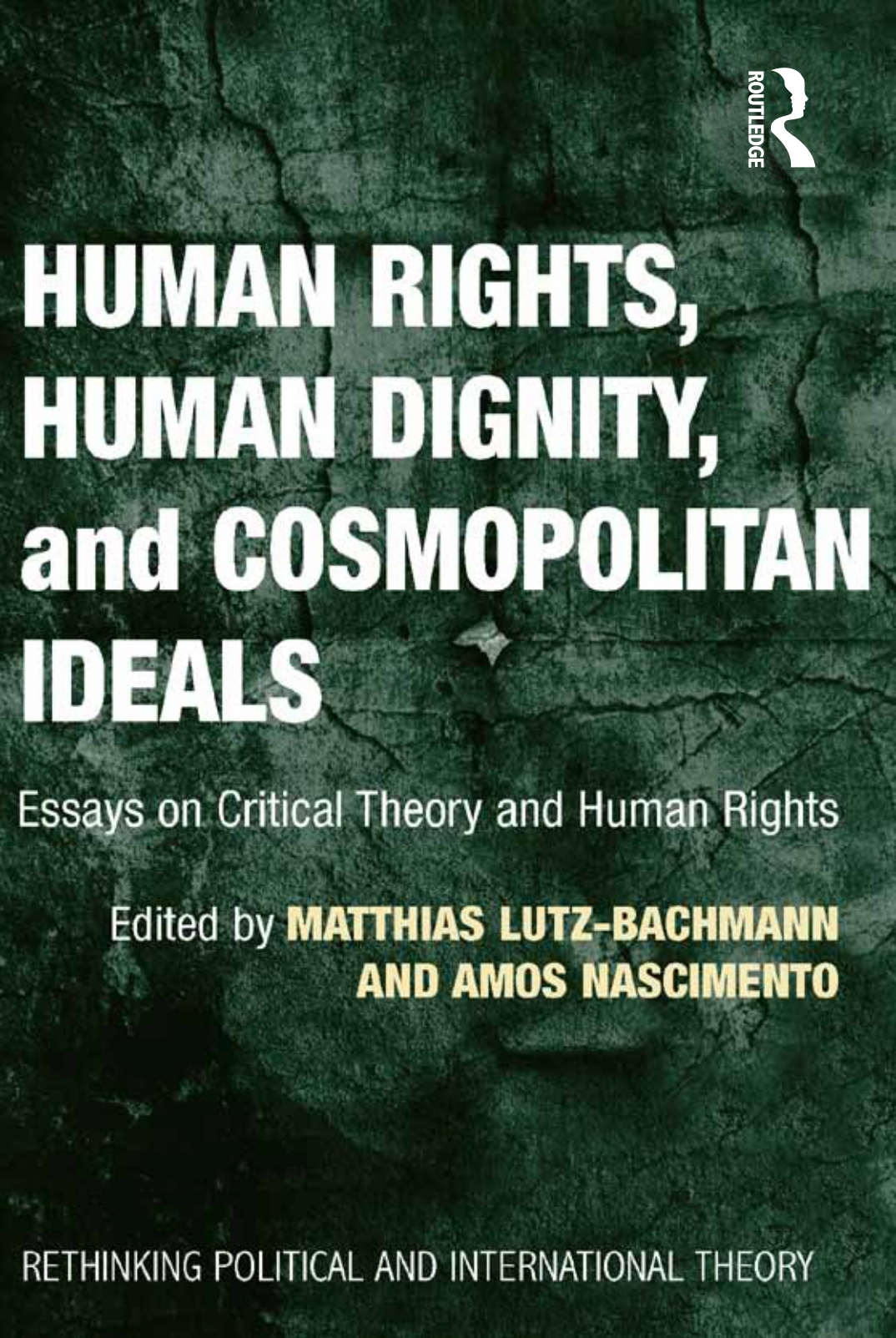
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Essays on Critical Theory and Human Rights
Edited by MATTHIAS LUTZ-BACHMANN AND AMOS NASCIMENTO
RETHINKING POLITICAL AND INTERNATIONAL THEORY

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Human Rights, Human Dignity, and Cosmopolitan Ideals

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Edited by

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Acknowledgments

This book is the result of a project involving various scholars who have dedicated a good portion of their academic careers to study and promote new perspectives on human rights and cosmopolitanism. Our intention with this publication is not only to document the process implicit in this endeavor and the ongoing dialogue among the persons involved, but also to set out a platform for future collaborations that will certainly expand the framework of discussion. This collection of essays would never have been completed without the engagement, commitment, and cooperation of all these colleagues. They participated in seminars and colloquia organized by the Interdisciplinary Research Cluster on "Human Interactions and Normative Innovation" at the University of Washington in the United States and the Exzellenzcluster "Herausbildung normativer Ordnungen" at the University of Frankfurt in Germany. The chapters prepared by these authors have had previous iterations at other venues: James Tully presented a more extended version of his paper as the Oxford Amnesty Lecture, Cristina Lafont presented ideas expressed in her chapter in her Spinoza Lectures at the University of Amsterdam, and Matthias Lutz-Bachmann shared earlier versions of his chapter at colloquia at the University of Bonn and lectures at various universities around the world. William Talbott presented many of the ideas registered in his chapter at lectures given as Fellow of the Institute for Human Sciences at the University of Frankfurt and Andreas Niederbeger's chapter is informed by his lectures on human rights at the University of Mainz. Finally, Eduardo Mendieta presented earlier versions of his chapter at the University of Durham and Amos Nascimento's chapter evolved out of his lectures on philosophy of human rights at the University of Washington and previous papers presented at meetings of the American Philosophical Association and the University of Salamanca. We appreciate that all authors were willing to revise, adapt, and submit their texts for this publication. Our thanks to all of them for their important contribution to our dialogical process.

We have been fortunate to have the support of our respective institutions—the University of Washington, University of Victoria, BC, Northwestern University, University of Stony Brook, and the University of Frankfurt—where we have had the opportunity to organize meetings, use state-of-the-art facilities, and count on the support of dedicated staff. Funding for the work involved in this overarching project as well as for our dedication to the completion of this book has been granted by the Simpson Center for the Humanities and the Interdisciplinary Arts and Sciences program at the University of Washington and the Exzellenzcluster "Herausbildung normativer Ordnungen' at the University of Frankfurt. At these institutions, there are many people directly or indirectly involved in processes

related to the preparation of this book and we would like to express our appreciation to Ursula Johannsen, Miriam Bartha, Bev Wessel, Noreen Slease, Chelsea Schlievert, and Patrick Smith. Jennifer Sundheim at the UW Libraries in Tacoma and Seattle provided us with extensive support in terms of bibliographical references, acquisition of titles, and documentation. Our students were able to profit from the contact with many of the authors and this interaction was certainly a motivating factor for many of them in their engagement with the theory and practice of human rights and cosmopolitanism.

In the process of going from the proposal for a publication through the organization of the events where these chapters were presented to the preparation of the manuscript, we also counted on the support of our colleagues who participated in the dialogue at large and presented papers related to other subjects not included in this book. They provided an important community of interlocutors and include Michael Rosenthal, Thomas Schmidt, Michael Forman, Andreas Wagner, Jamie Mayerfeld, Roseli Fischmann, Philip Schinck, Anita Ramasastry, Jonathan Warren, Margaret Griesse, Michael Blake, Amy Reed-Sandoval, Brad McHose, Elizabeth Scarborough, Jennifer Driscoll, Adam Goch, Gregg Miller, Filiz Kahraman, and Kristin Bunge. We thank them all for their support and cooperation. The following students, involved in Amos Nascimento's research project on human rights, helped in the final preparation of the manuscript: Kiana Baharloo, Anna Beebe, Priscilla Hur, Libby Kaczmarek, Jesmeen Kaur, Sarah Kwan, Kasumi Maeda, Yuki Shibamiya, Sophia Winkler, and Caterina Zagona-Prizio.

A previous version of Matthias Lutz-Bachmann's chapter was published in German as "Die Idee der Menschenrechte angesichts der Realitäten der Weltpolitik" in a book he edited with Jan Szaif, *Was ist für den Menschen Gute?/ What is Good for a Human Being?*, published by Walter DeGruyter, Berlin/New York, 2004, pp. 276–92. This is an updated publication in English, translated by Amos Nascimento and Margaret Griesse and reviewed by the author. The chapter by Cristina Lafont appeared as the first chapter in her collection of essays, *Global Governance and Human Rights* (Amsterdam: Koninklijke Van Gorcum, 2012), pp. 1–20 and was slighted revised for this publication. An earlier version of Eduardo Mendieta's chapter appeared as "From Imperial to Dialogical Cosmopolitanism" in *Ethics & Global Politics*, Vol. 2, No. 3 (2009), pp. 241–58, and has been adapted for this publication, taking into account the context of his talk at the University of Washington in 2011. An earlier version of James Tully's chapter was given as a 2010 Oxford Amnesty Lecture and published as "Rethinking Human Rights and Enlightenment: A View from the Twenty-first Century" in Kate E. Tunstall (ed.), *Self-Evident Truths? Human Rights and the Enlightenment* (New York: Bloomsbury, 2012), pp. 3–34. It was revised for the talk at the University of Washington in 2011 and for this publication. Extracts from Amos Nascimento's chapter have been previously published in chapter 6 of his book, *Building Cosmopolitan Communities: A Critical and Multidimensional Approach* (Palgrave Macmillan, 2013).

Finally, we thank Keith Breen, Dan Bulley, and Susan McManus for accepting this publication in the series "Rethinking Political and International Theory" at Ashgate. We also acknowledge the patience and the guidance provided by Rob Sorsby, Margaret Younger, Tricia Craggs. and the staff at Ashgate during the process of preparing this manuscript and submitting it to peer reviewers whose comments helped us improve this book in many ways. We acknowledge the various critics and suggestions at different stages of this project, but owe special thanks to Margaret Griesse for her help with the translation, critical reading of the whole manuscript, discussions about particular contents of this book, and her continuous support.

Our cooperation in this project goes back to two conferences on cosmopolitanism organized by Matthias Lutz-Bachmann in 1995 at the University of Frankfurt and in 1996 at the University of Saint Louis, in which Amos Nascimento was able to participate. It was in these occasions that we first envisioned the possibility of working together in a series of initiatives in areas such as human rights, human dignity, and cosmopolitan ideals. Our joint involvement as editors of this publication is another important step of our ongoing collaboration in this area.

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Preface

This book presents a collection of chapters written and presented as part of an ongoing international dialogue on the meaning and importance of human rights and their relationship with conceptions of human dignity and cosmopolitanism. This is the result of a series of meetings and seminars in partnership with the Research Cluster on "Human Interactions and Normative Innovation" at the University of Washington in the United States, the Exzellenzcluster "Herausbildung normativer Ordnungen" at the University of Frankfurt in Germany, the Consortium on Democratic Constitutionalism at the University of Victoria in Canada, and other groups around the world. This collection brings together a few of the presentations given at events organized by the clusters and other texts related to this project. Each chapter contributes to the general endeavor of this ongoing dialogue by pursuing three goals: To reconstruct modern philosophical theories that have contributed to our views on human rights and issues of global justice; to highlight the importance of *humanity* and human dignity as a complementary dimension to liberal rights; and, finally, to integrate these issues more directly in contemporary discussions about cosmopolitanism. The authors not only present theoretical perspectives on how to rethink political and international theory in terms of the normativity of human rights, but also promote an international dialogue on the prospects for a critical theory of human rights in the twenty-first century.

With this publication we hope to contribute to the delineation and establishment of an emerging field which could be described as a "Critical Theory of Human Rights" which is informed by recent debates in the fields of philosophy, law, political theory, sociology, and international relations. Contemporary definitions and interpretations of human rights are decidedly influenced by the *Universal Declaration of Human Rights*, but recent studies have attempted to go beyond this document in order to understand the metaphysical, philosophical, and political implications of human rights discourses in the twenty-first century. Undoubtedly, the experiences of two World Wars, the rise of dictatorial regimes, and the Holocaust are often seen as events in the first half of the twentieth century which triggered the initiative of establishing an international bill of rights and many international institutions to secure a just and democratic world order. While these events functioned as a catalyst that led to the *Magna Charta* of the United Nations, the Nuremberg Trials, and the drafting of the *Universal Declaration of Human Rights*, it is also important to acknowledge an ongoing philosophical discussion that accompanied these events. Authors such as Hannah Arendt, Jean-Paul Sartre, Jacques Maritain, Charles Malik, P.C. Chang, Karl Jaspers, H.G. Wells, and others clearly discussed the ethical and political issues at hand at the time the *Universal*

Declaration was being drafted. Today, new debates attempt to address more directly the question concerning the need for normative guidance to orient the responses to contemporary global challenges. There are many prominent positions in these debates but the authors in this book locate themselves within the context of an ongoing conversation involving two poles represented by the philosophies of John Rawls and Jürgen Habermas.

John Rawls' political liberalism represents a very influential position that has yielded a plethora of publications and debates on human rights and cosmopolitanism understood as a theory of global justice. The greatest contribution of his *A Theory of Justice* (1971) was the definition of a general conception of justice from which he derived different principles that justified basic liberties and distributive measures. This initial conception was somewhat modified in *Political Liberalism* (1993) in order to make room for differences—as he affirmed the "fact of pluralism" and the idea of an "overlapping consensus"—and then extrapolated to international contexts and adapted to the discussion on human rights. The short list of rights he proposed in *The Law of Peoples* (1999) has been criticized for showing a profound bias towards the United States as a liberal nation and then generalizing this model without account for contextual differences. Authors such as Ronald Dworkin, John Beitz, Amartya Sen, and James Nickel attempt to address this problem by discussing the criteria upon which a basic repertoire of liberal rights can be expanded in order to match the claims raised in human rights discourses. However, as Thomas Pogge, Will Kymlicka, Joseph Raz, and Gillian Brock have shown, the limits of a Rawlsian conception of human rights require a more global approach that points to a form of cosmopolitanism.

