do this by taking the perspective of the individual who possesses – or is dispossessed of – the right into account. If Rubin's proposed formula is to be preferred as a characterization of human rights, then we should hope that it would provide a similar – or better - stimulus for the critical scrutiny of the constitutive and declaratory roles which certain human rights perform. There is a risk that it would not. This is because the language of moral constraints and demands on government, while it may aptly capture the essence of human rights as claims by individuals against the state, is perhaps less appropriate as a description of that dimension of human rights which effects ascription of status or the delineation of groups. In consequence, his scheme may be even less likely to be recognised as constitutive and declaratory (of status, and of groups) than traditional human rights theory, because individuals are no longer the focus of analysis. They still have a role, clearly, as the persons to whom state obligations are owed (which Rubin acknowledges when he reminds us that “of course, people have not been subtracted from the equation”). But they are no longer to be characterised as possessors of human rights. There may be even less reason to consider the constitutive effect of unevenly distributed entitlements to pursue claims against government, when the emphasis of the analysis is on the way government acts rather on the ca-

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capacity of individuals to challenge those acts. The disentitlement of those currently denied certain human rights may in consequence become subsumed in questions about whether government may be constrained, rather than by whom.

We would need to know more about who may assert the moral demands and constraints against government to which Rubin refers before reaching a conclusion on this matter. The perspective of state obligation clearly has value, but the position of the persons to whom the state is obligated remains significant. It is not clear if Rubin's scheme is premised on the retention of the same sorts of distinctions that human rights theory makes (often quietly but no less clearly) between those who are entitled to enforce a right, demand, or constraint and those who are disentitled. The nature of the norm of universality which has fronted human rights theory has gone unexplored for too long. Any alternative to that theory will need to tackle the difficulties which that norm presents. Whether an approach which de-emphasizes human rights in favour of moral demands and constraints can do this is uncertain. Examining state obligations may tell us much about the moral universe, but not who comprises it and why. Rubin is keen to dispense with the language of human rights as possessions – and probably correctly so – but perhaps we can still learn more about the crucial phenomenon of dispossession from a theory which professes a set of universal entitlements for all human beings than from an idea which emphasises the actions of government over the claims of the governed. Those who are denied human rights may at least make arguments to challenge this denial through human rights theory. Whether an individual

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denied standing to enforce a moral constraint on government will have available to her an effective moral vocabulary in which to assert her claim is uncertain. Human rights, for all their failings, at least purport to universality. Do moral demands and constraints on government do the same?

### **Recasting Human Rights**

Would it be possible to translate all of the human rights in our current catalogues into the language of moral demands and constraints on government? The position of the right to vote, discussed above, raises doubts about this. This does not mean, however, that the new formula is necessarily at fault. Instead, it may be a virtue of Rubin's conception that it exposes entitlements or arguments currently dressed in the ideology of human rights but with a rather shaky claim to be included there. The human right to vote does contain claims which may easily be translated into the language of moral constraints and demands on government. The right is characterised centrally by a constraint upon government attempts to interfere with or withdraw the franchise from qualified electors. It demands also that government hold regular, free and fair elections. At another level, however, the human right to vote encompasses claims which cannot be so easily categorised as state obligations. So, for example, the human right to vote has in recent years been taken to express an idea about the entitlement of all human beings to live under democratic rule, rather than being confined to describing

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the relation of individuals to the electoral machinery in their particular democracy.<sup>5</sup>

A right to democracy is a curious notion. It asserts that democracy can be the explicit subject matter of rights, rather than the political practice which is generally thought to sustain them. Even assuming this to be so, it is difficult to phrase this entitlement in Rubin's language. The idea of a human right to democracy cannot easily be translated into a set of moral constraints and demands upon government because it is concerned not only with delineating the morally acceptable sphere of state action, but with prescribing the nature of government itself. The right, in addition to guaranteeing suffrage and free elections, is both an institutional declaration of the democratic credentials of a state, and an expression of a fundamental commitment to democracy as the form of government to which everyone is morally entitled. A core part of its function is to proclaim the privileged position of democracy as the form of government under which human beings are entitled to live. One might say that this prescription forms a "constraint" on the manner in which the government acts. Government may not choose to take on a form which is undemocratic: suspending free elections indefinitely, for example. In such a case, individuals could use their human rights to vote to protest the government's actions, and to claim the right to exercise their suffrage in free elections. The government's actions in suspending the elections might certainly be characterized as a violation of moral

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<sup>5</sup> Thomas M. Franck, "The Emerging Right to Democratic Governance", 85 *Am. J. Int'l. L.* 46 (1992).

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constraints. Generally speaking, however, to describe a government as morally constrained to be or to become democratic, or under a moral obligation to remain so, would seem to depend upon a rather narrow and negative presentation of the state's fundamental commitment to democracy. It is narrow in the sense that democracy is being presented as just one of a series of moral claims about how government must act; and negative because such a picture presents democracy as principally a set of procedural prescriptions about how government must act or refrain from acting. The human right to vote, for all its imperfections, offers a wider and more positive presentation of moral claims about democracy. It articulates the distinct and positive value of democracy as a form of government, rather than offering only the capacity to restrain or compel governments which deviate from democratic procedures. The human right to vote is as much about proclaiming the essentially democratic character of government as it is about auditing the democratic character of the various acts which government performs.

The notion of state obligation may provide us with helpful insights into the practices of human rights which we tend to take for granted. It may not, however, be entirely suitable for re-examining those aspects of the ideology of human rights which express the primacy of democracy as an explicit value or which declare the boundaries of the population given standing to vindicate those claims. For all its flaws, the notion of a human right to vote perhaps performs better as a descriptor of this particular set of claims than does the formula Rubin proposes. Ultimately, however, whichever conceptual scheme promises better to expose any ambiguities and inconsistencies in the

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moral claims we call human rights is to be preferred. Rubin's approach might well do this, but only if it is sensitive to the peculiar characteristics which render some human rights – and especially the right to vote – moral claims with more than one dimension, each attended by its own uncertainties. The right to vote is a declaration of the elector's status as a member of a bounded electorate as well as a statement of entitlement to sue for interference with the franchise. It is also, as the human right to vote, an elevation of the value of democracy into a primary state goal. Can the language of moral claims adequately represent these different aspects? The right to vote is never – despite the common rhetoric of universal suffrage – possessed universally by all within a state and yet remains recognised, even lauded, as a human right. Democracy may be both the subject matter of a human right and a prerequisite of the proper protection of human rights. Can the language of moral claims address these apparent contradictions?

Perhaps the transition which Rubin proposes we make will require us first to deepen our understanding of those human rights whose very familiarity tends to blind us to their strangeness. Testing the credentials of such human rights would likely prove very illuminating, exposing the points of disconnection between our ideas about how government should best be constrained and our beliefs about how ultimate political values are best promoted and protected. It may be that the language of human rights is inappropriate to statements of the latter sort, although we do currently use it in that way in the case of the human right to democracy. It may, then, be a corresponding virtue of the vocabulary of moral demands and constraints that it

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would limit such pronouncements to clearly identifiable acts or failings of government, excluding expressions of generalized - and plainly unrealizable - aspirations to some abstract idea of democracy.

# A Plea for Theory in Rethinking Human Rights

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Professor Edward Rubin has suggested that we should rethink human rights as moral demands (obligations and constraints) on the government's treatment of its citizens. Such a thesis immediately raises two sets of questions. First: What is the problem with human rights? Why should we rethink them? Second: How should we do so? And what exactly does it take to 'rethink' human rights? Though I am sympathetic towards the ambitious goal that Rubin has set for himself, and though I share his dissatisfaction with the language of human rights, I will suggest that his proposals fail to provide clear answers to both sets of questions.

Some of the difficulties that have arisen in formulating the issue of human rights, Rubin suggests, go back to the most basic aspect of the concept: the identification of protections against the government as rights. Rubin argues that there is no convincing justification for identifying these protections as rights, and that another formulation of these issues will avoid much of the confusion in recent

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controversies about human rights and help us to understand the real issues involved.

The first two sections of Rubin's paper are historical: together they argue that human rights and protections against government evolved separately and thus that there is what Rubin calls 'a conceptual space' between them. The third section aims at demonstrating that this conceptual space is worth maintaining, because contemporary human rights theories incorporate many of the outmoded elements in natural rights theory - elements that are no longer persuasive in the contemporary context. The fourth and last section makes the case for recharacterizing human rights as moral demands imposed on government, by arguing that this would resolve three conceptual problems that haunt present-day discussions of human rights issues.

This brief overview raises several questions. What would count as a convincing justification for identifying something as a right?<sup>1</sup> What is the relevance of knowing that some issues currently discussed in the language of rights, were formulated differently centuries ago? What does it mean to say that something is 'outmoded'? If contemporary theories are not persuasive because of the presence of these 'outmoded elements', why should this have implications for rights language as such, rather than the

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<sup>1</sup> Rubin says that scholarly literature begins by assuming that the core protections against government are rights. Is the fact that these protections can intelligibly be called rights not enough justification that something is properly conceived as a right? If not, then it seems to me that only a theory of rights could provide a justificatory decision.

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theories themselves? The ultimate objective of Rubin's argument seems to be to convince us not to use the label 'right' for the protections that we (ought to) enjoy against some government actions. In other words: Rubin's paper seems to be focused on a linguistic reform. But how can such a 'recharacterization' solve any conceptual problems?

The main purpose of the first part of Rubin's argument is to familiarize the reader with the tradition of natural rights and with some of the principal natural rights theories. This is, of course, a tremendous task, and although the author displays a wide knowledge of both primary and secondary literature on the subject, some of his major statements are too imprecise to be accepted without comment. Sometimes, the ideas are too sweepingly formulated. For example, the claim that natural rights seem to have emerged from the interplay of Christianity and feudalism seems highly controversial and is not supported by the historical material presented by the author.<sup>2</sup>

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<sup>2</sup> While it is true that most historians of (medieval) natural rights theories would agree that those theories first developed somewhere between the 12<sup>th</sup> and the 14<sup>th</sup> centuries, there still exists literature that will place the first natural rights theories anywhere between Plato and the Stoics. See Gregory Vlastos, "The Rights of Persons in Plato's Conception of the Foundations of Justice" in *Studies in Greek Philosophy. Vol. 2: Socrates, Plato and Their Tradition* 104-125 (Princeton University Press, Princeton, 1995) for Plato; see Fred D. Miller Jr., *Nature, Justice, and Rights in Aristotle's Politics*, (Clarendon Press 1995) for Aristotle; see Phillip Mitsis, "Natural Law and Natural Right in Post Aristotelian Philosophy: The Stoics and their Critics" in *Aufstieg und Niedergang Der Romischen Welt* II, 36.7 ed. W. Hasse 4812-4850 (1993) & Phillip Mitsis, "The Stoic Origin of Natural Rights" in *Topics in Stoic Philosophy* ed. Katerina Ierodiakonou 153-177 (Clarendon Press, Oxford, 1999) for the Stoa. To say that Feudalism generated the idea of personal rights and

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Rubin's presentation of the theories themselves also leaves room for disagreement.

First, the section pertaining to the Franciscan poverty debate misrepresents both the arguments of Pope John XXII and those of Ockham. For example, John did not argue that any use of material objects amounted to an assertion of property rights.<sup>3</sup> He did hold that ownership of material things could not be avoided, but this was because one could not licitly use *consumables* unless one had a property right in them.<sup>4</sup> Neither is there any fundamental

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Christianity the idea of natural law seems to disregard both the tradition of Roman law and the ancient philosophical schools that induced natural law. It is true that Michel Villey has argued that *ius* in Roman law could not have meant (subjective) 'right', but his argument for this is generally considered inconclusive, even by Richard Tuck. See Richard Tuck, *Natural Rights Theories: Their Origin and Development*, 8 (Cambridge University Press 1979), who is generally sympathetic towards Villey (see also the discussion in Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law, 1150-1625*, 15-9 (Scholars Press 1997). I believe it can be argued that 'natural law' in Ancient philosophy or even in Roman law meant something very different from 'natural law' in medieval (Christian) natural rights theories, but this has to be *argued*, it cannot be assumed. For Roman law, see Michael P. Zuckert "'Bringing Philosophy Down from the Heavens': Natural Right in the Roman Law" in *The Review of Politics* 51, 70-85 (1989). Moreover, as a matter of historical fact, it is certainly more plausible to suggest that the study of Roman law, stirred by the discovery (in around 1080) of a copy of Justinian's Digest, was the main impetus to the growing academic speculation about individual rights, rather than the feudal system. For a general account of this, see Harold J. Berman, *Law and Revolution: The Foundation of the Western Legal Tradition*, (Harvard University Press 1983).

<sup>3</sup> This is probably extrapolated from Richard Tuck's claim that "For John, all relationships between men and their material world were examples of *dominium*." See Tuck, *supra* note 2 at 22.

<sup>4</sup> Against the Franciscan claim that they had no common or individual *dominium* - which for them meant that they had neither property

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novelty in Ockham's connection of the concept of rights with the division between natural and human law. Ockham did say that individual property was introduced by human law, while the right of using things was part of natural law, but this is very much in accord with the teachings of Aquinas.<sup>5</sup>

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rights, nor (legal) rights to the use of things they needed for their daily subsistence - John had argued that to licitly use some thing, one must either have a property right, or a right to the use. He clearly distinguished between property and a right of using something. See the bull *Ad conditorem canonum*. For the Franciscans (but not for the Dominicans) these were both instantiations of *dominium*. Ockham's main contribution to the debate, *The Work of Ninety Days*, has recently been translated in English by John Kilcullen and John Scott. The standard historical account of the debate is Malcolm D. Lambert, *Franciscan poverty: The Doctrine of the Absolute Poverty of Christ and the Apostles in the Franciscan Order, 1210-1323* (The Franciscan Institute 1988). A very stimulating discussion of the contribution of the debate to the history of natural rights is Virpi Mäkinen, *Property Rights in the Late Medieval Discussion on Franciscan Poverty* (Peeters 2001). English translations of the bulls of Pope John XXII can be found at Professor John Kilcullen's website. See <http://www.humanities.mq.edu.au/Ockham/paplist.html>

<sup>5</sup> Ockham divided the history of human property in three periods. In the state of innocence, Adam and Eve had no property, but only a licit power of using things. The second period began after sin. In that time they had a power of appropriating things, but had not yet done so. The third period in the human history of property began with the introduction of the first exclusive properties (*dominia propria*). Individual property was introduced by human (not divine) law. See William of Ockham, *The Work of Ninety Days*, 238-40, 243-4, 554-565 (John Kilcullen & John Scott trans., Edwin Mellen 2000). Ockham liked to refer to Aquinas whenever he could find incongruence between his teaching and John's bulls, as John XXII was a great admirer of Aquinas. "Let those who hold the doctrine of Thomas take note of what he says," Ockham sneered, for in the *Summa Theologica* Thomas wrote that: "the division of possessions is not according to the natural law, but rather arose from human agreement which belongs to positive law." *Id.* at 554-565, *Summa Theologiae II-II<sup>ae</sup>*, q. 66, 2. It is also not true that Pope John held that property was natural because any general legal principle was part of natural law. Aquinas' thought that no law was valid if it went against natural

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Secondly the section about Hegel gives a misleading account of Hegel's relation to natural rights. Given that Hegel devotes the entire first part of the *Philosophy of Right* to property - a natural right, according to Hegel - how can anyone say that his political philosophy essentially eliminates natural rights as an operative concept? Such a thesis can only be supported by an analysis that shows that the concept does not play a role in the subsequent phases of 'morality' and 'ethical life'. I cannot see how this could be substantiated, but Rubin's survey of Hegel does not even mention property rights.<sup>6</sup> It is true that what Hegel calls 'substantial freedom' is different from what most people mean when they discuss 'freedom' (which is what Hegel calls 'arbitrary freedom', the ability to do what we please). This does not mean, however, that freedom, in its ordinary sense, is absent in the Hegelian state. On the contrary, Hegel repeatedly stresses that the state must respect the rights of individuals to direct their own lives.<sup>7</sup>

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law, but he did not hold that property was a natural right. Contrary to Aquinas, John said that it was not possible for human beings not to have *individual* property. This is something that Aquinas could not possibly have held, because he was a mendicant.

<sup>6</sup> A very good recent analysis of Hegel's view on property, with references to the standard literature, can be found in Allen Patten, *Hegel's Idea of Freedom* (Oxford University Press 1999).

<sup>7</sup> Rubin's assessment of Hegel seems to rely, to a large extent, on Russell's account, but his appraisal is not shared by contemporary Hegelian scholarship. See Allan W. Wood, *Hegel's Ethical Thought* (Cambridge University Press 1990), who specifically defends Hegel against the charge of totalitarianism.

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These misconceptions have a bearing on Rubin's conclusions as well. Rubin asserts that natural rights reflected a direct distribution of power by the Almighty Himself, and that hence each individual can play the role that was previously played by the king or pope. There are two problems with this assertion. First, since reference is made to Ockham, the "direct distribution of power" must refer to the powers that Ockham said God had given to humanity after the fall - *i.e.* the power of appropriating property and of exercising jurisdiction. But the whole point of Ockham's intervention in the debate was to prove that these powers were *not natural rights*. The Franciscans not only claimed to have no property whatsoever, meaning that they could live without ever appropriating things, they also vowed complete obedience to their superiors. Franciscan theologians interpreted the vow as an abdication of their own will, and this implied that the vow made the friars incapable of exercising any kind of dominion.<sup>8</sup> Thus dominion is not natural to human beings - as John XXII claimed it was - in the sense that it is not inalienable.

The second problem is closely related to this: Rubin's analysis does not succeed in recognizing the extent to which the Franciscans built a theory of natural rights completely divergent from the theory of John XXII. The Franciscans did not wish to have dominion, but they nevertheless insisted that they had natural rights. This failure to analyze the difference between John XXII and the

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<sup>8</sup> For a good summary of this strain of thought, see Annabel S. Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought*, 11-20 (Cambridge University Press 1997).

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Franciscans as a difference between basic conceptions from which their theories of rights emerged, leads to the reduction of the idea of natural rights to an indeterminate concept of 'natural liberty' on which all thinkers from Ockham to Habermas (with Grotius, Locke, Rousseau, Rawls, and Nozick in between) are supposed to rely. Again, the conclusion that employing natural rights in a modern context is problematical, "because the idea depends on a well-developed theory of natural law," is only stated, not argued for.

Hegel is cited in support of another consideration - that liberty is not a naturally occurring concept in the human mind, but the product of an evolving consciousness. According to Rubin, reading the modern conception of liberty back into the natural rights tradition would be anachronistic. But how can we be sure about this? Rubin does not supply concrete evidence for the thesis that 'our' conception of liberty is so different from the conception that is operative in the natural rights tradition. Some would consider it to be simply self-evident that our common understanding of liberty has evolved over such a long period. Yet even if we grant this, the opposition between a modern and a pre-modern conception of freedom poses a problem.