While the debates within this front have provided important insights, especially concerning the issue of global justice, it is also important to acknowledge the contribution of Critical Theory to the debate on human rights. Since its beginnings in the 1920s, the Critical Theory of the Frankfurt School had a strong commitment to a critique of society, but during the rise of the Nazi regime references to authoritarianism, anti-Semitism, and humanity became even more explicit. This is seen in *Dialectics of the Enlightenment* (1944), a book written by Theodor W. Adorno and Max Horkheimer. In an aphorism of *Minima Moralia* (written in 1946), Adorno states that "human dignity insisted on the right to walk, a rhythm not extorted by the body through command or terror," and in his *Negative Dialectics*, he concludes: "in the concentration camps it was no longer an individual who died, but a specimen." These initial elements of a "Critical Theory of Human Rights" seemed to have been dormant, waiting for further reflection, but were then advanced in new directions by Jürgen Habermas after the publication of his *Theory of Communicative Action* (1981), the expansion of its application in terms of a discourse ethics in *Moral Consciousness and Communicative Action* (1983) and a discourse theory of law and politics in *Between Facts and Norms* (1992). In his writings on this subject, Habermas defines human rights and popular sovereignty as the "two ideas that have determined the normative self-understanding of constitutional democracies." He also rescues Kant's

cosmopolitanism, identifies a current postnational constellation that prompts a move beyond nation-states, and reacts to intercultural discourses that criticize human rights as an imposition of Western values. In an article published in 2010, Habermas acknowledges that contemporary discussions seem to have overlooked an important aspect in the first article of the *Universal Declaration of Human Rights*, which states that "All human beings are born free and equal in dignity and rights." In view of this statement, he then asks a question, "Is it only against the historical background of the Holocaust that the idea of *human rights* becomes, as it were, retrospectively morally charged—and possibly over-charged—with the concept of *human dignity*"?

The authors contributing to this collection move between and beyond these two important traditions and attempt to address this and other questions which are implicit in the very title of this book: *Human Rights, Human Dignity, and Cosmopolitan Ideals*. This title corresponds to the guiding theme of a lecture series organized by the Interdisciplinary Research Cluster on "Human Interactions and Normative Innovation" at the University of Washington in Seattle and Tacoma, the United States, and was also the title of a conference organized under the auspices of the *Exzellenzcluster* on "Formation of Normative Orders" at the University of Frankfurt, Germany. The implicit approach shared by the authors indicates that there is a field of tension involving issues on human rights, human dignity, and cosmopolitanism which needs to be accounted for when discussing human rights in general. For instance, human rights cannot be conceived in terms of liberal rights alone without taking competing models into account and addressing the contemporary global challenges that go beyond the framework of national and state-centric approaches to rights and democracy. A response to global challenges requires the adoption of a cosmopolitan perspective which retrieves and reviews Immanuel Kant's original proposal for world citizenship rights in terms of cosmopolitan law [*Weltbürgerrecht*]. Yet, this expansion of the framework of rights from the national to the global sphere cannot be performed without a corresponding consideration of what humanity means and how human rights are intrinsically connected to human dignity.

The book has an introductory chapter that provides a map of some key challenges and positions involved in this debate, and then continues with two parts that attempt to show the complementary relationship among human rights, human dignity, and cosmopolitan ideals.

Matthias Lutz-Bachmann authors the first article and presents a series of challenges in world politics which have not been adequately addressed by contemporary mainstream political theories. As a way of addressing this problem, he insists on the need to connect ethics and politics at the global level by moving from a "philosophy of the *polis*" to a "philosophy of *cosmopolis*" based on human rights. In this process, Lutz-Bachmann questions the positions represented by realism, liberalism, and communitarianism because of their inability to provide tools of analysis for the global context. As an alternative, he then proposes an understanding of human rights in relation to ethical norms and ethico-juridical principles.

Having the background of this initial description of global challenges, the diagnostics of the problems, and the indication of possible responses to these challenges in a normative conception of human rights and a philosophy of *cosmopolis*, we then proceed to the first part: Human Rights and Human Dignity beyond the State. This part focuses on discussions around political liberalism, questions regarding state-centric approaches to human rights, and issues in moral theory.

William Talbott begins by noting the moral transformations that have historically occurred due to a turn to human rights, relates these transformations to the idea of human dignity, and asks what is actually presupposed when one talks about human dignity. To answer this question, he relies on Rawls to propose an expanded original position (EOP) as a test to identify, explain, and predict consensus in the development of human rights. This test is applied in order to reconstruct the ongoing historical process of moral discovery and moral development, taking Kant as an example. Based on his findings, Talbott suggests that the principles implied in the EOP can be expanded at the global level and offers a new defense of human rights as the result of a process of moral transformations.

Cristina Lafont affirms that the universality inherent in the concept of human rights expresses a cosmopolitan ideal of equal moral concern for all human beings, but then shows that the protection and allocation of human rights obligations are generally ascribed to states which understand human rights as a responsibility towards their own members. Against this shortcoming, Lafont presents a series of arguments that show how the practical approach of existing institutions has brought about better outcomes than the state-centric view based on a theoretical approach to human freedom. She therefore proposes the recognition of plural actors beyond the state in the international arena who ought to protect human rights globally, and suggests the development of more mechanisms within existing international institutions as a tool to promote global democracy and human rights beyond borders.

Andreas Niederberger recognizes the acceptance of universal human rights and acknowledges the existence of institutions that promote such rights, but then presents a less optimistic account of contemporary reality, which often contradicts and violates human rights. In view of this situation, he asks whether human rights ought to be seen as legal, political or moral rights. He defends the idea that moral rights can transcend the contingencies of empirical contexts, but also recognizes that moral rights are too indeterminate, either in their universal approach or in reconstructive versions: In the former, moral rights are seen as all encompassing; in the latter they emerge as an answer to specific situations and then gain wider acceptance. In view of this impasse, Niederberger concludes that in either case the role of philosophy is to detect conflicts and test the validity of human rights claims.

The second part is organized around the theme Human Rights and Cosmopolitanism with a Human Face. It presents a different accent and brings together some contributions that question traditional views of the Enlightenment and propose a move beyond the epistemic approaches that focus on abstractive

methods, a legalistic view of rights, and institutional frameworks that do not provide for sufficient venues for democratic participatory processes.

Amos Nascimento articulates cosmopolitanism with contemporary views on human rights and human dignity by relating these concepts to a series of paradigmatic positions in philosophy. He proposes an understanding of human rights paradigms according to three philosophical stages defined by Jürgen Habermas and Karl-Otto Apel: metaphysical, epistemic or postmetaphysical, and discursive or communicative. Based on these distinctions, he provides an overview of different forms of cosmopolitanism, criticizes the sole focus on the epistemology of rights, and observes a new trend that progressively places more emphasis on humanity and communicative interactions instead of the traditional focus on a human rights paradigm within the confines of the nation-state. Based on this trend, Nascimento concludes that a new understanding of cosmopolitanism is needed, which allows us to stress the importance of the *human* rather than only the *rights* aspect of human rights discourses.

Eduardo Mendieta provides a survey of discourses about cosmopolitanism and reveals what is normative and ideal in the cosmopolitan concept. To this end, he considers the epistemic and moral dimensions of Immanuel Kant's cosmopolitan attitude toward the world and other cultures and concludes that this is an example of a Eurocentric and "imperial cosmopolitanism" which does not account for its own conditions of possibility. Relying on philosophers such as Martha Nussbaum, Anthony Appiah, Walter Mignolo, Judith Butler, Seyla Benhabib, and Ulrich Beck, Mendieta then proposes a grounded, enlightened, and reflexive form of cosmopolitanism affirmed through democratic iterations that can have a positive global impact. Relying on this approach, he defines a form of "dialogical cosmopolitanism."

James Tully provides yet another critical view of Kant's shortcomings by identifying two overlapping yet distinct traditions of human rights which can be identified according to their constitutional processes. The first claims that human rights can be unilaterally *declared* by an authority because they are self-evident universal truths and can be exercised through modern legal, political, and economic institutions that are coercively imposed prior to the exercise of human rights. The second tradition sees human rights as *proposals* which are discussed among fellow citizens, pass critical examination, and are justified by means of reflections, interpretations, and processes that imply the recognition of plural political, economic and legal institutions. Comparing these views, Tully identifies the first as the high Enlightenment tradition of human rights and sees the second as a tradition of democratic participation exemplified in the non-violent initiatives led by Mahatma Gandhi. He concludes that human rights and democracy go together and are instituted not by imposition but by co-articulation with non-violent means.

Although each of the authors above provides different approaches to human rights, human dignity, and cosmopolitanism, there is a thematic unity in their perspectives, which is expressed in their critical approach and challenges to established traditional views. Thus, there is a common thread guiding all

contributions in this collection. Moreover, what is registered in these pages is their collaboration and effort to create a network of people interested in developing a new framework to address global challenges that emerge in the twenty-first century and respond to them by appealing to human rights discourses. One of the challenges this network attempts to address is the need to understand social and political change in relation to the transformation of global normative ideals.

The very reference to a transformation of normative ideals explains the insertion of this book within the Ashgate Series on *Rethinking Political and International Theory*. As indicated clearly in the opening chapter of this book, the authors in this collection grapple with concepts that are at the heart of a reconsideration of international paradigms by recognizing the current post-national constellation, questioning traditional conceptions of territorial sovereignty, reviewing traditional arguments for war and cosmopolitan pacifism, as well as providing a framework that could include agents who are not clearly integrated into traditional conceptions of international theory—immigrants, tourists, terrorists, refugees, and other individuals who participate in international and global processes. This changing international context requires a revision of state-centered approaches that forget the dimensions of rights and humanity beyond borders. Thus, we hope to advance the rethinking of political and international theory by discussing philosophical theories that contribute to a Critical Theory of Human Rights and highlight the importance of human dignity. They complement and diverge from the current emphasis solely on liberal rights by integrating these issues more directly into a broader conception of cosmopolitanism.

Introduction

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Chapter 1

The Idea of Human Rights and the Realities of World Politics: A Reflection on the Relationship between Ethics and Politics

Matthias Lutz-Bachmann

Developments in the field of international relations in the past few years have given me the opportunity to reconsider the relationship between ethics and politics. These developments are also related to the question about the importance of human rights amidst the changing realities of world politics. They are related to a series of events such as the attack on the World Trade Center and the Pentagon in September 2001, the impact of cross-border terrorism, the changes already observed in the structure of future military conflicts, especially the new recurrence of wars—which are not simply state-run but also initiated by private and non-state actors—as well as the mass phenomenon of suicide bombers with political motivations and, most importantly, the unresolved problem regarding the proliferation and global availability of weapons of mass destruction. These and other related factors lead to the assumption that the scenarios for action and the structures of international politics have experienced fundamental changes in the wake of globalization processes. All this affects political philosophy, which is no longer understood simply as a "philosophy of the *polis*," that is, as a theory of a politically oriented individual State, but increasingly as a "philosophy of *cosmopolis*" or a "philosophy of international relations"[1] that needs to reflect upon its own foundations. My reflections on the relationship between ethics and politics and the role of human rights aim at contributing to a discussion on this state of affairs.

I would like to present my ideas on this topic according to three steps: *First*, I want to provide a brief survey of current debates confirming that the way in which the relationship between ethics and politics has been conceived in dominant contributions to a political philosophy of international relations is inadequate for various reasons and requires a different approach. *Second*, I want to propose a new perspective to justify the relationship between ethics and

1 See Wolfgang Kersting, "Philosophischee Friedenstheorie und international Friedensforschung," in Christina Chwazcza, et. al. (eds.), *Politische Philosophie der internationalen Beziehungen* (Frankfurt am Main, 1998), p. 523.

politics in light of new realities in world politics. *Third*, I would like to specify in more detail the implications this approach has for the question concerning the status of human rights.

Critique of Contemporary Political Philosophies of International Relations

The political theory of international relations developed in recent years continues to walk in the footsteps of the modern political philosophy inaugurated by Hobbes, Kant, and Hegel. One example of this trend is the very influential *theory of realism* which has been adopted by national political consultants and is now presented as a supposedly precise analysis of the international realm of action. This theory continues to follow those far-reaching philosophical premises that Thomas Hobbes once presented as the presuppositions to the relationship among individuals in the "state of nature." However, because the realist theory does not postulate a new sovereign or Leviathan as Hobbes did, it remains limited by a mere directory of accounts characterized as "realist." If this theory had followed Hobbes consistently, it would have had to conceive of the sovereign as a World State [*Weltstaat*] that claims all the power to itself while demanding and dominating the States of the World [*Staatenwelt*]. This evaluation consists of the view that the only possibility beyond the juridical order guiding the relationship within the state would be anarchy among competing states which, in principle, cannot be overcome. In the realm of international politics, realism recognizes only the action of individual states that defend their national interests, above all those for their own survival. This prompts them to follow a politics of national security and sovereignty.[2] Whenever one finds structures of public law, customary practices or comparative legal doctrines as well as global structures such as the United Nations, such structures are understood exclusively as a function of the individual strife toward national sovereignty and security. Based on this theoretical perspective of the politics of power exercised by individual states and their actions, practical and strategic maxims for action are derived in international politics which disregard the claims of ethical and normative principles. This does not preclude, however, that normative principles be demanded within democratic communities.