Rubin views liberty as the result of consciously selected social policies and the result of an evolutionary process. Despite its initial plausibility; this claim is deceptive. Rawls, Nozick and Habermas are all accused of relying on the Ockham-Locke-Rousseau concept of natural liberty. Imagining oneself as free to choose the entire structure of government, as Rawls does, is only possible

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by reproducing the conceptual framework of the pre-modern natural law tradition. Similarly, both Nozick and Habermas are said to invoke an outdated concept of natural liberty that seemed inconvertible in the pre-modern world of natural law. However, we seem to be in a muddle already. How can one uphold the concept on which these theories rely as an outdated concept that only makes sense in a pre-modern natural law tradition, and simultaneously maintain that 'we' read 'our' concept of liberty back into the tradition of natural law?

Of course, one may come up with several ways to escape this looming inconsistency. For example, we might argue that there are really two levels on which the notion of liberty is being invoked here. One is the abstract proposition that human beings are 'naturally free', and the other is the way this freedom is being imagined concretely (where it includes the right of married women to own property, rights to vote, the abolition of child labor, etc.). None of these explanations will work, for the simple reason that the critique conflates two quite different conceptions of liberty. The freedom that human beings supposedly possess in natural rights theories is, at least partly, a normative concept. It is the classical notion of freewill - the idea that people have the ability to choose between right and wrong. I believe the secularized version of this claim is expressed in the idea - also operative both in natural rights theories and in contemporary liberal theory - that people have the ability to choose their own values.<sup>9</sup> Both

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<sup>9</sup> See my paper "Natural Rights and Individual Sovereignty", forthcoming in *The Journal of Political Philosophy*. 12(2) (June 2004).

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these claims are partly empirical and partly normative. They are empirical in the sense that they ultimately hinge on assumptions about human psychological abilities, and the respect in which these differ from the psychological outlook of other animals. They are normative in the sense that it can be assumed that, even if human beings are not in all (cultural, political, economical...) circumstances as free as they should be, the idea of freely deciding may always be present as a potential capacity of all human beings - *something that ought to be realized whenever possible*.

The point is that it is simply not possible to counter such a normative claim by saying that our idea of freedom is different from that of medieval theologians, or with the conviction that freedom in the relevant sense would not exist in a state of nature. Moreover, it seems to me that Rubin has not given any convincing argument for the claim that the belief in freewill is outmoded, or that it makes sense only if one accepts the (religious) framework of the natural law tradition. The idea that human beings are capable of choosing between right and wrong (or may freely decide between alternative courses of action) is not only acknowledged by much scholarly literature, but it arguably underlies much of our commonsense moral psychology.<sup>10</sup> Surely it is reasonable to require a strong argument to the effect that the idea of freewill is not worth

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<sup>10</sup> The literature on this issue is so vast that one could spend a lifetime studying it. See Thomas Pink, *The Psychology of Freedom*, (Cambridge University Press 1996) and Robert Kane, *The Significance of Free Will*, (Oxford University Press 1996).

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maintaining, before we are ready to dismiss the bulk of contemporary political theorizing.

The second section argues that protections against government - such as freedom of religion, the prohibition of slavery, and due process - that are now commonly identified as human rights, developed independently in the civic humanism of the Renaissance, and only merged with the natural rights tradition in the late eighteenth century. Again, I wish to identify two problems. First, the formulation of this thesis is too imprecise. How are we to know whether it is true that “nearly everyone” would identify these protections to be human rights. Whose consensus are we talking about? That of people in the world? People in the West? Scholars? What would count as a proper test for this proposition? Personally, I am convinced that many people (certainly outside the West) feel much more strongly about human rights to subsistence, than, for example, about a right to free speech. It might seem tedious to insist on this, but there are two reasons why I think the issue is important. First, the confidence with which authors can proclaim the controversial nature of so-called second generation rights is not so much related to an estimation of what people generally think about the issue, as it is based on a consensus in the scholarly literature. This scholarly consensus stems from an assessment of the theoretical basis of rights to subsistence, which is often regarded as being much less firm than that of first generation rights. Second, if we would settle on the verdict that rights to subsistence are also part of the core of human rights, we would have a clear example of a right, or a set of rights, that cannot be regarded merely as *protections against* the government.

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Even if we agree with Rubin on the core of human rights, the thesis that protections against the government evolved separately from the tradition of natural rights is untenable. Let me single out three examples of protections that have undeniably been conceived of as natural rights before the eighteenth century. For example, freedom of religion. Since medieval society was religiously relatively homogeneous, it is not surprising that the issue of religious freedom was not as passionately debated then as it was in the seventeenth century. Personally I am not aware of discussions that directly address the right to perform religious practices (besides the generally accepted theological truth that no-one may be forced into baptism). But medieval lawyers did debate issues such as whether heathen rulers had legitimate authority, whether it was lawful to conquer infidels, etc. Some of the major discussions derived from a phrase in Gratian's *Decretum* that stated that there is no legitimate power outside the church.<sup>11</sup> Subsequent generations of canonists changed *potestas* into *imperium*, and thus transformed a statement on sacramental power into statements concerning temporal power. Most extreme among these transformations was the radical hierocratic position that it was impossible to conceive of any legitimate authority on earth that was not sanctioned by the pope.<sup>12</sup>

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<sup>11</sup> "*Potestas nulla est extra ecclesiam.*" See James Muldoon, "Extra Ecclesiam non est imperium: the Canonists and the Legitimacy of Secular Power" in *Studia Gratiana* 9 551-80 at 556-7 (1966).

<sup>12</sup> Angelicus Alanus, one of the most zealous of the hierocrats, had argued that papal supremacy in matters of earthly *dominium* implied that no ruler's power was legitimate unless he believed in the true God and received his power directly from the Church. *Id.* at 560-1.

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This strand of thought was opposed by both lay publicists and canonists. The most enduring challenge came from pope Innocent IV, one of the great lawyer-popes. In a commentary on a decretal (*Quod super his*) of Innocent III, he discussed the issue of the legitimacy of Christian warfare against non-Christian societies. The fundamental question, as it seemed to the pope, was whether infidel societies possessed natural rights to hold property and to rule themselves. Innocent IV's position was unequivocal. He began with the proposition that human beings are rational creatures, and went on to deduce the political implications of this statement.

I maintain, therefore, that lordship, possession and jurisdiction can belong to infidels licitly and without sin, for these things were made not only for the faithful but for every rational creature as has been said. For he makes his sun to rise on the just and the wicked and he feeds the birds of the air. (Mat. 5.45) Accordingly we say that it is not licit for the pope or the faithful to take away from infidels their belongings or their lordships or jurisdictions because they possess them without sin.<sup>13</sup>

Although Innocent doesn't use the 'word' right, his use of the terms lordship (*dominium*), possession and ju-

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<sup>13</sup> Innocent IV, *On Decretales*, 3.34.8, *Quod Super, Commentaria* c. 1250. Quoted in Tierney, *supra* note 2 at 155.

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risdiction and his argument based on human rationality clearly places this defense in the natural rights tradition.

It is true that Innocent IV went on to argue that because infidels are Christ's sheep by creation, the pope had *de jure* jurisdiction over them. Consequently the papacy, in some instances when infidels 'clearly' violated natural law - Innocent mentioned sexual perversion and the worship of idols - was nevertheless required to intervene to protect their well-being.<sup>14</sup> Pennington has shown that Innocent IV's commentary on *Quod super* had become the *communis opinio* of the canonists by the end of the fourteenth century.<sup>15</sup>

In the sixteenth century the theory that dominium required God's grace was - on account of its association to Wyclif - so discredited that Vitoria didn't even find it necessary to argue against it. When confronting Fitzralph's version of the theory, he simply stated that there can be no doubt that the heathen have legitimate rulers and masters.<sup>16</sup> Surely the kind of protection that was granted to heathen and infidels by medieval jurists falls short of today's standards for religious freedom. Nevertheless it is plain that there was a tradition that argued against unequal-

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<sup>14</sup> Robert A. Williams Jr., *The American Indian in Western Legal Thought* 45 (Oxford University Press 1990).

<sup>15</sup> Kenneth J. Pennington "Bartholome de las Casas and the Tradition of Medieval Law" in *Church History* 39 149-61 at 152-4 (1970).

<sup>16</sup> Francisco de Vitoria, O.P., *On Civil Power* 1.6 in *Political Writings* 18 (Anthony Pagden & Jeremy Lawrance eds., Cambridge University Press 1991).

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ity on the basis of religious practice, and did so the basis of natural rights.

In regards to the issue of slavery, Rubin is convinced that the Spanish Thomists, though they believed in natural law and natural liberty, did not draw their arguments against enslavement of the American Indians from these philosophic principles. Contrary to this, most contemporary historians of medieval and early modern thought have treated their defenses of the Indians as resting on arguments from natural rights.<sup>17</sup> Pennington, who has studied the legal tradition on which Bartholomé de Las Casas relied, summarized Las Casas' fundamental belief as follows:

The basic premise in Las Casas' position on the rights of the Indians is that legitimate secular power does exist outside the church. Las Casas insisted throughout his life that the Indians' *dominium* was legitimate and just, and that the Spaniards did not have the right to usurp the Indians' just title. From this basic principle sprung all of the rest of Las Casas' ideas.<sup>18</sup>

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<sup>17</sup> See Brian Tierney, "Aristotle and the American Indians – Again", in *Cristianesimo nella storia* 12 295-322 (1991), reprinted in Tierney, *supra* note 2 at ch.11 & Brett, *supra* note 8 at ch. 4.