In opposition to the realist theory of international relations one finds the *theory of political liberalism*, which is inspired by John Rawls but has its origins

2 See Hans Morgenthau, *Politics Among Nations* (New York, 1948) and *Macht und Frieden: Grundelegung einer Theorie der Internationalen Politik* (Gütersloh 1963); Martin Wight, *International Theory: The Three Traditions* (Leicester/London 1991); Kenneth N. Waltz, *Theory of International Politics* (New York 1993); Robert O. Keohane (ed.), *Neorealism and its Critics* (New York 1986); Hedley Bull, *The Anarchical Society: a Study of Order in World Politics* (New York 1977) and *Justice and International Relations* (Ontario 1984); Chris Brown, *Sovereignty, Rights and Justice: International Political Theory Today* (Cambridge 2002), pp. 27–75.

in the practical philosophy of Immanuel Kant and Jean-Jacques Rousseau, and represents a "cosmopolitan cognitivism." The normative foundations of law, such as those deployed by Kant when he defines the public law of the individual state[3] in his philosophy of rights, are then adapted by political liberalism and applied to inter-state relations. This results not only in the grounding of the universal validity of human rights in political liberalism—through which the anarchy among governments can be halted—but also in the normative justification of global institutions of law, where a more or less clearly articulated autonomy or independence is granted to national actors.[4]

This contemporary liberal concept of cosmopolitan democracy is, however, contradicted by the political *philosophy of communitarianism*, which understands itself less as a stand-alone program and more as a corrective to liberal theory. Communitarianism shares with liberalism normative concerns and a basic approach, but provides different answers in its account of reality. At the center of the communitarian critique of liberalism[5] we find all those concepts that are inspired in Kant and represent a "covering-law universalism" which, as Michael Walzer once put it, implies "a global or universal state, if it is to be effective."[6] Against the supposedly abstract universalism of the postulates of global law, communitarianism suggests a resurgence of motives inspired in critiques of Kant by Johann Gottfried Herder and Georg W. Friedrich Hegel, in particular the idea of a "reiterative universalism."[7] This acknowledges more appropriately the reality of cultural differences among peoples both within nations and among them and takes into account their historical origins, their religious experiences, and their social forms of life which, for communitarianism, are reflected positively in the fact that there are many states. Political liberalism, in its theory of international relations, seeks to enforce global legal relations at the cost of suppressing differences, imposes the integration of states in international treaties by means of force, or pursues the formal equality of people on a global scale through an assimilation of cultures. Contrary to this tendency, communitarianism advocates a politics of recognition of existing differences between states, national boundaries, individual

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3 Immanuel Kant, *Metaphysik der Sitten*, Rechtslehre §43–9, A 161–73,B191–203.

4 Charles Beitz, *Political Theory and International Relations*, (Princeton, 1979); Daniele Archibugi and David Held (eds), *Cosmopolitan Democracy* (Cambridge, 1995); Otfried Höffe, *Demokratie im Zeitalter der Globalisierung* (München, 1999) and 'Globalität statt Globalismus,' in Matthias Lutz-Bachmann and James Bohman (eds), *Weltstaat oder Staatenwelt? Für und wider die Idee einer Weltrepublick* (Frankfurt am Main, 2002) pp. 8–31; Stefan Gosepath and Jean-Christophe Merle (eds), *Weltpublik, Globalisierung und Demokratie* (München, 2002); Chris Brown, *International Relations Theory: New Normative Approaches* (New York, 1992).

5 See Michael Walzer, 'The Communitarian Critique of Liberalism,' *Political Theory*, 18 (1990): pp.6–23.

6 Michael Walzer, 'Nation und Welt: Universalismus und Partikularismus in Moral und Politik,' in Michael Walzer, *Lokale Kritik—globale Standards* (Hamburg, 1996), p. 176.

7 Ibid., p. 191 ff.

autonomy of national states, and the pluralism of state constitutions, which have their own moral quality.

What follows from this survey on the current debate and its relationship to our question, namely the relationship between ethics and politics in view of the problems and challenges of international relations? Within the limits of this chapter, I can only refer to a few general points. First, one can notice that the theory of realism neutralizes and separates the states and their direct connection with questions of ethical and normative justification of politics—thus agreeing with traditional approaches to political philosophy, from Plato and Aristotle through to the political philosophy of modern times in Hobbes. In contrast, the subsequent views represented by both a theory of political liberalism inspired in Kant and a communitarian theory that follows Hegel's critique of Kant attempt to solve the problem of defining the relationship between ethics and international politics, albeit in different ways. Simplistically speaking, the theory of liberalism is committed to the fundamental principle of a robust normative legal theory, which is then adapted and applied to the legal relationships between the states. In this way, the normative postulate becomes a binding global or supranational legal order. In contrast, the theory of communitarianism consists of the view that this step should neither question the moral quality of existing national legal relationships among individual states nor disregard their cultural identities. In the heart of the debate between liberals and communitarians, one finds an old problem that is already present in the dispute concerning the basis for a moral or legal theory, that is whether and how it is possible to substantiate a normatively rich and at the same time globally valid general theory of a "just law" [*Theorie des "gerechten Rechts"*] in face of the fact of pluralism in modern lifeworlds or also in view of the global diversity of cultures and states. While the representatives of the liberal position see moral theory and positive law in a "complementary relationship"[8] due to an "ethical formalism" that uses a "razor-sharp" distinction to separate matters of justice from matters related to what is good,[9] the representatives of communitarianism, on the contrary, see the need to avoid detaching questions of political justice from questions concerning the good life. The different responses that political liberalism and communitarian give to the question concerning what is politically just reflect the difference between these two positions regarding what shall be the right normative order or structure for international politics. Yet, based on the background of recent developments in world politics, these positions of

8 Jürgen Habermas, *Faktizität und Geltung: Beiträge zure Diskurstheorie des Rechts und des demokratischen Rechtstaats*, (Frankfurt am Main, 1992), p. 137.

9 See Jürgen Habermas, 'Diskursethik—Notizen zu einem Begründungsprogramm,' in Jürgen Habermas, *Moralbewusstsein und kommunikatives Handeln* (Frankfurt am Main, 1983), p. 113. "When we define practical questions as questions about the 'good life,' referable in each case to the totality of an individual form of life or to the totality of a particular biography, ethical formalism is, in fact, decisive: the postulate of universality functions as a knife that cuts in *the good* and *the just*, and between evaluative statements."

political philosophy are in agreement when it comes to a particular point which, despite the differences described thus far, cannot be overlooked. Precisely at this point there is for me the opportunity for questions and criticism.

Liberalism and communitarianism agree that, in principle, the philosophical justification of a theory of morality cannot be given in generally or universally valid terms because of a *de facto* pluralism within the modern societies and polities or in the broader field of different cultural realms and various individual states. From this axiomatic statement shared by both theories they derive different consequences: While political liberalism pleads for a strict separation of questions regarding what is "right" and what is "good" for the sake of the unconditional and universal validity of the legal principles they favor, communitarianism draws from this premise the conclusion that the validity of the rules of law needs to be limited to the context of a communitarian life.

Thus, the communitarian position falls into the problem of a legal contextualism that leads, at least in its radical variant, to a relativization of the law and its normative legitimacy. But even in its less radical variant, the communitarian contribution to a political theory of international relations falls into theoretical proximity with the theory of realism: Both are similar in their consequence, if not in their justification, that no general legal ethical principles or political institutions should be recognized in the realm of international politics which claim an independent right to establish or impose a binding global law. From this perspective, for example, Michael Walzer defends the moral justifiability of war in general, also in view of individual states and the politicians responsible for them.[10]

For various reasons, all three theories do not seem to be able to solve the problem of defining an appropriate relationship between moral theory and politics in the context of the new challenges in international politics. The theory of realism cannot solve it precisely because of its simplistic description of existing relations. Among the actual power relations between states there are also given institutions and structures that claim the general validity of international laws, but their real meaning are not adequately recognized by a supposedly realistic theory. Currently accepted international laws and institutions established by them, such as the UN, have to be understood as more than simply an instrument of the national security policy of individual states. A realistic theory of international politics fails also because it underestimates the influence of a global civil society in the wake of globalization and its resulting challenges. Finally, this theory also ignores the validity claims of human rights, regarding their scope, their priority within state relationships, and their ethical necessity.

However, the communitarian theory of international politics is exposed to a double challenge: It is either at risk of relativizing the validity claims of law as a whole through their contextualization of rights and, in this way, of rendering the content of human rights unclear; or it is confronted with the problem that

10 See Michael Walzer, *Just and Unjust* (New York, 1977) as well as many of his earlier works.

normatively justifiable claims by states or individuals beyond the limits of national law cannot be solved in terms of their theory, except by appealing to the resolution of conflicts through the use of violence. Therefore, they simply repeat the Hegelian philosophical aporia at the end of his philosophy of right [*Rechtsphilosophie*], according to which the history of each country progresses necessarily (and, thus, free of the any taint of illegitimacy or immorality) as a military event.[11]

Given these arguments, the position of political liberalism seems to be the only convincing one. But also here we run into unresolved problems:

First, in the classical version of this theory I identify an unexplained relationship between the claims to legal rights within individual states and the imperatives of a global law. In view of this same problem, Kant himself was forced to interpret the idea of a "cosmopolitan law" in a minimalist way, namely by limiting it to a so-called "right to hospitality" [*Hospitalitätsrecht*][12] to avoid restricting the rationally and legally justified law of individual states and their sovereignty. The idea of global justice in this conception seems to be nothing more than pure international treaty law. Yet, we must ask further: What would be the status of those "legal principles" [*Rechtsprinzipien*] that underlie this international treaty law and, for example, provide the basis upon which accepted international law becomes valid and gains its character as "*jus cogens*"?[13] If the representatives of political liberalism dispense with the *jus cogens* claim of international law, then their position seems completely unable to justify a course of action capable of responding to the challenges of international politics. Also, even if they do not accept this conclusion, another question remains: How could we put together national sovereignty and international or global law without contradiction?

Second, the classical theory of liberalism allows only an unsatisfactory response to the status and content of human rights. Kant had already arrived at the conclusion, later taken up by Hannah Arendt, that there is only *one* human right, that is the right to have rights. But exactly this provision has proved to be too weak in recent history. If we view human rights strictly as the fundamental rights of a political community, as Habermas proposes,[14] then we need to address the question concerning a pre-national or supra-national validity of human rights. This shows the price that a liberal theory has to pay for the strict separation between law

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11 Georg Wilhelm Friedrich Hegel, *Rechtsphilosophie* §334; see also Ludwig Siep, 'Kant und Hegel über Krieg und Völkerrecht,' in Dieter Janssen and Michael Quante, *Gerechter Krieg* (Paderborn, 2003), pp. 100–15.

12 Immanuel Kant, *Zum Ewigen Frieden*, BA 40ff; see also Matthias Lutz-Bachmann and James Bohman (eds), *Frieden durch Recht* (Frankfurt am Main, 1996).

13 See Jïrg Manfred Mössner, *Einführung in das Völkerrecht,*(München, 1977), pp. 54ff; Otto Kimminich and Stephan Hobe, *Einführung in das Völkerrecht* (Tübingen/ Basel, 2000) especially pp. 169–71; Juliane Kokott, "Der Schutz der Menschenrechte im Völkerrecht," in Hauke Brunkhorst, Wolfgang Köhler and Matthias Lutz-Bachmann (eds), *Recht auf Menschenrechte* (Frankfurt am Main, 1999) especially pp. 182ff.

14 See Habermas, *Faktizität*, pp. 109–65; Habermas, "Der interkulturelle Diskurs über Menschenrechte," in Brunkhorst, et.al. (eds), *Recht auf Menschenrechte*, pp. 216–27.

and morality which leads to the rejection of the material theory of supranational valid rights grounded on principles of a substantive moral ethos [*Sittlichkeit*]. This reasoning is always accompanied by a moral philosophical or legal casuistry which leads to unacceptable responses to the realities of world politics and amounts to a political assessment of the global situation which ultimately falls back into the position of realism.[15]

The Relationship of Ethics and Politics within New World Realities

Regardless of their different positions on issues concerning a just and peaceful global order, representatives of both political philosophies—communitarianism and liberalism—agree on certain assumptions. They agree that due to the modern pluralism of lifeworlds and the plurality of relations among states and their juridical frameworks, it is impossible to have a theory of the moral good which could provide insights toward universally accepted principles in the area of politics. As we have seen, these two positions in political philosophy draw different conclusions from the same axiom as they identify different consequences from claims that influence the organization of international politics.[16] Against this presupposition that seems to be accepted by both positions, I would like to present an objection, an objection that is indeed raised for the sake of the very assumptions shared by both positions, namely the presupposition of a critically reflective liberal theory of politics that defends the universal validity of human rights as well as the idea of a normative commitment to a just and peaceful democratic political order. Without reference to reasons capable of being generally accepted, in principle, across all cultural differences, political systems or lifeworlds, we obviously cannot seriously claim either the universal validity of human rights or the idea of a normative legal and binding global peaceful order. Faced with this challenge, the representatives of communitarianism and liberalism give up their hopes very quickly, whenever it comes to discussions on the possibilities of a philosophical justification of postulates for global politics. This necessarily means that in case of conflict, the representatives of realism always determine the parameters of foreign and security policies, while those representing philosophy withdraw from the discussion, either to assume a lonely "moral standpoint" or to let the course of events—despite of all their seriousness—be decided by a supposedly collective and substantial moral justification. The arguments used for this purpose range from the "theory of double effect" through "supreme emergency arguments" to the plea for the "*ultima ratio*."