<sup>18</sup> See Pennington, Kenneth J. Jr., "Batholome de las Cases and the Tradition of Medieval Law" in *Church History* 39 149-61 at 151 (1970).

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It is true that Richard Tuck was not convinced that Vitoria and his followers put an objective sense of *ius* at the center of their concern, and were thus not propagators of a ‘Gersionian’ rights theory. Tuck wrote that the central feature of the Spanish Dominican theory was the emphasis on the limitations of what men were free to do. According to the Thomists - contrary to ‘Gersonians’ such as Mazzolini - men were not free to enslave themselves.<sup>19</sup> The problem with this argument is that it depends on a very strict construal of what counts as a theory of truly subjective rights (Tuck uses the terminology of ‘active’ rights).<sup>20</sup> If we would count the capacity to enslave oneself as the mark of a true natural rights theory, many theories that are commonly placed in the natural rights tradition, including Locke’s theory would drop out. But Vitoria did argue that the Indians had rights that these rights were natural rights, and he grounded them in the natural capacities of human beings.

Vitoria’s most important contribution to the debate was his lecture “On the Indians lately discovered” (*De Indis*), delivered in 1539 at the university of Salamanca. The text presents itself as an attempt to answer the ques-

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<sup>19</sup> See Tuck, *supra* note 2 at 45-50.

<sup>20</sup> Tuck’s analysis also depends on a general argument throughout his book according to which the equivalence of *ius* and *dominium* is seen as a central feature of active rights theories. However, both the underlying conceptual analysis and the interpretation of the historical sources seem to be deficient. For criticism, see Brian Tierney, “Tuck on Rights” Some Medieval Problems” in *History of Political Thought* 4(3) 429-41 (1983) (which, alas, is also confused on several points, especially the fact that it fails to understand the difference of ‘passive’ and ‘active’ rights as a difference between theories) and Brett, *supra* note 17.

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tion whether it is lawful to baptize the children of unbelievers against the wishes of their parents. To answer this question, Vitoria first deemed it necessary to consider three other questions, and the first of these questions was by what right (*ius*) ‘these barbarians’ were subjected to Spanish rule.<sup>21</sup> To answer this question, Vitoria first asked “whether these barbarians, before the arrival of the Spaniards, had true dominion, public and private.” He noted that there were only four possible grounds on which to hold that the barbarians were not true masters of their property before the arrival of the Spaniards - either because they were sinners, unbelievers (*infideles*), madmen, or insensate.

Vitoria’s answer to the first possible ground for losing dominion – being a sinner – is extremely interesting. He gave two traditional replies as to why sinners had dominion. The first was that evil sinners like Solomon, and Ahab were frequently given the title ‘king’ in Scripture. The second was that mortal sin cannot deprive the sinner of civil dominion<sup>22</sup> since it depends much less on grace than spiritual jurisdiction; and yet a bad priest could consecrate the mass, and bad bishops could consecrate priests.

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<sup>21</sup> The word ‘barbarian’ played a crucial role in the attempts to understand the Amerindian and his culture. The term derived in the first instance from Aristotle and his commentators, in particular Thomas Aquinas. See Anthony Pagden, *The Fall of Natural Man: The American Indian and the Origins of Comparative Anthropology* 15-26 (Cambridge University Press (1986).

<sup>22</sup> *Dominium rerum*: Vitoria distinguished between *dominium rerum* and *dominium jurisdictionis*, but also speaks of *dominium* ‘in general’, which covers both types. Vitoria, *De Indis* 1.2 in *Political Writings* 242 (Anthony Pagden & Jeremy Lawrance eds., Cambridge University Press 1991).

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His other arguments referred to human capacities. Vitoria argued that if a sinner had no civil *dominium*, it would follow that he had no natural *dominium* either, since natural *dominium* was a gift from God even more than civil *dominium*. But this consequence was false since, Vitoria said, “the sinner does not lose his dominion over his acts and body.” Against the argument (adduced, in traditional scholastic style, by himself) that *dominium* is formed in the image of God, but that the image of God is not in the sinner and that, therefore, the sinner cannot have *dominium*, he maintained that “...man is the image of God by his inborn nature, that is by his rational powers. Hence he cannot lose his dominion by mortal sin.”<sup>23</sup>

In the fourth and the fifth article, Vitoria considers whether irrational men and children can be true masters (*domini*). Conrad Summenhart had maintained that *dominium* is nothing else than “the right to use a thing for one’s own benefit,” and Vitoria added that brute creatures have this kind of right. Even the stars had the right to shed their light.<sup>24</sup> However, he responded that irrational creatures

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<sup>23</sup> *Id.* at 241-3. Paul J. Cornish, “Spanish Thomism and the American Indians: Vitoria and Las Casas on the Toleration of Cultural Difference” in *Difference and Dissent: Theories of Toleration in Medieval and Early Modern Europe* 99-117 (Cary J. Nederman & John Christian Laursen eds., Rowman & Littlefield 1996) argues that Vitoria’s conception of *dominium* is derived from Aquinas’ account of the *dominium* that Adam had in the state of nature (*dominium naturale*). If this is true, however, then Vitoria could not have derived property rights from the Indian’s *dominium*, because Aquinas made a sharp distinction between *dominium naturale* and property, which was conventional. See *Summa Theologiae I* q. 96, a. 4.

<sup>24</sup> Gerson was famous for ascribing *iura* to any entity “...equivalent to those positive qualities which constitute their identity.” “In this way,” Gerson wrote, “the sky has a *ius* to rain, the sun to shine,

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cannot have any dominion, since dominion is a legal right and irrationals cannot have any legal rights. Irrationals, according to Vitoria, cannot be victims of injustice for they have no dominion over things, nor do they have rights over their own bodies. That irrational beings have no rights over other things is proved by the fact that they have no dominion over their own actions. Vitoria says that we do not speak of anyone being the owner of a thing unless the thing lies within his control. A person is master of his own actions only insofar as he is able to make choices. But brutes do not move by their own will, and so cannot have any *dominium*.<sup>25</sup>

Vitoria concluded that the barbarians were not prevented by any of this from being true masters (*domini*), for they were not madmen, but had judgment like other men. This was self-evident because they had some order in their affairs: “They have properly organized cities, proper marriages, magistrates and overlords, laws, industries, and

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fire to burn, a swallow to build its nest, and every creature to do what is naturally good for it.” Cited in Tuck, *supra* note 2 at 26. Gerson, however, did not assimilate *dominium* to this broad sense of *ius*. On Summenhart’s account of *dominium*, see Brett at 34-34, and more recently Jussi Varkemaa, “Medieval Ideas on Individual Sovereignty in Summenhart’s *Opus Septipartium*” in *Studia Theologica* 53 58-69 (1999) & Jussi Varkemaa, “Justification Through Being: Conrad Summenhart on Natural Rights” in *Moral Philosophy on the Threshold of Modernity* (J. Kraye & Riso Saarinen eds., Kluwer 2003). Vitoria also refers to Silvestro Mazzolini da Priero, but Mazzolini made a clear distinction between *dominium* as a *posse iuris* and *posse facti*. See Brett, *supra* note 8 at 45-7.

<sup>25</sup> Vitoria, *supra* note 16 at 247-8. Vitoria relies here on Aquinas *Summa Theologiae I-II<sup>ae</sup>* q 1. 1-2; *I-II<sup>ae</sup>* q 6. 2 and *Summa Theologiae I* q 82. 1 ad 3.

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commerce, all of which require the use of reason.” They also had a kind of religion and they correctly apprehended things which are evident to other men. The conclusion was that before the Spaniards arrived, the barbarians possessed true dominion, both in public and private affairs.<sup>26</sup> Vitoria noted that it would be harsh to deny to them, who had never done the Spanish any wrong, the rights (to ownership) that were conceded to Saracens and Jews.<sup>27</sup>

The importance of Vitoria’s argument lies in its firm defense of the property of the Indians. Since they were rational creatures, they did have *dominium*, and this could not licitly be taken from them by the Spanish colonials. There was, after all, enough property left in those territories which were open for anyone to occupy.<sup>28</sup> Later Thomists would radicalize Vitoria’s claim, and insist that no Spanish could licitly mine gold or silver on Indian lands.<sup>29</sup> In the end, such defenses did not greatly enhance the cause of the Indians. Anthony Pagden wrote that with the death of Las Casas, the famous Dominican colleague of Vitoria, in 1566 the debate over the rights lost most of its immediate force.<sup>30</sup> One of the reasons for this was the rapid decline of the Indian population. In other words,

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<sup>26</sup> *Id.* at 250-1.

<sup>27</sup> ‘Saracens’ was the common way to refer to Muslims.

<sup>28</sup> Vitoria, *supra* note 16 at 291-2.

<sup>29</sup> On this, *see* Anthony Pagden, “Dispossessing the Barbarian: The Language of Spanish Thomism and the Debate over the Property Rights of the American Indians” in *The Language of Political Theory in Early-Modern Europe* 79-98, 90 (Anthony Pagden ed., Cambridge University Press 1987).

<sup>30</sup> *Id.* at 96.

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there weren't enough Indians left to make their rights worth debating.