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15 See the debate in Reinhard Merkel (ed.) *Der Kosovokrieg un das Völkerrecht* (Frankfurt am Main, 2000); Herhjard Beestermöller (ed.) *Die humanitäre Intervention—Imperativ der Menschenrechtsidee?* (Stuttgart, 2003) and Janssen and Quante, *Gerechter Krieg.*

16 See the discussion in Matthias Lutz-Bachmann and James Bohman (eds), *Weltstaat oder Staatenwelt? Für und wider die Idee einer Weltrepublik* (Frankfurt am Main, 2002).

Contemporary challenges, however, require nothing less than a recognition that, despite the pluralism of our social worlds, political legal relationships, religious beliefs, cultural languages and individualized lifestyles, we need an argument to show that we cannot establish fundamental as well as general principles for what can count as "good" in the sense of a morally obligatory value. We cannot have a value that would prove itself suitable as a tool to yield basic insights in the realm of politics and at the same time escape the charge of falling into a self-contradiction. Therefore, the argument I am trying to pursue goes beyond what Otfried Höffe offered as a "fundamental political philosophy"[17] whose first task in terms of legitimacy is to determine the justification of both the political community and the institutions that are authorized to shape legal rules.[18] The reasoning structure introduced by Höffe as "transcendental exchange" is based on the interests of participants in joining "a free and reciprocal as well as mutually beneficial and enforceable self-limitation of negative freedom"[19] which is built on interactions among subjects. Thus, Höffe derives this structure from the normative idea of a two-stage contractual agreement: First, it leads to the general recognition of the law and, secondly, it yields the creation and justification of a system of public political rights. Yet, I wonder here about the foundations that precede this contractual argument offered by Höffe. For Höffe, there is obviously a human interest in one's own life, which he assumes as an anthropological constant and considers as more fundamental than the contract setting from which law and the state primarily emerge. The human is an extremely vulnerable corporeal being (*animal*) who possesses thinking and language skills (*animal rationale*) and shows both a "dependence on community" (*ens sociale*) and a capacity for politics (*ens politicum*). Höffe talks about "socio-transcendental interests"[20] which, if interpreted correctly, must precede the idea of a two-stage contract. However, from these interests it only follows that a normative contract is binding to all parties when the bearers of such interests, abilities, and natural inclinations are also recognized as subjects of original rights that enable each other to establish a universally binding contract. The argument for a "*pactum juris*" proposed by Höffe already presupposes, therefore, the validity of "original rights" based upon which the binding force of a contractual agreement can be derived. The transcendental idea of a normative legal constitution through exchange of rights and obligations can be convincing only if the validity of "pre-political rights" are already assumed. But this must be justified by means of a different kind of philosophical approach than the one presented by contractualism.

17 Otfried Höffe, *Politische Gerechtigkeit:Grundmodelle und -probleme der praktischen Philosophie* (Frankfurt am Main, 1987).

18 Otfried, *Demokratie im Zeitalter*, pp 39–94, particularly pp. 39–57.

19 Ibid., p. 53.

20 Ibid., p. 64.

Rainer Forst has indicated that a "fundamental right to universal and mutual justification of all norms"[21] must precede the contract that constitutes law as proposed by Höffe, whenever norms claim to be universally and reciprocally valid. I do agree with Höffe that this "fundamental right" must be related to the human as a rational, social, and political animal (*animal rationale, sociale et politicum*), but this "fundamental right" gets its standing as a "pre-political right" not simply from the anthropologically-described "nature" of humans. More precisely, this "fundamental right" is not derived from human natural abilities, preferences, interests or goals, but rather, from our moral self-awareness in intersubjective action in the form of a "rational insight" that can be gained, in principle, in any active experience of dealing with other people. This understanding of our practical reason implies the recognition of others who are equal to us due to the respect to the vulnerability of our bodies, our reason and language capabilities, our dependence on a social community, and our disposition to politics. In our interactions with others we always assume and ascribe to them the real possibility of the freedom of their will and action in relation to our own will and action.

It is only this possible reciprocal recognition of our freedom by others and our recognition of others as basically the same subjects of freedom that enables us to formulate the core understanding of a supreme moral principle of the good. In this determination I presuppose the formal and classical definition of knowledge of the good as the insight of practical reason in what is to be done ("*bonum est faciendum*")[22] as well as the Kantian formula that whatever is conceived of as the "good" must be determined only by means of a free and, therefore, autonomous will which is mediated by practical reason.[23] It is crucial that this awareness of the principle that defines what is morally good and reasonably binding is tied to intersubjective practices. Through their analysis, it is possible to demonstrate that we can only claim "original rights" when we recognize and ascribe them to all other humans. This can be shown not only because we *can* always already presuppose in our very actions that other active subjects are bearers of free will and free actions, but also because we *must* always have this presupposition as a condition for the very achievement of our intended actions: They are "free subjects" who, like us, realize freedom in interaction with one another. This insight applies even for an action that is a purely strategic dealing with others, an action to which we are inclined to ascribe no "end in itself" [*Selbstzweck*]. In fact, a strategically successful action already requires that we prudently assume that others have at least the same rationality and self-determination as we do. In reconstructing our intersubjectively-constituted conditions for action we also recognize that the practical knowledge of those who interact with us occurs through us as well as

21 Rainer Forst, "Konstruktionen transnationaler Gerechtigkeit: John Rawls" *The Law of Peoples* and Otfried Höffes *Demokratie im Zeitatler der Globalisierung* im Vergleich' in Gosepath and Merle *Weltrepublik*, pp. 181–94, particularly p. 193.

22 Thomas von Aquinas *Summa Theologica*, I-II p,. 94, a.2.

23 Immanuel Kant, *Grundlegung zur Metaphysik der Sitten*, BA 1 ff.

by us through others, and this requires a mutual recognition of each other as free and equal in our freedom to act. Without such recognition there can be no justified practical action. The demand for the recognition of the other as free and equal subject of action cannot be denied by anyone without committing a practical self-contradiction. From the necessity of this reciprocal though yet unqualified acknowledgment of the freedom and equality of each other as cooperative or conflictive acting subjects, we can derive the *highest*, *most necessary*, *valid*, and *universally first ethical principle* for the recognition of all other human beings as interactive persons who have rights equal to "mine" or to "ours."[24] This principle can also be considered cross-culturally valid and absolutely necessary because it is practically uncircumventable through actions and cannot be questioned by any consistent arguments. Whoever denies it, either by the individual avoidance to present arguments or by actions that attempt to disregard others, cannot but have already recognized the content of this principle in his or her very actions.

Based on this ethical principle of a moral insight into the required recognition of others as equal persons, it is possible to derive *three legal and political principles*—which raise a claim to normative validity that cuts across various cultures: *First*, the recognition of other humans, not only as bearers of freedom but also as a bearers of rights that are inalienable and prior to legal state-entitlements; *second*, the demand made in the name of political justice, according to which public juridical relationships need to be established among all those who cannot but constantly interact with others in their political action; *thirdly*, the postulate—in the name of social justice—that the political communities in which we live should be prepared also to positively promote the common good. The postulate concerning the orientation of political action for the common good transcends the boundaries of the political community and involves everyone else at least negatively, in such a way that certain basic goods that they need for their own lives cannot be denied to them if they are—in principle—available.

These three juridico-political principles correspond to the three groups of human rights, namely the rights to individual freedom, democratic participation and social partaking. They are derived from the first ethical principle that demands an unavoidable recognition that all other human individuals are equal to "me" or to "us," endowed with practical freedom and, therefore, "persons"; because these are the others who, like "me" or "us," are equally beneficiaries of inalienable and pre-state rights. The function of such rights—when considered in relation to the legal system maintained by the state through coercion—consists precisely in protecting everyone against the arbitrary intervention of state power or against coercive laws. At the same time, this principle characterizes people positively as authors of a legal order that holds them together according to both the constituted rules of public law and their relation to those rules based upon which individuals interact with each other as private or political persons. By referring to these principles

24 See my approach in "Menschen sind Personen," in *Information Philosophie,* 3 (2001): pp. 16–19.

and rules I take up the thought introduced by Kant in his *Metaphysics of Morals* in terms of legal reasoning as the principle of "Exeundum ex statu naturali."[25] What Kant conceives here as the "contract" between interacting agents, that is the political order, bases its claim to validity on fundamental rights that are already recognized before the state grants individuals rights. These rights, in turn, can neither be legally produced by an original "contract" nor be ethically established by a consensus among interested individuals, but rather be recognized as already given through contractual agreement or consensus and as already recognized as inter-subjectively valid. In fact, "contract" and "consensus" already presuppose these original rights and can only come to expected results or enforcement if understood as a realization of these same rights. The normative insight established through the *highest, first ethical principle* precedes, therefore, the transcendental contractualism of Kant's *Philosophy of Law* [*Rechtsphilosophie*].

A purely theoretical contractualist interpretation of the original rights of the people is in danger of overlooking this whole rationale that justifies Kant's procedures. Even Habermas' talk of a "co-originality"[26] of individual and political fundamental rights is not free of possible misunderstandings. He is correct in his conclusion that the fundamental rights of individuals are formulated in an appropriate manner only when they are put in the form of positive law, which means that they become a positive part of the constitution of a political community. In fact, only in this way can they have the full form [*Gestalt*] of legally constituted law. However, regardless of and even prior to their positivity in law, these rights gain a juridico-ethical obligatory character upon which the postulate of political justice is based.[27] According to this postulate, relations based on public law should be established and maintained in order to allow members of a political community to participate, in principle, in all decisions affecting them. While the first and second juridico-political principles include either the political implications that are necessarily given or the juridical institutional conditions for a juridical ethical recognition of "the others" by "us" and of "us" by "others," the third juridico-political principle formulates the orientation of political action toward the *bonum commune* as the goal that ought to determine every political action, be it inside the political communities or be it beyond their boundaries. In this way, the individual rights to freedom and political participation obtain an orientation toward the goal of human happiness which is indeed always morally permissible but not legally enforceable. Yet, as a juridico-political objective, this represents a norm for positive legislative processes. Because the "happiness" [*Glückswürdigkeit*] of other people cannot be limited to those with whom we share the corresponding membership in a political community granted by the second principle, the demands of the principle of social justice cannot be limited to the

25 Kant, *Metaphysik der Sitten*, § 41–2, A 155B 15—AB 158.

26 Habermas, *Faktizität und Geltung*, p. 155.

27 Otfried Höffe, *Politische Gerechtigkeit: Grundlegung einer kritischen Philosophie von Recht und Staat* (Frankfurt am Main, 1989), pp. 382–406.

internal realm of individual states. Nevertheless, it must be noted that the juridico-political principle of social justice within states has different consequences beyond borders. While it can play the role of an actual constitutional goal for the political community itself, it can take a legally positive character beyond the internal realm of validity of state law whenever a system of global law provides a comparative reference external to the law of a state. Otherwise, only the positive legal duty can be derived that everyone has a right to life and subsistence, to which corresponds a moral-political obligation to international assistance.

With this reference to a comparative system of global law, I imply a cosmopolitan legal order that must be complementary to the jurisdiction of the individual states because the classical problems of domestic policy cannot be solved anymore without the involvement of a (traditionally conceived) "foreign policy" due to the new challenges of international politics in the age of globalization. The interdependence of the economic levels of action, the internationalization of both production systems, the flows in trade and capital, the development of modern technologies as well as transport and communication have not only radically and continually changed the relationship between politics and economics or between state and society, but also displaced the separations between the "inner" and "outer" realms of the state which were previously conceived by traditional international legal doctrines and are still accepted today. Given these developments, specific legal rules are required from the perspective of the three juridico-political principles of philosophy I established above, so that we may ensure that the claims of these political principles are operative and effective also in the worldwide realm of political action which has been affected by globalization. Thus, next to or above the current scope of national law and its structures such as legislation, enforcement and adjudication, fundamental structures of political order are necessary in order to replace the existing mechanisms of politics which are overly dominated by the national power interests and hegemonic policies of traditional states as well as by classic international treaty laws. Specific and concrete starting points for such a development could provide a politically oriented reform of the United Nations Charter, based on the principles of democratic legitimacy; also, the constitution of an International Criminal Court would be in line with the perspective of this reform.[28]

Implications for Status of Human Rights

This brings me to my final step, namely the question concerning the significance of the concepts presented thus far for the idea of human rights today. In view of the above mentioned developments in international politics, I consider that a big

28 See my approach in "Weltstaatlichkeit und Menschenrechte nach dem Ende der überleiferten Nationalstaats," in Brunkhorst et. al. *Recht auf Menschenrechte*, pp.199–215 as well as "Souveränitätsprinzip und Demokratie: Überlegungen zur Transformation der Staatenwelt im Anschluss an Kant," in *Philosophisches Jahrbuch*, 106 (1999): pp. 334–56.

problem in contemporary discourses on the role of human rights consists in an observed inflation of a merely rhetorical use of human rights while their function in relation to political tasks remain largely undefined or even controversial. This condition is not only unsatisfactory but also dangerous because it brings about the risk of an exploitation or instrumentalization of human rights for arbitrary purposes and, thus, for their misuse. Unlike the theories of realism, communitarianism, and liberalism, I see human rights—which I take to be juridico-political principles—as the justification of a normative claim to universal validity.

The arguments I presented here are different from realism because I maintain a juridico-political requirement that the structures of international politics be defined according to human rights and the juridico-political principles. My considerations differ from the communitarian position due to the fact that human rights are valid cross-culturally and across all legal traditions and can actually be expected to be recognized because they derive their status from the highest ethical principle that requires the recognition of others as ourselves. Regarding the liberal interpretation of the law, in particular its interpretation of human rights, my argument is different already in its architectonics, for I believe that it is not plausible to separate questions regarding moral good from general questions regarding a politically committed view of the just. Especially in view of human rights, the liberal theory does not define clearly what role is to be awarded them: They are not to be seen as an expression of moral-practical first principles and therefore not prior to state law. Only as such would these rights be able to constitute and also restrict state law. Due to their dual nature, which allows them to formulate universal legal claims with ethical unconditional validity, they limit not only national law with regard to the individual and his or her freedom, but they also allow its juridico-ethical justification. However, since human rights understood in this way have a pre-state nature, their ensuring of individual freedom, participation and social partaking rights is not exhausted in only one particular state. Instead, a consequence of these rights is the justification of a comprehensive global legal order that includes all the particular states from an "external" perspective." This global order, however, cannot be structured in a way that contradicts its own juridico-political requirements.

If we consider human rights as juridico-political principles, then it is not a contradiction to see them as simultaneously possessing a pre-state validity and being fundamental rights within a system of rights guaranteed by a particular state. Nor are they contradicted if they take the role of *global* law above particular states and assume the function of a justified legal claim that individuals may raise regarding their freedom, political participation, and social inclusion. This seems reasonable and necessary in the wake of the globalization process.

The talk about "pre-state" or "supra-state" rights that are morally justified and informed by ethical reflections avoids the difficulty we found in the liberal theory of international politics. If we consider the concept of human rights from a "semantic" view, then we can also say: We can only talk of the term *human* rights in the full sense when it is guaranteed that such rights are valid not only in individual countries but also in the last horizon of political action, namely,

in the structure of a global public law. Due to its democratic constitution this global public law provides that, whenever the postulates of these juridico-political principles are violated, each human has the possibility to claim and vindicate these rights in a due legal process, independent of age, family, wealth or nationality. But this also means that human rights grounded in this fashion are nothing less than the nucleus of a cosmopolitan order of fundamental rights which is structured in diversity and through which we will hopefully be in condition to face and address the challenges of international politics in a peaceful way, in accordance with the rule of law, and over time.

PART I
Human Rights and Human Dignity Beyond the State

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Chapter 2

Human Rights, Human Dignity, and Hypothetical Consent

William J. Talbott

When we think about such moral transformations as the historical development of a consensus on the right not to be enslaved and of a consensus on rights against discrimination on the basis of race, ethnicity, nationality, religion, sex, and gender, we are struck by the fact that they have occurred even though there was a time at which they were opposed by all or almost all of the major religious and other moral authorities. What kind of social force explains these and other moral transformations?

To a first approximation, we can say that this process has been a process of moral transformation that involves identifying and elaborating certain human rights. What explains the contours of these human rights? It is a commonplace in the human rights literature that human rights are grounded in respect for human dignity (for example, Donnelly's *Universal Human Rights*). Respect for human dignity can straightforwardly explain why human rights are equal rights: All human beings share in the same human dignity. If we go on to ask about the content of those equal human rights, we immediately confront questions and puzzles: What, exactly, does respecting human dignity require?

In almost every major religious tradition, there has emerged a kind of hypothetical consent test to help to answer that question: The various versions of the Golden Rule. The Golden Rule is not an exceptionless moral principle, but it is a useful hypothetical consent test for figuring out what one ought to do in many situations. In a situation in which I am trying to decide what I ought to do I can ask myself: Would I consent to be treated in the way that I would be treating others?

In this article, I suggest that it is possible to refine the hypothetical consent test employed in the Golden Rule to provide a more precise test of what respecting human dignity requires and I use the test to both explain and predict important past and future transformations in the developing consensus on human rights. I refer to this more refined test as the *Expanded Original Position (EOP) test*.

In earlier work I have suggested that the social forces responsible for the developing consensus on human rights are a combination of empathy and concern for fairness as judged from an impartial point of view, forces that actually can

motivate most people to incur at least some small costs to promote fairness.[1] The idea that the EOP test is to model these social forces is the key idea for understanding the requirements of the EOP.

From the Golden Rule (GR) to the Expanded Original Position (EOP)

One problem with the Golden Rule (GR) test is that it is typically applied to individual actions. It is much more useful as a test for evaluating policies rather than individual acts. But its biggest problem is that it provides no way to adjudicate between conflicting preferences.[2] Both of these problems are addressed by an *original position* test first introduced in the work of John Harsanyi and developed most fully in the work of John Rawls.[3]

The main idea of the original position is that the parties choose the principles for their society with no knowledge of their place in society. Harsanyi proposed his construction as a method for deriving the ideal social welfare function. Harsanyi suggested that social welfare judgments "be interpreted as what sort of society one would prefer if one had an equal chance of being put 'in the place of' any particular member of the society."[4] Rawls named his construction the *original position* and proposed it as a method to derive ideal principles of justice.

Both Harsanyi and Rawls asked very much the same question: If purely rational agents (with no moral motivation) were placed in a position of having

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1 William J. Talbott, *Which Rights Should Be Universal?* (New York, 2005), especially chapters 2 and 7 and William J. Talbott, *Human Rights and Human Well-Being* (New York, 2010), especially chapter 13.

2 For example, consider a case in which your friend, whom you do not want to marry, asks you to marry her. If you apply the GR test to determine what you ought to do, the test gives different answers depending on whose preferences are used. If you imagine yourself in your friend's situation with *your* current preferences, the GR test would tell you to say "No." But if you imagine yourself in your friend's situation with *her* current preferences, the GR test would tell you to say "Yes." Clearly, you are not morally required to say "Yes" in this case. But there is no general rule to determine whose preferences should be used in a particular application of the rule. In this case, applying the GR test with your preferences rather than the other person's preferences yields the right answer. However, there are other cases in which using your preferences rather than the other person's preferences in the GR test would yield the wrong answer. For example, in one episode of *The Simpsons*, when Homer Simpson asked himself what he should get his wife Marge for her birthday, the answer he came up with was a bowling ball with a monogrammed "H" on it. Though Marge does not even like to bowl, this gift makes perfect sense if Homer asked himself what gift he would like if he were in Marge's situation with *his* current preferences.

3 John C. Harsanyi, "Cardinal Utility in Welfare Economics and in the Theory of Risk-Taking," *Journal of Political Economy*, 61(1953): pp. 434–5. John Rawls, *A Theory of Justice* (Cambridge, 1971), pp.12, 137–8.

4 Harsanyi, "Cardinal Utility."

no identifying information about themselves (no information on their race, sex, nationality, intelligence, family background, and so on), which Rawls refers to as choosing *behind a veil of ignorance*, what principles would they agree on to govern the society that they will live in when they leave the original position? Though the parties would have no identifying information, Rawls allowed any kind of general information. The parties would not be choosing in complete ignorance.

Rawls proposed his original position construction as a device to generate the principles of justice for an ideally just society. My use of the construction is different. I propose to use a modification of the original position as a model for the social forces of moral transformation that have led to the development of human rights, both to explain developments in the past and to predict developments in the future.

I believe that to be an adequate model for the social forces of moral transformation, we need to make several modifications to the Harsanyi-Rawls construction. I begin with the domestic case of the members of a single society and consider the global case later.

Imagine that you are behind a veil of ignorance, so that you have no identifying information about yourself. You don't know your religion (or if you have one); you don't know your political or moral views; you don't know your life aspirations. Behind the veil of ignorance, you and the other members of your society will discuss and vote on a variety of proposals, including proposals for government policies, laws, and individual rights for your society. In evaluating the various proposals, you must consider them from the point of view of every member of the society, because you must take seriously the possibility that you could be any one of them. Your reasoning cannot rely on religious authorities or on the content of your own moral or political view, because, behind the veil of ignorance, you would not know what they are.

One important departure that I make from the Harsanyi-Rawls original position is based on the criticism made by Habermas, among others, that it is monological—that is, that it is a thought experiment that a single individual can perform in isolation.[5] This criticism is not fatal to the construction. It simply invites an expansion to make the construction truly social by actually including representatives of the different groups that will be affected by the relevant social practice. In the limit, everyone affected by the practice could be included, but that would be somewhat unwieldy. If we understand the EOP to be dialogical, not monological, then we would need some way of determining a way for all affected groups to be adequately represented. I take up this question below.

Another departure I make from the Harsanyi-Rawls construction is that you are *not* to assume that you are rationally self-interested. As I conceive it, in the expanded original position, you would reason in whatever way makes sense to you

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5 Jürgen Habermas, *Moral Consciousness and Communicative Action*, Christian Lenhardt and Shierry Weber Nicholsen, trs (Cambridge, MA, 1990), p. 66; Jürgen Habermas, "Rawls's Political Liberalism," *Journal of Philosophy* 92 (1995): pp. 109–31, 117.

and the other parties would do the same. All of you are simply trying to come up with rules that are fair to all parties.

Also, the Harsanyi-Rawls test required unanimous agreement. However, even Harsanyi and Rawls disagreed about what would be unanimously agreed to. So I would remove the unanimous agreement requirement. I would suggest that we simply record the extent of agreement on various proposals. As I envision it, the result of the deliberations would be a list of proposals on which votes were taken and the results of those votes.

There are three additional revisions that I would make to the Rawls-Harsanyi construction. The first is that I assume the parties have all the available general information and access to the relevant authorities on important empirical questions. One way of thinking of the expanded original position is as a deliberative poll conducted behind the veil of ignorance.[6]

The next revision, at least to Rawls's construction, is that I assume that the parties in the original position are to consider that they might be any member of the society, even someone with a serious physical or psychological impairment. Since someone with a serious cognitive impairment could not carry out the original position deliberations, the parties should imagine that, after they leave the original position, they might acquire such an impairment.

If we make the EOP test a dialogical test, an important question is this: What kind of population sample would best implement the EOP test? I have already suggested that it would be important to have a diverse sample of the population. It might seem that the best kind of sample would be one that is fully representative of the population. I think that this is a mistake.

For the EOP test to reflect the moral forces of empathy and impartial fairness, the parties must be able to take up an impartial point of view, to empathically identify with people from different backgrounds and in different life situations, and to listen respectfully to different points of view. Some percentage of any population are bigots, who have no interest in people who are different from them; some are stubborn and intolerant of other points of view; some are ideologues who would never make a good faith effort to set their ideology aside; some are fundamentalists who would not be willing to set aside their moral authorities. A fully representative sample of the population would include all these kinds of people. To adequately represent the moral forces of empathy and impartial fairness, an EOP test would need a procedure, call it a *good faith test*, to *exclude* them.[7] There would also have to be a way to select for those who are particularly good at empathic identification.

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6 For more on deliberative polls, see James S. Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform* (New Haven, 1991).

7 Clearly, the good faith and empathy tests could not be limited to evidence from self-reports. Even bigots are inclined to believe that they are unbiased. Perhaps some kind of Implicit Association Test (IAT) would be employed. See A.G. Greenwald and M.R. Banaji, "Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes," *Psychological Review* 102 (1995): pp. 4–27.

The incorporation of tests for good faith and empathy is my final modification to the Harsanyi-Rawls construction.

The good faith and empathy tests would help to correct what would probably be the most powerful distorting influence on the EOP test, the existence of false stereotypes. Historically, the treatment of oppressed groups has typically been justified by generally shared false stereotypes—for example, of non-whites or women or gays and lesbians. While there is no guaranteed method of correcting for the effects of false stereotypes before they are known to be false, when such stereotypes are undermined, it is often because empathic individuals are able to establish relationships with members of the stigmatized group. The good faith and empathy tests for inclusion in the EOP would screen for those with the ability to empathically identify with others and the deliberations in the EOP itself would involve members of all relevant groups, including the oppressed. Because everyone in the EOP was able to hear from and empathize with those in the oppressed group, the deliberations in the EOP would tend to undermine false stereotypes. However, it is important to acknowledge that no test could be guaranteed to eliminate all false stereotypes. This leads me to recommend taking conditional votes on some questions in the EOP, as I explain shortly. Would the good faith and empathy tests be unfair to bigots? If I were proposing a procedure for enacting legislation, then it would be subject to normative constraints requiring that everyone have a voice. But I am not proposing any such procedure. I am simply trying to design a procedure that will adequately reflect the moral forces that have led to the development and elaboration of human rights and that will continue to contribute to their development and elaboration in the future. For that purpose, any screening that would make the EOP test a better model of those forces is to be favored.

These conditions define the *Expanded Original Position* (EOP).[8] The EOP test is a hypothetical consent test that seems to me to be a clear improvement over the GR test.[9] My suggestion is that the EOP test might provide us with an explanatory and predictive model for moral transformations, especially those that involve the identification and elaboration of human rights. Because of the excesses of Hegelian theories of history, I must proceed very carefully here. I am not suggesting that there is a World Spirit that is driving history to make moral transformations. I am suggesting something more modest—that, in addition to the other forces that are driving history, we can recognize a force that arises from human social interactions and is based on humans' ability to empathize with others, to make impartial judgments of fairness, and to be motivated to incur at least small personal costs to promote fairness. My suggestion is that the EOP can be used to model these social forces and explain and predict past and future moral transformations.

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8 For more on the expanded original position, see Talbott, *Human Rights*, especially chapter 4.

9 Consider again the marriage example from note 2. It is clear that a policy of not being required to marry those who want to marry you, unless you also want to marry them would be unanimously agreed to in the EOP.

In the remainder of this article, I consider three kinds of test of this model: I show how a predecessor of the EOP was in fact used to make surprising predictions that seem to be coming true; I show how the EOP could have been used in the past to make other surprising predictions that have come true and seem to be coming true; and, most importantly, I show how the EOP could be implemented to make predictions about future transformations that can be used to subject the EOP model to a kind of empirical test. I take up these three topics separately.