With regard to due process, we may rely on Kenneth Pennington's recent book, *The Prince and the Law*, which responds to Rubin's claim that the subject rights of defendants and criminal procedure were not part of the natural rights tradition. Rubin argues that some of the components of due process were conceived in terms of rights, but that these rights were not natural rights. Pennington, however, has shown that jurists in the middle of the thirteenth century began to argue that the *ordo iudiciarius* and the rights of litigants in a judicial process were not derived from civil law but from natural law or the law of nations.<sup>31</sup> For example, when Johannes Monachus, a French lawyer who died in 1313 asked whether the pope could proceed against a person without a summons, he answered that the pope was only above positive law, not natural law.<sup>32</sup> Later, Oldradus de Ponte, a jurist at the curia in Avignon, argued that a summons must respect the defendant's ability for self-defense, a right that is granted to everyone by natural law. Examples such as these can be multiplied from Pennington's book, but I trust the point has been made: from the late thirteenth century onwards, it became standard practice to argue for the rights of defendants against the Prince on the basis of natural law. Clearly, the thesis advanced in the second section - that protections against government developed independently from the natural rights tradition - cannot withstand scrutiny.

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<sup>31</sup> See Pennington, *supra* note 18 at 148-64.

<sup>32</sup> *Id.* at 161.

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This may not matter to Rubin's main thesis about the need to reformulate human rights. The major concern of the first two sections of his argument is to point out that the moral issues that are involved in what is commonly called the right to freedom of religion, to a fair process, to freedom from slavery, etc...., are issues that can be formulated in ways that differ from the natural rights theories under which they are often categorized.

But of course we do not need alternative accounts of the history of political thought to be able to imagine the possibility of alternative ways to conceptualize these protections. It is enough to read any history of political thought to realize that utilitarians, for example, have argued for these protections without relying on a concept of natural rights. Bentham, one of the leading figures of utilitarianism, had good reasons for not relying on a natural rights foundation when arguing against slavery, for example. Not only did he think that these rights lacked a proper foundation (as his famous dictum "nonsense upon stilts" makes amply clear), he also thought they were dangerous because they didn't necessarily promote the greatest good of the greatest number. Bentham wrote: "I know of no natural rights except what are created by general utility: and even in that sense it were much better the word were never heard of. All such language is ...at the best an improper and fallacious way of indicating what is true."<sup>33</sup> It

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<sup>33</sup> Jeremy Bentham, "Supply Without Burden" in *Jeremy Bentham's Economic Writings: Critical Edition based on his Printed Works and Unprinted Manuscripts*, 279-367, 333 (W. Stark ed., George Allen & Unwin 1952).

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is true that utilitarianism has been scorned for not having the resources to prohibit the sacrifice of a few if it promotes the happiness of the greater part of the population. Even so, one does not have to succumb to utilitarianism to make sense of protections against the government without resorting to a language of natural rights. In recent times several philosophers have argued for a system of morally grounded rights that are not natural rights.<sup>34</sup>

Bentham had his reasons for eschewing talk of rights, and several other authors have presented comprehensive arguments as to why we should not construe protections against the government in terms of natural rights. Rubin also offers a reason in favor of abandoning natural rights, or rather two such reasons. The first of these is put forward in the third section. Following the argument that Rawls, Nozick and Habermas all rely on a “contingent and contestable” notion of natural liberty, Rubin says that the natural liberty of human beings is not a self-evident starting point but something that has to be justified by argument. This claim sounds intuitively appealing, but again, I believe that it’s attractiveness is deceptive. Why? Because there are better reasons to suppose that the burden of proof does not fall on the authors of these theories, at least not on Rawls.

First, contrary to what Rubin writes, Dworkin, in his book *Taking Rights Seriously*, does not argue that Rawls

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<sup>34</sup> See e.g. Attracta Ingram, *A Political Theory of Rights* (Clarendon Press 1994), W. L. Sumner, *The Moral Foundation of Rights* (Clarendon Press 1987), Amartya Sen, “Rights and Agency” in *Philosophy and Public Affairs* 11(1) 3-9 (1982).

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relies on a notion of natural liberty. On the contrary: he explicitly argues against this. Dworkin maintains that the fundamental principle underlying Rawls' argument is a right to equal respect.<sup>35</sup> Needless to say, Rubin would reply that such a principle also has to be justified by argument. But this suggestion has far less strength with Rawls's theory than it has, for example, with Nozick's. The relevant difference is that Nozick's theory might be described as one which relies on a methodology that has been called the *nature to morality methodology*.<sup>36</sup> This method draws on some assumptions about the kind of beings that human beings are, to derive conclusions about what people may or may not do to them (or how we should go about deciding what should or should not be done to them). Rawls's method - he calls it intuitionism - is very different. He argues that there is a plurality of first principles which in a certain particular type of case may conflict (*i.e.* give contrary directives about what ought to be done), and maintains that in these cases we are simply to strike the balance by intuition, by what seems to us most nearly right.<sup>37</sup> The principle of equal respect in Rawls's theory only underlies the argument for putting people in the famous original position, where they are temporarily ignorant of their talents, ambitions, and con-

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<sup>35</sup> Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977).

<sup>36</sup> Robert Noggle, "From the Nature of Persons to the Structure of Morality" in *Canadian Journal of Philosophy* 31(4) 531-65, 532 (2001). See for example Robert Nozick, *Anarchy, State, and Utopia* 33 (Basic Books 1974): "The moral side constraints upon what we may do, I claim, reflect the fact of our separate existence. They reflect the fact that no moral balancing act can take place among us...".

<sup>37</sup> John Rawls, *A Theory of Justice. Revised edition*. 30 (Oxford University Press 1971) (originally published 1971).

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victions - before they start drawing up the social contract. The important point is that Rawls argues that this method allows us to come to a reflective equilibrium, a situation in which the moral principles we take to be true match our considered moral judgments, fitting together in a coherent view.

Why do we need a reflective equilibrium? Most of us have a tendency to think that our moral behavior and our convictions about what is right, are guided by certain rules (“do not lie” is a very simple example). But in concrete situations different rules seem to conflict (*e.g.* “do not lie” can come into conflict with “do not knowingly inflict psychological pain on your friends”). Now it is very tempting to think that conflicts such as these are due to the fact that the rules we have identified are just too crude, that the way we will strike the balance if such a conflict occurs is guided by a more complex, deeper principle. And this perhaps, is the task of moral philosophy: to unearth the fundamental principles to which - upon reflection - we find ourselves to be committed.<sup>38</sup> To me, this seems a very attractive view of the rationale of doing moral and political philosophy.

A theory like this cannot be reasonably dismissed on the basis of a contention that it presupposes something - in this case, that people have a right to equal respect. To dismiss such a theory, one must either argue that there is something fundamentally wrong with the presupposition,

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<sup>38</sup> This is, to be sure, a very simplified formulation, but it will do for the present purpose.

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or argue that another theory will do a better job in getting us from our commonsense moral judgments and principles to a reflective equilibrium. I do not say that this cannot be done, but Rubin does not come close to formulating such an argument. He writes that protection against government oppression or abuse is unquestionably one of our deepest emotional commitments, but that characterizing these as rights is unconvincing, because the notion of a human being's universal features only makes sense in the religious, sacerdotal context from which natural law and natural rights originally emerged. However, if it is acceptable to say that we are committed to protection against government oppression, is this not equivalent to saying that the government should not oppress anybody? Again, is this not the same as saying that no one should be oppressed by the government? What, then, is the essential difference between saying that nobody should be oppressed by the government and saying that everybody has a right not to be oppressed by the government? Rubin seems to think that once we use the *word* 'right', we are led into a dark pre-enlightenment universe where everything is made dependent upon the existence of God. Yet I think it is reasonable to say that we also have a deep emotional commitment to the principle underlying Rawls's theory - *i.e.* that we are entitled to equal respect. Perhaps our commitment to this principle is infused in our culture by the presence of religion (or Christianity), but this in itself is not enough reason to abandon it.

In the last section, Rubin formulates the crucial question: Is there any advantage to replacing the idea of human rights with a neologism? He argues that recharacterizing human rights as moral demands imposed on government

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will resolve three conceptual problems. The first of these problems is that the concept of human rights fails to put the focus on the fact that the government is an essential actor in all theories of negative rights. But it is inaccurate to say that government is an essential factor in all theories of negative rights. For example, in Nozick's theory, the problem of enforcing negative rights is solved first and foremost by private protective agencies. It is only at a later stage that one of these protective agencies will acquire the characteristic of a government.<sup>39</sup> Again, early modern theories of punishment can be said to be theories of human rights in which government does not play an essential role.<sup>40</sup> In any case, there is no necessary relation between theories of negative rights and government. The reason why government plays such an important role in some theories of negative rights is simply due to the fact that governments in our societies possess the monopoly of enforcement. But this is a contingent reality.

The second problem that Rubin thinks will be solved is the debate between those who argue that only negative rights (rights against interference) are justifiable, and those that argue that positive rights (*i.e.* rights that demand people to aid others) have a place alongside negative rights. This debate, Rubin says, is generated largely by a pre-modern concept, specifically the imposition of natural rights concepts on a separate and more relevant tradition of reform. However, opponents of positive rights will not

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<sup>39</sup> Nozick argues that this transition will not violate anyone's rights, but this argument is problematic on Nozick's own principles.

<sup>40</sup> See J. H. Burns, "*Jus Gladii* and *Jurisdiction*: Jacques Alamain and John Locke" in *The Historical Journal* 26(2) 369-374 (1983).

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likely be convinced by this move. Surely if talk of rights is abolished, libertarians will have a hard time arguing that the only rights that government must protect are negative rights, but this is merely because the language in which these claims are usually put forward, will not be available any more. I agree with Rubin that the distinction between negative and positive rights is much less clear than libertarians tend to assume, but this is a matter that can only be 'solved' by arguing for it.<sup>41</sup> No conceptual problem has ever been solved (or will ever be solved) by simply abolishing the vocabulary in which the problem is formulated.