Past Predictions of Moral Transformations

It just so happens that we do have an example of someone using a hypothetical consent test very much like the EOP to make predictions of moral transformations. A little over 200 years ago, Immanuel Kant made three such predictions (although the second was just a corollary of the first).[10] His first was that eventually all states would have *republican* constitutions, by which he meant that legislation would be enacted by representative, democratic legislatures and citizens would be regarded as free and equal, both as subjects and as co-legislators, with "innate and inalienable rights."[11] When Fukuyama predicted that liberal democracy would be the end of history in 1989, he was just updating Kant.[12] An implication of the prediction that citizens would be regarded as equal, which Kant explicitly drew, was that positions of hereditary privilege would be eliminated. He distinguished inherited wealth from inherited status. His prediction concerned only hereditary status, including hereditary slavery. Kant's third prediction was that once all states were republics in his sense, an international federation of republics would eliminate war. This third prediction gave Kant the title of the work in which he made his predictions: *Perpetual Peace*.

Let me immediately add that Kant would not have claimed that his predictions were so inevitable that nothing—not even an asteroid colliding with the earth—could have prevented them from coming true. Experimental predictions in the natural

10 Immanuel Kant, *Toward Perpetual Peace*, in Mary J. Gregor, tr. and ed., *Practical Philosophy*: *Immanuel Kant* (Cambridge, 1996), pp. 315–51 [8:341–86]. Page references in brackets are to the volume and page of the Berlin Academy Edition of Kant's works. Kant makes his predictions at pp. 322–8 [8: 348–57] and 335–7 [8:365–8].

11 Kant, *Toward Perpetual Peace*, p. 323n [8:350n]. Kant distinguished between a democratically elected legislature (which is part of a republican constitution, in his sense of the term) and a democratically elected executive (which is not) at pp. 324–5 [8:352–3]. He explained the rights of citizens more fully in Kant, "On the Common Saying: That May Be Correct in Theory but It Is of No Use in Practice" [referred to as "Theory and Practice" below], in Gregor, *Practical Philosophy*, pp. 277–309 [8:273–313] at 290–96 [8:289–96]. As is well-known, Kant limited the status of citizen to self-supporting adult males. Ibid., p. 295 [8:295]. I discuss Kant's moral blindspot toward women and toward non-Europeans shortly.

12 Francis Fukuyama, *The End of History and the Last Man* (New York, 1992).

sciences always assume that there are no interfering factors (for example, cosmic rays from the sun). I think we can understand Kant's prediction to have been of the same kind. He was identifying a social force that would be expected to bring about the predicted result in the absence of certain kinds of interference.

Kant made these predictions in 1795—that is, at a time at which there was only one fledgling democracy in Europe, and it was to be short-lived. At the time he made his predictions, almost every country in the world (and even territories that were not organized into states) had systems of hereditary privilege and were ruled by hereditary leaders of one kind or another and there were systems of hereditary slavery in large parts of the world. At the time he made his predictions, there had been no sustained period of peace throughout Europe for centuries, if ever.

And yet, from our vantage, we can see that, though none of Kant's predictions has been completely realized and though the first and the third are still far from being realized, the evidence now indicates that all three may be true. Indeed, when Kant made his predictions, he was primarily thinking of Europe and in Europe his predictions have been almost completely realized. The European nations have eliminated slavery and most forms of hereditary privilege. They have formed a confederation of more or less liberal democracies and none of the democracies of Europe has ever gone to war with another. In the rest of the world outside of Europe, the trend is the same. Slavery is no longer condoned. There is a long-term trend toward more or less liberal democracies and toward the elimination of wars between democracies, so that one of the most robust social scientific predictions is that genuine democracies that guarantee individual rights don't go to war with each other.[13] It is beginning to seem possible that young people alive today will see all three of Kant's predictions confirmed. That would be startling.

How did Kant make his predictions? He made them as a result of the following line of thinking: Out of the need for self-protection, individuals without a government would form one. To be stable, a government would have to call forth the voluntary allegiance of its citizens. Kant's great theoretical insight was that the only kind of government that would be able to claim the voluntary allegiance of its citizens would be one that was seen to be legitimate. In turn, for a constitution to be seen to be legitimate, Kant thought that its citizens would have to be able to agree to it in a

13 Spencer R. Weart, *Never at War: Why Democracies Will Not Fight One Another* (New Haven, 1998). The brief war between Russia and Georgia in 2008 may seem to be an exception. A good case can be made that this is not a genuine exception, because Russia is not a genuine liberal democracy. However, I think that Russia and Georgia are close enough to liberal democracies to enable us to see their brief war as providing confirmation for Kant's prediction. Kant predicted that there would be a world-wide confederation of republics and only then would war be eliminated. The fact that liberal democracies almost never go to war with each other now, before such a confederation has been established, is actually strong evidence that Kant's prediction will turn out to be true. Also, by any measure, the hostilities between Russia and Georgia were quite contained, thus indirectly manifesting the forces opposing warfare between liberal democracies.

hypothetical situation of equality. He thought that the only constitution that everyone could agree to in that situation would be *republican*—that is, one that treated all citizens as free and all property-owning, male citizens as equal co-legislators.

It is necessary to add that Kant did not envision the hypothetical agreement as the result of a process of bargaining by rationally self-interested agents. That is the main reason that the agreement is hypothetical, rather than actual. He wanted the agreement to be one with moral force, because it would be the ground of legitimacy of the state. So he defined the terms of the agreement by what people *could* agree to, not by what they would actually agree to. So his hypothetical consent test is clearly a precursor of the Harsanyi-Rawls original position. Kant used it to derive his first prediction, republican governments.[14]

The second prediction, the elimination of hereditary privilege, was implied by the first, because hereditary privilege is incompatible with the equality of citizens. The third prediction was a near generalization of the first to the international sphere. In the international sphere individual nations (assumed now to be republics, in Kant's sense) would need self-protection from other states. Kant considered the possibility that states would unite to form one single republican government for the entire world. However, because of differences of religion and language and the danger of a single, universal despotism, he did not think that they would try to form one worldwide liberal representative democracy.[15] Rather he predicted that they would form a confederation of independent states for mutual protection and would thereby eliminate war.[16]

Take a minute to think about this. Kant lived in a Europe made up almost entirely of states with hereditary classes that inherited both social privilege and governing authority. War was such a constant that during the entire existence of these states there had been only brief periods when at least one of them was not at war or engaged in open hostilities with another. And yet Kant used a simple thought experiment to not only imagine, but predict, a completely different, morally transformed world.

Kant was able to make these predictions applying his hypothetical consent test monologically, but we can see that there was a problem with his doing so. Kant correctly realized that systems of hereditary privilege would not survive the hypothetical consent test. In the EOP, the reasons for guaranteeing the usual categories of rights against discrimination (for example, on the basis of race

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14 It is true that, as Kant used the term, in a republic the legislative branch would be democratically elected but not the executive branch. See note 11 above. So Kant did not exactly predict the development of liberal democracies (in which both branches are elected). As I mentioned in note 11, this is not the only respect in which Kant's use of the thought experiment was deficient. However, in 1795, the suggestion that the world was evolving toward a federation of states with democratic legislatures would have seemed unlikely in the extreme.

15 Kant, *Toward Perpetual Peace*, p. 336 [8:367].

16 Kant, *Toward Perpetual Peace*, pp. 336–7 [8:367–8].

or sex) are simply generalizations of Kant's reasons for eliminating hereditary privilege, but Kant himself did not draw this conclusion. For example, Kant did not advocate rights against discrimination on the basis of race or sex. This is a reminder of the limitations of a monological application of the EOP. Kant was easily able to empathically identify with white males who were disadvantaged by the systems of hereditary privilege in his time. He was not able to empathically identify with blacks or women. Instead, he relied on contemporary stereotypical understandings of these groups. I believe that Kant's false stereotypes for blacks and women prevented him from seeing the otherwise obvious consequence of his prediction of the elimination of hereditary privilege—that discrimination against blacks and women was a way of maintaining hereditary privilege for white males that would never be agreed to in his hypothetical choice situation.

Retrodictions of Past and Present Moral Transformations

Even as we fault Kant for his moral blindspots, we have to be impressed that a simple thought experiment might be a test for social forces that take hundreds of years to work themselves out. Although Kant's false stereotypes prevented him from drawing the conclusion that there would be rights against discrimination on the basis of race or gender, we can see that, but for the effects of false stereotypes, the EOP model could easily have predicted the success of the black civil rights movement and the movement for equal rights for women more than 150 years before they occurred. These are examples of retrodictions of important moral transformations. As articulated above, the EOP test attempts to correct the effects of false stereotypes of this kind by, first, imposing good faith and empathy tests on participants and, second, by requiring that all relevant parties actually be involved in the deliberations.

Though not as impressive as actual past predictions, retrodictions can help us to appreciate the power of the EOP device. The simplest retrodictions to make are extensions of Kant's prediction of the elimination of hereditary privilege. In the EOP, almost all discrimination based on ethnicity, race, religion, sex, and gender would be prohibited.[17]

The Indian independence movement led by Gandhi began as a movement against discrimination, so it would have been endorsed by the parties in the EOP. What about Indian independence itself? Independence replaced British colonial rule in India with a democracy. It is almost inevitable that a democratic decision rule would garner majority support in the EOP. So it is very likely that an impartial implementation of the EOP would have predicted the success of Gandhi's movement long before it even arose.

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17 The exception would be for discrimination that served a reasonable purpose, such as providing pregnancy care for mothers.

The example of Gandhi is important, because it helps to explain what makes the EOP an effective prediction device. I believe the EOP provides us with a way of measuring social forces that have had profound effects on history. What is the source of those forces? They are not fundamental physical forces like the electromagnetic force. They are not forces even that would ever appear in a natural scientific theory. Nor are they supernatural forces like divine intervention either. They are social forces that result from the fact that judgments based on empathy and concern for fairness from an impartial point of view (modeled by the EOP) actually motivate most people to incur at least some small costs to promote fairness.[18] These forces can be opposed by other forces, overwhelmed by them, redirected by them, and distorted by them. But I doubt that they ever disappear.

When these forces are multiplied by a factor of millions, they can be irresistible. For example, it was crucial to the success of Gandhi's movement of nonviolent resistance that the British had a democratic government with a tradition of broad freedom of the press. Reports in the press and by word of mouth made it possible for Gandhi's movement to gain support, first from the large body of relatively impartial observers among Gandhi's own compatriots in India, and then from the large body of relatively impartial observers in England and throughout the world. In contrast, if Gandhi had initiated a movement of nonviolent resistance against Hitler or Stalin or Mao, there would have been no reports of it in the press and his movement would have been swiftly crushed.

Similarly, legalized segregation in the Southern US would have persisted longer than it did had there not been a relatively impartial audience of US voters outside the South who could empathize with the black protesters and who were willing to support federal court decisions and federal laws that ended it. Also, the system of apartheid in South Africa would have persisted longer than it did had there not been a relatively impartial audience of observers outside South Africa who could empathize with the victims of apartheid and were willing to support sanctions to end it. In each case, the EOP test would have strongly supported the end of segregation and full democratic rights for blacks, but had there been no impartial audience to exert pressure, it would have taken much longer to bring about the changes. From this I conclude that the EOP test can give us a measure of the potential for moral transformations of the status quo, but the time frame for the change will depend on the strength of the social forces involved.

It is useful to consider one more example of successful retrodiction by the EOP, because it will have important consequences for how to design the EOP so as to make successful future predictions. Consider the example of same-sex marriage. It is clear now that the EOP test predicts the establishment of a right to same-sex marriage, even though most of the world does not acknowledge such a right. But what is even more noteworthy is that, with one qualification that I take

18 For more on the effects of this force in history, see Talbott, *Which Rights Should Be Universal?* (New York, 2005), especially chapters 2 and 7 and Talbott, *Human Rights*, especially chapter 13.

up shortly, the EOP could have been used to predict the development of a right to same-sex marriage in the past—for example, in 1960, before the idea of same-sex marriage had even appeared as a moral or political issue.

In 1960 hardly anyone would even have been able to have the thought that there might be same-sex marriages. Suppose that in 1960 we had administered the EOP test to a diverse sample of Americans. How would they have deliberated on a right against discrimination on the basis of sexual orientation? In 1960, homosexuality was prohibited by every major religion. Indeed, almost all of them still prohibit it today. However, this would not have been a consideration in the EOP. In the EOP no party can appeal to a religious authority, because the parties do not know their religion.

In 1960, homosexuality was still categorized as a psychiatric disorder by the American Psychiatric Association. In addition, there were widespread stereotypes of homosexuals as promiscuous and morally corrupting.[19] Although there would eventually be social scientific research that would completely undermine those stereotypes, there was practically no such research in 1960.

We now know that a big part of the moral transformation after 1960 was to undermine those false stereotypes. Note the similarity to the movements for rights for blacks and women, where also the case for discrimination was supported by false stereotypes.

The existence of false stereotypes is, in a backhanded way, more evidence of the strength of the moral forces modeled by the EOP test. Even unjust systems show the influence of these moral forces by the extent to which they depend on maintaining a system of beliefs (for example, demeaning stereotypes) that would, if true, be a basis for defending the unjust system in the EOP. Throughout history racist, sexist, and other stereotypes have performed this function. For systems supported by racist, sexist, or other stereotypes to be stable, the stereotypes do not have to be based on evidence. They only have to be part of a system that prevents most people from obtaining or seriously considering evidence that they are false.

It is always important to provide the parties in the EOP with the latest relevant social scientific research, but in 1960, there would not have been much research on homosexuality. There would have been one relevant study, the Kinsey reports from 1948 and 1953, which reported that homosexual behavior was much more widespread than had been previously thought. This information would have at least suggested to the parties in the EOP that there were more homosexuals in the population than the relatively small number that had self-identified as such. But the parties to the EOP would have had, at least in theory, another source of evidence. Any randomized process of selection would have been almost certain to

19 In the US in 1960 even to admit to being a homosexual would have been to risk serious physical harm or death, because violence against homosexuals was not taken seriously as a crime (in some states, making a homosexual "advance" was legally regarded as "reasonable provocation," and thus a full defense, for homicide). In most places in the US, such an admission would have been professional suicide.

have included gays and lesbians among the parties. Thus, in their deliberations, all the participants would have been able to hear what it is like to be gay or lesbian from gays and lesbians themselves. Because all the participants would have passed the good faith and empathy tests, their ability to empathize with the situation of gays and lesbians might well have undermined their false stereotypes.

Of course, there is no guarantee that they would have been able to do so. For this reason, I suggest another device for use in the EOP: *conditional consideration*. It would have been useful to be able to ask the group to consider the issue conditionally, on the assumption that their stereotypes were false and that gays and lesbians were as likely to be responsible members of the community as any other group.

I believe that stated thus conditionally, the issue of a right against discrimination on the basis of sexual orientation would have garnered strong support in the EOP test that I have described, even if it had been carried out in 1960. Note that this is a different question from the question of whether outside of the veil of ignorance, these same people would have supported such rights. I have been doing the EOP thought experiment with student groups for over 20 years. Before the right to same-sex marriage was even on the political agenda, students in my classes were asked to go behind the veil of ignorance to consider the issue of same-sex marriage. These groups have included evangelical Christians and Islamic women in burkas who, when not behind the veil of ignorance, agreed in their strong opposition to same-sex marriage. Nonetheless, when they considered the issue from behind the veil of ignorance, they almost all agreed that there was no good reason to oppose same-sex marriage and they voted to permit it.

This is an important feature of the EOP. If in order to be able to predict a transformation like the development of a right to same-sex marriage, the EOP test had to somehow transform the moral views of the parties so that they themselves would become proponents of same-sex marriage, it would be a failure. People's moral views are too strong to be changed by such a simple experiment. The EOP can produce successful predictions because even some people with very strong moral views have the ability to set those views aside and take an impartial point of view. When they do, they may find that the conclusions they reach from the impartial point of view differ from their own personal moral views. Thus, the agreements that parties reach in the EOP do not simply replicate the moral views of the parties when they are not behind the veil.

Rights to same-sex marriage are liberty rights of individuals to enter into voluntary relationships that do not harm others even if the majority regards them as "foolish, perverse, or wrong."[20] This is J.S. Mill's famous statement of a right against paternalism. Mill's arguments for a right against paternalism can easily be translated into arguments that would be persuasive in the EOP. Thus, we can see that the EOP test might well have predicted one of the most significant transformations in recent US Supreme Court jurisprudence. Beginning in 1962 in *Griswold v. Connecticut*, in which the Court declared that married couples have the right to

20 John Stuart Mill, *On Liberty* (New York, [1859] 1986), p. 19.

use contraception, the Court has gradually developed a new constitutional right.[21] Initially described as a "penumbral" right to privacy, the right has evolved to be correctly classified as a liberty right protecting "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy."[22] This includes a right to voluntary sexual activity in the privacy of one's own home, including homosexual activity; a right to refuse end of life care;[23] and a right to determine end of life care by the use of an advanced directive.[24]

All of these rights would have been easily endorsed in the EOP long before the Supreme Court recognized them, because behind the veil of ignorance, where none of the parties knew their religious views, it would be easy to obtain agreement that those who did not want to practice contraception should be free not to do so and that those who did want to practice it should also be free to do so. It is true that the EOP test could not have predicted whether the rights would be adopted by the Supreme Court or enacted by legislative bodies. However, since the Supreme Court has taken the lead, the EOP test can be used to predict future developments in this Supreme Court doctrine, as I illustrate shortly.

Also included on the list of liberty rights established by the Supreme Court is the right to abortion.[25] However, abortion is not an issue that can be resolved by the EOP test as I have specified it. For that reason, I postpone the discussion of a right to abortion and take it up later.

More on the EOP

An interesting question is whether Kant himself would have survived the screening process for being included in the EOP. I have already mentioned that he had false stereotypes about blacks and women. But there really is no screening device for false stereotypes before they are known to be false. What would be important would be to be able to listen to others and to empathically identify with them, so that what they say would not be discounted by those stereotypes. Interestingly, if Kant's reasoning matched the reasoning that he employed in his own moral theory, I think he might have failed the qualifying tests for the EOP. Because his ethical view was based on an austere conception of reason rather than feelings such as empathy, I doubt that he would have had the ability to empathically identify with others that would be necessary to be a good predictor in the EOP.[26] If this is correct,

21 *Griswold v. Connecticut*, 381 US 479 (1965).

22 *Planned Parenthood v. Casey*, 505 US 833, 851 (1992).

23 *Lawrence v. Texas*, 123 S.Ct. 2472 (2003).

24 *Cruzan v. Director*, Missouri Department of Health, 497 US 261 (1990).

25 *Roe v. Wade*, 410 US 113 (1973).

26 Kant famously argued that it would be wrong to lie, even if you were quite sure that the lie would save an innocent life and cause no harm. Kant, "On a Supposed Right to Lie from Philanthropy," in Gregor, *Practical Philosophy*, pp. 609–15.

it should increase our respect for the power of the EOP test. If even someone with limited empathic ability like Kant was able to derive such surprising predictions from an early version of the test, think of the test's potential if the parties have more highly developed empathic capacities.

Imagine that screening procedures for good faith and empathy were used to identify 100 (or 1,000) people selected to be statistically representative of the population, except in characteristics that would bias the results of the EOP test, such as bigotry and intolerance. Suppose they were brought together for a week to deliberate on the various moral and legal issues. This kind of deliberative polling has already been carried out on a large scale by James Fishkin.[27] The only differences would be that there would be a screening of participants for good faith and empathy, and they would be instructed to conduct their deliberations as though they were parties in the EOP behind a veil of ignorance.

When factual or scientific issues were raised, they would receive briefings from authorities on those issues. If there was a disagreement among the authorities, the parties would receive briefings from all sides that had substantial authoritative support. On many issues, it would make sense to take conditional votes, illustrated by my discussion of rights against discrimination on the basis of sexual orientation earlier. In that case, I suggested that in 1960 a vote might have been taken on including such a right, conditional on a determination that on the assumption that their stereotypes were false and that gays and lesbians were as likely to be responsible members of the community as any other group.

The votes could then be translated into a measure of the strength of the corresponding force for moral transformation. One theoretically important step would be to develop a formula for the translation. Whatever the formula might be, we would expect any vote above 50 percent to indicate some significant moral force, with the force increasing as the percentage increases.

The EOP is an artificial choice situation. It is also an impossible one. We could not actually erase from our memories identifying information about ourselves, including our own moral views and religious convictions. The guiding idea of the EOP construction is that, in evaluating a proposal from behind the veil of ignorance, the parties, if they act in good faith, will have to think about its effect on every member of the society impartially, because, after the veil of ignorance is lifted, they could turn out to be any member of the society.

Using the EOP to Predict Future Moral Transformations

Some moral transformations are so easy to predict, that we can make them with a monological application of the EOP. Let's begin with Kant's predictions. It is

27 James S. Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform* (New Haven, 1991). Fishkin heads the Center for Deliberative Democracy at Stanford. For more information, see the Center's Web site (http://cdd.stanford.edu/polls/docs/summary/).

almost certain that the parties in the domestic EOP would favor democratic rights, because no one would be willing to grant political power to some and not others, if they took seriously that they might be one of the others.

This is not so startling a prediction as it was when Kant made it, but it is still a surprising prediction. In 2010, Freedom House classified 60 percent of the countries in the world as democratic.[28] This is impressive, but there is still a long way to go to confirm Kant's prediction. Since 2010 peaceful movements for democratic change in the Middle East have made Kant's prediction even more probable, even if, as seems likely, it will take some time before those movements produce genuine rights-respecting democracies in most of those countries. If such a transformation does occur, that would be a powerful confirmation for the EOP test.

Kant also predicted the elimination of war. To generate such predictions, it would be necessary to set up a global EOP test. This would be much more difficult than the domestic version of the test. I discuss how to do so in the next section.

What other predictions would we expect on the domestic front? One prediction that we have already discussed is a right against discrimination on the basis of sexual orientation, including a right to same-sex marriage. This prediction is far from having been realized, but it seems almost inevitable that it will be.

Another right that I would expect to meet with a high level of approval in the domestic EOP would be a right to assisted suicide. This is a right that in 1997 the US Supreme Court refused to recognize as part of the liberty right that it is in the process of defining.[29] This is not surprising. Although it is easy to determine many of the elements of a right against paternalism that would be agreed to in an EOP, the US Supreme Court's progress is much slower. In 1986, when the issue of the constitutionality of sodomy prohibitions came before the Court, the Court upheld those laws, even though they would been rejected in the EOP.[30] It was not until 2003 that the Supreme Court brought its legal doctrine into alignment with the predictions of the EOP.[31] Some sort of right to assisted suicide could still be coming, though it may well be enacted into legislation before the Supreme Court sees its way to reversing itself.

Assisted suicide is going to become a more urgent issue as the elderly population increases and more and more adults become involved in their parents' end-of-life care. I would expect the parties in the EOP to be concerned about the potential for abuse, so it may be necessary to take conditional votes, one on the assumption that regulation can effectively prevent abuses and one on the assumption that it cannot. Since every major religion in the United States opposes such a right, typically on

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28 http://filipspagnoli.wordpress.com/2010/01/18/measuring-democracy-5-the-freedom-house-freedom-in-the-world report/

29 *Washington v. Glucksberg*, 117 S.Ct. 2258 (1997); *Vacco v. Quill*, 117 S.Ct. 2293 (1997).

30 *Bowers v. Hardwick*, 478 US 186 (1986).

31 *Lawrence v. Texas,* 123.S. Ct. 2472 (2003).

the basis of moral doctrines that they regard as infallible, it would seem that the probability of such a development would be very low. So this change would also provide further confirmation for the EOP test.

Because there is so much potential for moral transformation, it is possible to make some predictions by applying the test monologically, the way that Kant did. However, I believe that if we were to actually carry out the domestic EOP test, it would produce other predictions that would go beyond these fairly obvious ones. These predictions would provide lots of opportunities to falsify the model.

If an EOP test of this kind were actually carried out, I do not believe that we would have to wait 200 years or more to see if the predictions were confirmed, as we have had to do for Kant's predictions. The reason is that, as more governments become liberal democracies, the pace of moral transformation increases, due to the magnifying effects of freedom of expression and of the press and of there being a large relatively impartial audience willing to incur at least small costs to promote fairness.

The Global EOP

The global EOP test would present special challenges. In addition to screening for good faith and empathy, it would be necessary, I believe, to establish some minimal level of education, because, as illustrated by the effect of false stereotypes, false beliefs distort the results of the test. The biggest challenge would be linguistic. How could the parties discuss the issues if they could not understand one another? Since empathic understanding is crucial to the success of the test, it is difficult to believe that the test would be effective if parties had to rely on translators to understand each other. However, even with these limitations, it would be useful to try to run the experiment and find out what the parties would agree on.

As in the case of the domestic EOP, I believe that there are some results that are so clear that we can project them from applying the test monologically. For example, there would almost surely be agreement on global rights to a minimum level of the necessities of life (largely realized by opportunities for gainful employment, not by social insurance), of health care, and of education (for both girls and boys). In the contemporary world, these seem like such utopian fantasies that, if they were ever realized, they would provide impressive evidential support for the model.

Notice that the application of the EOP device as a predictive tool requires that the parties represent individuals, not states or peoples. If the social forces of moral transformation are those that I have hypothesized—a combination of empathy and fairness— it is individuals, not states or peoples, that matter morally. Empathy is an attitude toward individuals and fairness typically is also.

I think that in the global EOP in which the parties represented individuals there would also be strong support for an international court to decide international controversies that might lead to war and an international court to try and punish leaders of countries guilty of aggression. This is part of the charge of the International Criminal Court (ICC).

In the actual world, large countries that can enforce their own rights, such as the US and China, have no interest in joining the ICC. In the international EOP, the parties would not know if their countries were large or small. Therefore, I would expect near unanimous agreement on the ICC. I know of no theory in political science that would predict such an outcome. Given that the US has opposed the ICC every step of the way and has gone to extraordinary lengths to undermine it and given that it is clearly not in the interest of either the US or China to join the ICC, it would be a surprising confirmation of the EOP if all countries do eventually join the ICC or an equivalent international regime.

Another prediction that Kant probably would have made if it had occurred to him would be the elimination of genocide. This is also one of the charges of the ICC, but it is quite evident that genocide has not yet been eliminated and any estimate of the probability of its being eliminated based on the current evidence would have to be quite low, because of the fact that attempted and partial genocides are still regular occurrences. So, again, this is a prediction that would be surprising enough to provide substantial confirmation for the model.

What other questions might be addressed to the parties in the global EOP? There are many questions that would provide a strong test of its predictive powers. I would like to know whether the parties would allow dictators who seize power by force to be able to sell a nation's natural resources and whether they would allow them to incur debts on behalf of the state. I think a good case can be made in the EOP not to make such transfers or debts legally binding on the citizens that the dictator claims to represent.[32]

It would also be valuable to know what kinds of cosmopolitan rights and duties the parties would favor. Would the parties favor a single world government? If so, what kind of representation would states have in that government? If not, what kind of global governance would they favor? Would they favor Kant's proposal of a confederation of democratic states, on the model of the European Union? Or would they favor multiple single-purpose international organizations such as the ICC and the World Trade Organization? I don't know the answers to these questions. Whichever alternative they did favor would provide a powerful test of the predictive power of the global EOP, because no one knows what type of world legal system will be favored in the future. This is only a small sample of the kinds of questions that the parties could address.