A third problem concerns the issue of community rights. Again the claim that a conceptual problem is being solved by abolishing talk of rights is misleading. The issue between proponents of group rights and those that would hold that no such rights exist, because rights are necessarily held by individuals, actually involves three distinct questions. First, is it conceptually possible to conceive of a group holding a right? Second, do such (moral) rights exist? Third, should we best address the underlying moral issues in terms of rights?

To answer the first question is a very complicated matter, because there are different conceptions of rights that will generate different answers to this question.<sup>42</sup> To

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<sup>41</sup> For a refutation of libertarian natural rights theory, see my paper "Libertarian Natural Rights" forthcoming in *Critical Review* 18(4) (2004). For problems with the distinction between negative and positive rights see Richard L. Lippke, "The Elusive Distinction between Negative and Positive Rights" in *Southern Journal of Philosophy* 33(3) 335-346 (1995).

<sup>42</sup> This matter is simply too complex to be addressed here. Very

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say that the conceptual problem is solved by eliminating rights-talk, however, is much like the case of negative rights, merely a way of silencing those who would argue that group rights cannot exist. This doesn't solve a conceptual problem, it only makes it impossible to talk about it.

Let me pass over the second question, since it seems to me that it is the third question that Rubin is most concerned about. Reconceiving human rights as moral demands on government, he says, clarifies the moral difficulty involved.<sup>43</sup> However, even though I tend to agree that such issues are not always best formulated in terms of rights, I do not believe that Rubin makes a very good case in arguing that this clarifies the moral issue. Ironically, Rubin admits that “Kymlicka's leading analysis” is stated in terms of rights, but he hastens to add that “the analysis turns on his conception of liberalism, essentially a code of government behavior.” What then, we are inclined to ask, is the problem with using rights language?

Rubin does not offer any persuasive arguments as to why we should recharacterize human rights as protections

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briefly, and with reservations, I believe that according to the interest theory of rights, it can be argued that a group cannot have an interest, but individual people (even if this includes everybody) can have an interest in the continued existence of the group. According to the will-theory, the issue is more complex, because it would involve an answer to the question whether a group can be said to have a will (whether people can transfer normative control to a group).

<sup>43</sup> By the way, being Flemish myself, I was surprised to learn that we are not satisfied with the freedom of speech that our nation provides.

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against the government, nor has he stated clearly what exactly he thinks is involved in rethinking human rights. Perhaps he is simply suggesting a linguistic reform. Indeed, in several passages, Rubin writes as if he thinks that the problems associated with rights-claims will disappear, if only we would avoid using the concept (the word?) right. But then he begins his conclusion with the assertion that the intention of the essay is not to suggest that we abandon the concept of human rights. Its intention is rather to question whether human rights are a useful analytical category, or whether it is preferable to think in other terms when analyzing the issue to which the category now refers. Perhaps the proposal amounts to something like this: when moral issues that we commonly associate with human rights are being discussed academically, or when we build theories about them, we should do so in other terms. Once more it might be questioned whether there is any advantage in doing so. Most people think of rights and obligations as two sides of the same coin. What then is gained by abandoning talk of rights and speaking only of obligations?

There is not much to be gained by Rubin's semantic changes as simple linguistic reforms. But there is one passage in the paper where Rubin's criticism seems to be directed more specifically towards theories that employ the nature to morality methodology—*i.e.* theories that argue for a set of rights on the basis of some premise regarding the nature of human beings. I have already indicated that I do not think this criticism is properly addressed to Rawls's theory. Therefore I would suggest that Rubin's concern is with right-based theories. A right-based theory is a theory in which there is an ultimate right that requires no further

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moral justification.<sup>44</sup> Rubin seems to think that such theories will generate propositions that diverge from people's own views, and this he seems to oppose.<sup>45</sup> This suggestion also allows us to make sense of his opposition to rights talk in general. Talk of rights could lead us (perhaps unintentionally) to smuggle in presuppositions that are connected with right-based theories. Even if I am correct, however, in identifying Rubin's concern, the focus of his argument seems to be ill-chosen. Every moral theory, or every discussion about morality, will involve propositions that are not subject to further justification. For example, we could ask ourselves: Why is torture wrong? Is it because it causes people to suffer pain? But then we could

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<sup>44</sup> Hugh Upton, "Right-Based Morality and Hohfeld's Relations" in *the Journal of Ethics* 4 237-56, 238 (2000), John L. Mackie, "Can There be a Right-Based Morality Theory?" in *Midwest Studies in Philosophy* 3 350-9 (1978), and Joseph Raz, "Right-based Moralities" in *Theories of Rights* 183-200 (Jeremy Waldron ed., Oxford University Press 1984) have written classical papers on the conception of a rights-based moral theory.

<sup>45</sup> He writes that ... "in an approach that focuses on government, as opposed to citizens, the moral attitudes of the citizenry will be determined by their own views, their overlapping consensus in Rawls' terms, rather than by a philosophic inquiry into the real nature of human beings."

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continue to ask what is wrong with pain which would lead to further questions. Such questioning has to end somewhere: in this sense every moral theory will contain propositions that remain unjustified. The burning question, then, is why there would be something wrong specifically with (non-justified) moral propositions that are formulated in terms of rights. In other words, we need a theory that can explain to us what is wrong with theories that start from the assumption that our fundamental moral categories are rights. It is not enough to say that rights-claims do not make sense outside a natural law framework.

# ***RESPONSE TO COMMENTS***

*Edward L. Rubin*  
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I truly feel honored to have such a distinguished group of scholars, from all over the world, commenting on my paper. They offer many illuminating insights that have helped me refine and clarify my thinking. As is generally the case with such insights, however, they have not changed my mind. I want to take this opportunity to explain, in light of the commentary, what exactly I was saying in the paper, and why I continue to think that it's important.

This paper is a companion piece to one chapter of a book, currently in press, entitled *Onward Past Arthur: Rethinking Politics and Law for the Administrative State*. The book's basic argument is that many of the concepts that we use to describe the modern administrative state were developed during the pre-administrative era, specifically during the Middle Ages, and do not necessarily provide us with the most effective means of understanding the government we actually possess. It

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might be instructive, the book argues, to set aside some of the concepts that seem to have engendered the most confusion – concepts such as democracy, legitimacy, discretion, law and property – and try to characterize the basic features of administrative government in other ways. Legal rights and human rights are two of the concepts that I treat in this manner. Both are products of pre-modern modes of thought, where the state was regarded as an alliance among rights-holding individuals, and, I argue, they derive their identity as two aspects of a single concept from these outmoded ideas.

In this paper, I do not emphasize the advent of the administrative state. Instead, I observe that the protections against government that we now associate with human rights did not emerge from the natural rights tradition, that is, the tradition we regard as the progenitor of human rights, but rather from separate considerations of religion or public policy. The point of these two different historical observations is the same: to open up a conceptual space between the concept of human rights and the protections against government that we associate with this concept. Having done so, I then argue, in both the paper and the book, that an alternative concept – that of moral demands on government – provides a better description of our consensus views about the subject, and a better framework for our ongoing debates about it. Legal rights are best regarded as causes of action, that is, a means of triggering the specific implementation mechanism of judicial adjudication. Human rights are best regarded as moral demands on government, that is, as demands that the government recognize itself as morally constrained from taking cer-

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tain actions and morally obligated to take others. Thus, claims for the existence of positive rights, such as the right to subsistence, are better characterized as moral obligations of the government; and claims for the existence of group rights, such as the right to a traditional culture, are better characterized as constraints upon assimilationist government programs (compulsory education in the majority language only) and obligations of government assistance (subsidized publication of cultural materials). Of course, I have no expectation, nor even any secret desire, to see people stop using the words “human rights.” The aspiration of the paper and the book, rather, is to cast doubt on the usefulness of this concept as an analytic category, to suggest that it is too readily substituted for real arguments in situations where it is essentially inapplicable.

Dr. Van Duffel does not respond to my argument, when he brings up the familiar point that human rights may be a culturally-specific concept, and that non-Western people may treat subsistence as more important than political freedom. The point of my paper, and my book, is not to advance any claims to the universality of my recharacterization, or to articulate a new way of justifying human rights. Rather, it is that those people who already believe that citizens should be protected from slavery, oppressive criminal prosecution, and restrictions on free speech and religious worship would do better to conceive these protections as moral demands on government, rather than as rights possessed by individuals. If someone doesn't think these protections are important, then this argument will be of no interest to him. Since virtually every Western political

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theorist, legal theorist and politician, and many non-Western ones as well, believe these protections are extremely important, this leaves me with a sufficiently large audience. Nor am I concerned by Van Duffel's assertion, with respect to my recharacterization of human rights as moral demands, that "opponents of positive rights will not likely be convinced by this move" or that I'm trying to "silenc[e] those who would argue that group rights cannot exist."<sup>1</sup> My argument is not directed to opponents of positive rights or group rights, but to proponents of these rights, such as the people who have codified them in modern constitutions. Such people, I suggest, are better off conceiving their claims as constraints on government, or moral obligations of government to act, rather than as rights possessed by individuals. In my book, I make the further point that opponents of positive rights and collective rights get an unfair rhetorical advantage from the rights concept, and that the recharacterization would make the real issues in the debate (e.g., the proper scope of governmental regulation, or of special benefits for an indigenous culture) clearer to both sides. But that's as far as I go toward addressing opponents of these ideas.

The other commentators correctly understand my basic point, but raise several objections. For the most part, these objections are not grounded on any theoretic-

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<sup>1</sup>Dr. Van Duffel asks why I take issue with Kymlicka if his analysis turns on a code of government behavior, which is akin to my approach. The problem for Kymlicka, and other proponents of group rights, is that they are trying to state these demands as rights, that is, possessions of a group, and the conception doesn't work very well. See Will Kymlicka, *Multicultural Citizenship* (Oxford, Eng.: Oxford University Press, 1995).

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cal objection to the recharacterization I propose, that is, on any comprehensive theory of human rights that would justify the concept of rights and preclude alternatives. Rather, the commentators advance two other arguments. The first is that the concept of human rights remains a valuable one that captures important aspects of our political morality; and cannot be as readily replaced as I suggest. The second is that my recharacterization fails to explain particular features of our morality, such as the “sacredness of human rights,” (Professor Harel), the connection between human rights and legal rights (Professor Hoffmann), the nature of the government’s moral obligation to curb corruption (Professor Harel), or the right to vote (Professor Lardy). These are important and well-stated criticisms, and I will discuss them – briefly – in turn.

There can be no question that the concept of human rights captures many aspects of our political morality. The term, either in its present form, or in its previous incarnation as the Rights of Man, has been in continuous use for more than two hundred years. It could hardly have survived that long without some degree of descriptive accuracy, and, conversely, having so survived, it could hardly have failed to incorporate many of people’s concerns about the subject matter it addresses. That is a partial answer to Professor Harel’s question about how human rights language could have survived for so long if it is descriptively inaccurate.<sup>2</sup>

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<sup>2</sup> The rest of the answer, which I discuss at length in my book, is that we cling to ideas from the pre-administrative era because of our distaste for the administrative state.

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The real question, however, is not whether the concept of human rights is sometimes a good description, but whether it is the best description of our prevailing beliefs, or whether its partial correspondence to some of those beliefs is purchased at the cost of obscuring or distorting equally important ones. The theory that the Earth is flat has a great many practical applications; it is regularly used when surveying land, designing buildings, and constructing roads. Despite these advantages, it is not the best theory because there are other situations where the description it provides is seriously inaccurate, and because there is an alternative theory that provides the same advantages and applies to the other situations as well. That is my point about the concept of human rights, and the need for its recharacterization.

A descriptive concept cannot be justified by simply pointing to particular cases where it seems accurate or advantageous. Rather, the entire range of its applicability must be considered, and any failures that occur within that range must count against it. We can only use one conceptual framework at a time. A partially accurate one is likely to do more harm than good because it will generally prop itself up with the easy cases and distort the difficult, controversial ones where conceptual clarity is required. Of course, given the untidiness of human thought and practice, no description is likely to be entirely accurate, so the question will always be the relative accuracy of alternative approaches. My claim for the proposed recharacterization is that resolves very serious descriptive problem in current human rights theory, including the fact that it elides the distinction between legal rights and human rights, that it

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fails to indicate why it applies primarily to government, and that it creates an unexplained and unjustified bias against positive and collective rights. My book advances the additional claim that human rights discourse fails to reflect the conceptual structure and practical realities of the modern administrative state.

The commentators' specific objections to my re-characterization can be taken as a direct response to this claim. Even if the descriptive inaccuracies of the human rights concept are conceded, even if this concept suffers from various conceptual confusions, the proposed idea of moral demands on government, they suggest, suffers from equivalent or greater inaccuracies. This would indeed be a reason to abandon the effort I have undertaken. After all, the burden of proof obviously rests with me. There is a verbal and conceptual economy to familiar ideas; if they are generally accurate, the best thing to do is to use them as a starting point, and get on with particular consideration of whatever issues have arisen under them. I have tried, in my book and in this paper, to avoid obscure or ornate neologisms by using ordinary terms such as demands, constraints and obligations. Nonetheless, there is no reason to displace such a historically grounded and rhetorically important concept as human rights unless one can propose an alternative that offers real conceptual advantages. I think that the alternative I have proposed does offer such advantages. In fact, I think the particular examples that the commentators suggest in opposition to my proposal indicate the conceptual confusion that the concept of human rights engenders, and the value of developing of the alternative conception.

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For the sake of brevity, I will consider only four these examples.

Professor Harel suggests that my recharacterization fails to capture an important feature of human rights discourse, which is its emphasis on the “sacredness of individuals.” But that almost concedes the pre-modern, sacerdotal origin of this discourse, and highlights the awkwardness of using it to describe protections against a secular, administrative state. When Professor Harel goes on to state the function of this discourse, he does not say anything about their sacred nature; rather, he says that the discourse’s function lies in “drawing attention to a particular commonality among hideous governmental practices, as well as drawing attention to fundamental differences between different types of governmental duties in accordance with the reasons underlying these duties.” In other words, he articulates the function of rights discourse in terms of state behavior. That is the general attitude that my recharacterization is designed to capture.

Professor Hoffmann suggests that the distinction I draw between legal and human rights is artificial, and that the two concepts are interrelated, both historically and conceptually. I share Professor Fan’s view, however, that the discourse of rights is obscuring a real, and morally crucial distinction. Legal rights are creations of the government, that is, of positive law, whereas human rights are universal claims that arise from other sources, such as personal morality, and apply to governmental

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action.<sup>3</sup> The “right” to deduct interest paid on a home mortgage from one’s taxes is a legal right, established by statute; the “right” to worship as one chooses is a universal principle that emerges from moral considerations. Virtually no one would argue that the right to the deduction is a universal principle that no government could abrogate without moral condemnation. Rather it is a legal right, and if the government eliminated it by statute it would simply be gone. In contrast, virtually no one would argue that the right to worship as one chooses is a mere creation of government, that could be eliminated at any time by passage of a statute. Rather, it is regarded as a human right, and while a government could certainly pass a statute that interfered with its exercise, most people in our society would strongly condemn any government that did so as a violation of the still-existing right. Given this distinction between positive law and moral judgments, it seems ill-advised to use the same terms – rights – to describe them both, and still worse to use this verbal oddity to trigger some search for an overarching theory that would unify the two. Professor Fan is quite clear on this point, but even so, he needs to work quite hard to disentangle his observation from the overlapping and ambiguous discourse of rights. The recharacterization of human rights as moral demands on government is intended to avoid

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<sup>3</sup> This distinction has been clear, in Western thought, since the work of Thomas Aquinas at the very latest. Aquinas, of course, spoke of universal claims as eternal, divine and natural law, and of legal rights as human law, but he is entirely clear about the distinction. See Thomas Aquinas, *Summa Theologica* (Fathers of the English Dominican Province, trans.) (Westminster, Md., Christian Classics, 1981), at 995-1023 (I-II, Q. 91-97).

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this confusion.

Responding to my effort to replace rights language, Professor Hoffmann asks: “who could, in the absence of rights language, possibly be the final arbiter of moral demands on government except for the government itself?” I think this reflects a tendency to conflate legal rights and human rights because of their verbal affinity. Moral demands on government are simply a recharacterization of human rights, and would thus be derived from exactly the same source as human rights, that is, individual morality, civil society, or some other non-governmental set of beliefs. They have no final arbiter. Of course, human rights, or moral demands on government, can be codified as legal rights by positive enactment in a statute or, more typically, a constitution. In that case, those who claim that the government has violated the codified provision will have a cause of action, that is, an appeal to a court, and the court will be the final arbiter of the legal, or positive law right. But this does not change the status of the human right or moral demand; it simply satisfies that demand in certain circumstances. It remains possible, and indeed desirable, to be able to say that a particular court decision, although a final determination of the parties’ legal rights, has violated their human rights. This assertion is encumbered, however, by the assumed conceptual connection between legal and human rights. If human rights are recharacterized as moral demands, the distinction remains clear. People’s prevailing sense of political morality constrains government from interfering with their ability to worship as they choose. Government can abide by this constraint or violate it, and it can use

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the courts for either purpose, but the demand itself remains the same.

A third objection, advanced by Professor Harel, also suggests to me that rights language breeds confusion. He argues that my recharacterization is “both too narrow and too broad. Governments have a moral obligation to curb corruption. A government that fails to fight against corruption violates its obligation towards its citizens. But violating this obligation is not typically characterized as a human rights violation.” I think Professor Harel is right to say that certain forms of corruption (allowing only those foreign companies that give bribes to import goods into our country) would be regarded as bad policy (because they decrease national wealth) but not as a human rights violation. On the other hand, we certainly regard a corrupt judge as violating the litigant’s due process rights. Thus, it is the language of rights that is underinclusive with respect to corruption; it fails to distinguish between some forms of corruption, which violate rights, and others that are just bad policy. The proposed recharacterization avoids this difficulty. It suggests that the government is morally obligated to provide disinterested judges (or morally constrained from judging individuals with corrupt ones), but not morally obligated to provide disinterested customs officials. Of course, providing the latter may be regarded as good public policy, but to treat it as morally obligatory, that is, something that should not be subject to the ordinary political process, would essentially eviscerate democratic decision making, since the same could be said for any other economic policy. In this case, the idea of a moral demand helps us distin-

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guish between truly obligatory efforts to curb corruption and merely desirable efforts that must be balanced against other uses of government resources. Framing the question by asking whether corruption is a human rights violation only impedes this analysis.

My final example is Professor Lardy's discussion of the "right to vote." "Possessing the human right to vote," she writes, "marks an individual's membership of a group." It is thus a "constitutive right." She then expresses the concern that my recharacterization would not provide a "stimulus for the critical scrutiny of the constitutive and declaratory roles which certain human rights perform." "This is because the language of moral constraints and demands on government, while it may aptly capture the essence of human rights as claims by individuals against the state, is perhaps less appropriate as a description of that dimension of human rights which effects ascription of status or the delineation of groups." But the language of human rights, and particularly the fact that it treats these rights as possessions of the individual, makes it singularly inapposite for voting. What would it mean to say that a group of people have the right to vote? Does it require that all major public policy issues be submitted to a vote of the populace?<sup>4</sup> Or would it be satisfied by allowing people to vote on a few issues in a regime that it headed by a dictator, or a hereditary monarch? The first is impractical in a modern state, and the second is morally unsatisfac-

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<sup>4</sup> This was Aristotle's requirement for a democratic constitution. See Aristotle, *Politics* (Benjamin Jowett trans.) (Oxford, Eng.: Oxford University Press, 1905), at 239-40.

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tory. Even if we assume that the right to vote refers to the election of political leaders, it could not mean that people are allowed to vote for local officials, while the same dictator or monarch controls the state. On the other hand, it cannot mean that people have the right to vote for the head of state, because that right is not provided in Great Britain, Sweden or the Netherlands, and any definition that would declare those regimes to be politically immoral on those grounds would be absurd. The same problems attend other variations in the scope of elections. Suppose people in a given country have always voted for the mayor of each city and town, but then a democratically elected national government decides to abolish local elections and move to a city manager approach? Clearly, the people have lost the “right to vote” for local officials, but would that constitute a human rights violation? Would there be a human rights violation if an American state abolished people’s right to vote for judges? The more common view is that this “right to vote” constitutes an abuse of the citizens’ due process rights.<sup>5</sup>

The problem is that voting is not something, like religious liberty, that can be coherently treated as a possession of individuals, in the way that human rights discourse suggests. Professor Fan points out that even free speech is “meaningless to a solitary person,” which may

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<sup>5</sup> See Charles Franklin, “Behavioral Factors Affecting Judicial Independence”, in Stephen Burbank & Barry Friedman, eds., *Judicial Independence at the Crossroads* (Thousand Oaks, Calif.: Sage, 2002), at 148; John Zaller, *The Nature and Origins of Mass Opinion* (New York: Cambridge University Press, 1992).

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be a bit further that I would go. But clearly, an individual, acting alone, cannot vote in any meaningful sense. An election is a highly structured government program by which the government submits certain questions of political succession or public policy to a defined electorate.<sup>6</sup> It is precisely in such cases that the concept of human rights breaks down, and fails to illuminate our genuine political morality. The proposed recharacterization, which focuses on our moral demands on government, seems much preferable. Employing this approach, we can say that government is morally obligated to establish political mechanisms that render it responsive to the desires of its citizens.

One way to do so is to submit all matters of public policy to a vote of the populace, but that is not the only way. The demand can also be satisfied by having the populace elect the legislators and the chief executive, or by having the populace elect the legislators and the legislators choose the chief executive. What is at issue is not some personal right to vote, but a moral demand that is made upon government, and is meaningful only in that governmental context. Professor Lardy's observation that voting is constitutive is captured by a different moral demand on government: the demand that it must not discriminate among people on irrelevant or invidious grounds. Thus, if the government chooses to fulfill its moral obligation to ensure responsiveness by holding an election to choose the chief executive, it may

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<sup>6</sup>For further discussion of this point, see Edward Rubin, "Getting Past Democracy", *University of Pennsylvania Law Review* 149:711 (2001), at 755-64.

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not restrict voting in that election to whites, or Christians, or those whose grandfathers voted. But it may restrict the vote to its own citizens, or to people over eighteen, or twenty-one or twenty-five years old. Similarly, Pennsylvania may forbid residents of New Jersey to vote in its election for its chief executive, even if they work in Pennsylvania, pay taxes to it, and own a second home there. The government, which runs the election, constitutes the group of voters, but our political morality constrains it from doing so on certain grounds. Here again, the language of moral demands on government provides a better description, and a better framework of analysis, than the language of individual rights.

As a final point, I want to respond to a few of the comments about my historical claim that the protections against government we now regard as human rights did not evolve from the natural rights tradition. As I noted above, the purpose of this claim is to open a conceptual space between these protections and the concept of rights, so that it becomes easier to think about describing those protections in other terms. Dr. Hoffmann points out, quite correctly, that ideas of political liberty and individual rights were “jumbled together” in the pre-modern period. I have tried to disentangle these ideas, and show that they emerged from different conceptual frameworks, but they were aspects of the same culture, and certainly bled into one another at certain points. On the other hand, ideas about life after death bled into theories about the structure of the solar system, and ideas about royal authority bled into observations about animal behavior. This imbrication of ideas,

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although certainly a valid sociological observation, does not preclude the possibility that the ideas themselves emerged from separate rationales, and represented separate, and essentially independent intellectual traditions.

Dr. Van Duffel offers more specific challenges to my historical claim, but I remain unconvinced. To begin with, all his counterexamples are all drawn from the Middle Ages or the sixteenth century. Even if they are correct, a lot of time elapsed between the those periods and the late eighteenth century. If natural rights and protections against government were linked when Professor Duffel suggests, and subsequently became separated, then the conceptual space I am arguing for nonetheless existed. Bodin, Locke, Montesquieu, Beccaria, Rousseau, the Levellers, the Quakers and the evangelical abolitionists are more important progenitors of current protections against government than medieval or sixteenth-century thinkers. If they did not rely on natural rights thinking for their arguments – and Professor Van Duffel offers no evidence that they did – my point would stand.

Second, I also find Dr. Van Duffel's particular challenges to my historical claim unconvincing. He asserts that medieval thinkers recognized a natural right to religious liberty. But a human right, as Professor Fan observes, and as I state at the beginning of my paper, is generally defined as having two attributes – it must be something possessed by all human beings, and it must be a claim or entitlement that these human beings can assert. A natural right is a human right derived from natural law, that is, a divine ordering of the social

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world. Dr. Van Duffel claims that the belief that infidels can licitly possess property proves that medieval thinkers recognized a natural right to religious liberty. This was hardly a universal view, but even those who did believe it, such as Pope Innocent IV, were not really saying that every human being had the right to worship as she chose. Recognition of such a right would preclude accusations of heresy, which were legion at the time. It would be a rather devastating critique of human rights discourse - more so than anything I offered - if it really induced modern scholars to present the medieval Catholic Church as a proponent of religious liberty, but I doubt most scholars would want to associate themselves with that position. In fact, when Innocent IV made the statement that Dr. Van Duffel quotes, he was asserting, at most, that infidels possessed a natural right to property, and were entitled to certain treatment on that ground. But, as I explicitly state, my asserted separation of natural rights and protections against government does not apply to property. The right to property does indeed come out of the natural rights tradition. All our other protections against government, such as religious liberty, do not. The concept of a right to property presents other difficulties, which I discuss in a different chapter of my book. For present purposes, it is enough to observe that a human rights philosophy that included only the right to preserve one's property would be unacceptable to virtually any person in our present society.

Dr. Van Duffel's discussion of the Spanish Thomists is equally unconvincing. Las Casas, even according to the quote from Pennington that he selects, argued

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against enslavement of the Indians on the ground that they had property or dominium. Even assuming that this was a natural rights argument, the right involved was a right to property, from which a legal prohibition on enslavement of the particular property owning person followed, not a natural right against enslavement, *per se*. This is, to reiterate, the one right I have excluded from my claim about the separate intellectual traditions of natural rights and protections against government. Moreover, the difference between a property right and a right against enslavement was not a narrow distinction, but one with major pragmatic consequences, since it led Las Casas to support the use of Africans in place of Indians as slaves. It is true that the natural law tradition recognized a property right to oneself, and thus perhaps a natural right to one's liberty. From a contemporary perspective, one would think that this would lead directly to a general condemnation of slavery, but it rarely did. One reason is that most natural rights theorists allowed people to trade away their dominium, whether property or liberty. Professor Van Duffel quotes Richard Tuck as saying that some of the Thomists, such as Francisco de Vitoria, argued that men were not free to enslave themselves. But what Tuck really says is that these Thomists believed that men were not free to enslave themselves for money.<sup>7</sup> They could enslave themselves to protect their lives, however. That is what they were conceived as doing in the social contract, which is a reason why social contract

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<sup>7</sup> Richard Tuck, *Natural Rights Theories: Their Origin and Development* 49 (Cambridge, Eng.: Cambridge University Press, 1979)

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theory, and natural rights theory, did not lead to a demand for government prohibition of slavery. In addition, the belief that people could enslave themselves to save their lives allowed prisoners of war to become enslaved, and people who were already slaves to be maintained in that condition, which was a major justification for African slavery in the late eighteenth and early nineteenth centuries.

I will conclude with one general observation. The purpose of my paper, and my book, is not to joust with terminology, but to enable us to think more clearly and creatively about the government we actually possess. The discourse of human rights derives from the pre-modern era, and was developed by people with very different, and to our minds, unappealing sensibilities. Because of its familiarity, this discourse possesses rhetorical value, but as an analytic framework, I think it embeds pre-modern notions, and thus creates a good deal of confusion. In many cases, it obscures the political morality that most people maintain, rather than illuminating it. I would suggest that the commentators' discussion of anti-corruption efforts, voting, and the connection between this morality and legal rights suffers from the conceptual burdens that human rights discourse imposes. I have proposed an alternative conceptual framework that scholars and other observers can use to think through these problems with greater clarity. I do not expect to see triumphant crowds marching beneath a banner saying "Protect Our Moral Constraints on Government." My aspiration is that those people who provide the intellectual basis, or the intellectual interpretation, of the struggle for human rights will be able to do so more effectively by thinking about the un-

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derlying issues in the more contemporary terms of the moral constraints and obligations that we impose on the modern administrative state.

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