Opposing Forces

As I envision it, the EOP test could be used to quantify social forces for moral transformation. I would never claim that the social forces for moral transformation are irresistible. However, I do think that it is easy to underestimate how powerful

32 For a proposal of this kind, see Thomas Pogge, *World Poverty and Human Rights* (Cambridge, 2002), Chapter 6.

they are. Many of the changes I have listed are changes that have been or would be opposed by powerful social forces. Most of them have been opposed by most of the world's major religions and some still are.

This is not to deny that there are many religious people who support these changes, but it is a reminder that moral transformations typically come from below, not from above. Eventually organized religions adapt to the change, but they do not typically lead the way. For example, almost all the major religions have sacred texts that condone slavery. None of the major religions in the South opposed segregation before the civil rights movement; none of the major religions supported equal rights for women before the feminist movement (some still don't). But there has rarely been such univocal and virulent opposition to a moral transformation as the opposition to gay and lesbian rights by organized religions.[33] This is unfortunate. It will make it harder for them to reinterpret their sacred texts to make it so gay and lesbian sex is no longer a sin. But it is almost inevitable that they will do so. Such is the power of the social forces for moral transformation.

The power of these forces depends on the existence of a relatively impartial audience that can empathically identify with others and on the availability of accurate information. Thus, there are two ways of neutralizing these forces. First, to disable the population's empathy and impartiality, typically through fear. Fear blocks empathy and impartiality. Second, to block information or, even more effectively, propagate false information. Racial and sexual stereotypes would skew results of the EOP.

The power of the social forces for moral transformation has become so strong in the contemporary world that, except in closed dictatorships, being the stronger party in a dispute is often a disadvantage. The stronger party almost inevitably uses its strength to seize an unfair advantage. This creates sympathy in the worldwide audience of impartial observers. The force of their opinions can often more than counterbalance even a large discrepancy in force between the parties to the dispute. This is the force that reversed the imbalance of power in South Africa and it is almost inevitable that it will alter the imbalance of power in the Israeli-Palestinian dispute also.

When we review the list of predictions already generated, it seems almost impossible that they could all be confirmed. What if the predictions made by the EOP test turn out to be false? There are two ways that this might happen: Its

33 The one exception is the Episcopal Church, some congregations of which have taken a brave stand in favor of rights for gays and lesbians. Since this seems to be leading to a schism within the church, I guess we have to say that the exception is limited to one sect of one major religion. An interesting question, which I cannot pursue here, is how many moral transformations have to take place before religions themselves modify their understanding of their own sacred texts to regard them as subject to reinterpretation as circumstances change. This will be a difficult transition for fundamentalist religious movements and for those who regard their sacred texts as infallible. And yet, it is almost certain that it will have to happen if the moral transformations predicted by the EOP test are to be realized.

predictions could turn out to be close to the truth or they could turn out to be nowhere near the truth. For example, if the EOP test predicted the elimination of wars, but in fact about once every century an imbalanced political leader initiated a war, this would be a powerful confirmation of the existence of the forces posited modeled by the EOP. It would just show that there are other forces that can interfere. This happens in the natural sciences, also.

However, if the test predicted the end of war between liberal democracies and instead, after a period of decline (that we are currently living through) wars between liberal democracies increased and reached a steady state of regular conflict, then the theory would be disconfirmed. That would be bad news from a moral point of view, but it would be to the credit of the model in one sense. This is a model that *can be* disconfirmed.

Can the EOP Test Itself Be Improved?

I believe that the EOP test is an improvement on a very old hypothetical consent test, the Golden Rule. I don't mean to suggest that the EOP test could not itself be further improved.

One potential avenue for improvement would be to have a way of determining the qualifications for being represented by the parties to the EOP. This is not a question about how to select the parties themselves; it is a question about how to determine who is covered by their deliberations. For example, the current EOP test is useless for trying to resolve the abortion debate, because it does not give any way of deciding the crucial issue: At what stage a fetus or young child is represented by the parties in the EOP. Wherever the line is drawn, the EOP test will endorse strong protections for the lives of those who have crossed the line. But the EOP test itself gives us no guidance on where to draw the line.

Another issue of the same kind is legal protections for non-human animals or for ecosystems. Should non-human animals and ecosystems be regarded as being represented by the parties in the EOP—for example, to be represented there by a guardian? Is there some other way to include them or is there some other test that should be applied to them to determine how they should be treated? These are questions for further research.

If the EOP test were actually conducted as an experiment, undoubtedly other refinements would be discovered that would improve it. I suspect that it would be improved by role playing sessions in which different parties got the opportunity to play different roles in the society. For example, I think it would be quite enlightening for the parties to actually have to work out a budget for living on the pay from a minimum wage job and then actually live on that budget for a week. The possibilities for improving the test are potentially unlimited.

Conclusion

It is no doubt true that human rights can be understood as motivated by respect for human dignity. However, that formula is too vague to be very helpful for explaining the content of human rights as they have developed in the past or for predicting developments in the future. I have suggested that the EOP provides us with a test that can be used to explain the social forces responsible for the near total consensus on certain human rights and, perhaps more surprisingly, to predict the course of such developments in the future. These social forces are themselves a product of the individual capacity for empathy, the individual ability to make impartial judgments of fairness, and individuals' willingness to incur at least small costs to promote fairness. The EOP provides us with a model for these social forces that has made surprising past predictions and retrodictions, which seem to be coming true. In addition, the EOP provides us with a test that can generate genuinely surprising new predictions that carry a great risk of falsifying the model. Thus, unlike most theories in the social sciences, the EOP model can be subjected to an empirical test. Let's test it.

Chapter 3
Global Governance and Human Rights*

Cristina Lafont

Globalization has brought to the fore a peculiar mismatch between the concept of human rights and the allocation of human rights obligations which has been taken for granted throughout the twentieth century. On the one hand, human rights are supposed to be universal. It is often said that human rights are possessed by all human beings simply in virtue of their humanity. The universality inherent in the concept of human rights expresses a cosmopolitan ideal of equal moral concern for all human beings. On the other hand, according to the standard interpretation of human rights obligations, states bear the primary responsibility for protecting the human rights of their own members.[1] This state-centric interpretation of responsibilities for human rights protections leaves a gap with respect to any responsibility that states might have in their treatment of members of other states either through direct action (for example, through their foreign policy) or indirectly through their actions as participants in global governance institutions. It suggests that states must protect the human rights of their own people, but are off the hook with regard to their treatment of those who are outside their jurisdiction. The current situation of the prisoners at Guantanamo is perhaps an obvious example of how a state can exploit the existence of this gap in the state-centric interpretation of human rights obligations for its own (often questionable) goals. But perhaps a better illustration of the morally unacceptable consequences of the state-centric distribution of responsibilities is former President Clinton's recent apology for pushing for dramatic tariff cuts on US rice imports to Haiti at the expense of Haitian farmers[2]. Testifying to the Senate Foreign Relations Committee in March 2010 Clinton declared that

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1 This criterion includes not only the nationals of a state but also any territorially present, jurisdictionally bound persons regardless of their citizenship status, whereas it is supposed to exclude everyone outside a state's jurisdiction. As Donnelly puts it, "states have international human obligations only to *their own* nationals (and foreign nationals in their territory or otherwise subject to their jurisdiction or control)." J. Donnelly, *Universal Human Rights*, (Ithaca, 2003) p. 34.

2 For some general information about this issue see http://www1.american.edu/TED/haitirice.htm

> It may have been good for some of my farmers in Arkansas, but it has not worked. It was a mistake … I had to live everyday with the consequences of the loss of capacity to produce a rice crop in Haiti to feed those people because of what I did; nobody else.

As made crystal clear by this example, in defending the economic interests of farmers in Arkansas, President Clinton took himself to be discharging his obligation to protect and promote the rights of citizens in his own country. But in light of the humanitarian catastrophe following the collapse of rice production in Haiti, he came to recognize his direct responsibility in hampering the human right to food of Haitian citizens. However, according to the current distribution of human rights obligations, it is hard to accommodate Clinton's claim of responsibility which is at the core of his apology. From the perspective of international human rights law, there is no specific legal obligation that Clinton failed to discharge. Since he is not a representative of Haitian citizens, he is not responsible for protecting their interests and rights. From a political perspective, his apology is even more puzzling, since Clinton certainly discharged his obligation to defend the interests and rights of those to whom he is politically accountable, namely, the citizens of his own country. Had he failed to do so in international negotiations, he would have faced adverse political consequences at home. Moreover, he was exercising this obligation within the legal parameters of the principles of free trade established by the WTO—principles which call for the elimination of tariffs on imports and other similar trade barriers. With his apology, Clinton is clearly suggesting that he did something wrong and that he is the one responsible for it, but neither of these claims make sense within the standard state-centric ascription of responsibilities for human rights protections currently recognized by the international community. According to this state-centric interpretation neither the US government nor the WTO has a legal obligation to protect the human rights of Haitian citizens. Officials from Haiti are the only ones responsible for their protection. But wait! If this is the case, then there is actually no gap in the distribution of human rights obligations after all. Shouldn't Haitian officials be held accountable by the international community for their failure to discharge their obligation to protect their citizens' human right to food? Didn't they fail to protect and promote the human rights of their own citizens in allowing such a humanitarian catastrophe to happen? Actually, it is hard to argue that they did. For if they had refused to bring Haiti's trade policies in line with the WTO agreements and accept the recommendations of the IMF and the World Bank then the economic consequences would have been even more devastating for Haitian citizens. It does not take a former head of State like Clinton to see what is wrong with this picture. Precisely the fact that none of the actors involved failed to discharge their respective obligations indicates that, for cases like this one, the current distribution of human rights obligations impairs the effective protection of human rights. For the actors who have the legal obligation to protect the human rights of their citizens—individual states—may

not have the effective capacity to do so and the actors who do have the effective capacity—the WTO, IMF or the World Bank—do not have the obligation.

This points to a serious structural incoherence in current human rights practice. By using various UN human rights agencies the international community is supposed to monitor states and to hold them accountable for any failure to protect the human rights of their members. However, at the same time, the international community may also use other UN agencies like the World Bank or the IMF to impose structural adjustment programs without any obligation to check whether these programs undermine the ability of recipient states to protect the most basic human rights of their members.[3] The devastating consequences of this structural incoherence make it clear that an alternative to the state-centric ascription of human rights obligations is urgently needed to move the human rights project forward in a globalized world. Can a philosophical conception of human rights be of any help here? I think that the answer is yes, but only after the state-centric assumptions that pervade philosophical debates on human rights are questioned.

Traditional vs Practical Approaches to Human Rights in Philosophical Debates

In current philosophical debates there are two main ways of looking at human rights. One is the so-called traditional or orthodox approach that is mostly concerned with core philosophical questions regarding the nature, grounds and substantive content of the concept of human rights. Following this approach, different authors articulate different conceptions of what human rights are on the basis of some independently grounded account of human nature or human freedom.[4] Despite its philosophical importance a weakness of this approach is that it tends to work in disconnect from actual human rights practice. The main task is to answer abstract questions related to the nature and grounds of human rights, whereas more practically oriented questions such as the proper allocation of human rights obligations tend to be regarded as subsidiary. The so-called political or practical approach starts from the opposite side. It takes contemporary human rights practice as a guide in order to figure out what human rights actually

3 M. Freeman, *Human Rights* (Cambridge, 2002) p.153. For an in depth analysis on the negative impact of the IMF and the World Bank structural adjustment programs on human rights see M. Abouharb and D. Cingranelli, *Human Rights and Structural Adjustment* (Cambridge, 2007).

4 For some examples see M. Cranston, *What Are Human Rights?* (London, 1973); A. Gewirth, *Human Rights*, (Chicago, 1982); J. Donnelly, "Human Rights as Natural Rights," *Human Rights Quarterly,* 4/3 (1982): pp. 391–405; A. Sen, "Elements of a Theory of Human Rights," *Philosophy and Public Affairs,* 32/4 (2004): pp. 315–56; J. Griffin, *On Human Rights* (Oxford, 2008); W. Talbott, *Human Rights and Human Well-Being* (Oxford, 2010).

are.[5] This orientation towards contemporary practice makes the practical approach seem more promising in terms of its ability to offer fruitful answers to the difficult questions that arise within that practice. However, a weakness of this approach is that precisely because it takes current practice as a guide it also tends to take the state-centric view of human rights obligations for granted, as this view pervades current practice. In so doing, it seems unable to offer fruitful guidance to the crucial challenges this practice currently faces. My contention, however, is that there is no intrinsic connection between adopting the practical approach and accepting a state-centric conception of human rights obligations. In what follows I would like to substantiate this claim through a detailed analysis of the core assumptions of the practical approach. On the basis of this analysis, I will offer an alternative account of the practical approach that is compatible with a pluralist conception of human rights obligations. Although I cannot provide here a fully articulated account of such a conception, I hope that even the brief sketch I will offer suffices to show that the practical approach to human rights contains valuable resources that are worth exploring.

The Practical Approach to Human Rights

As already mentioned, whereas the traditional approach attempts to ground human rights on some authoritative account of human nature or human freedom, the *political* or *practical* approach takes contemporary human rights practice as being authoritative for an understanding of what human rights are. The guiding thought is that by understanding the aim and purposes of contemporary practice one can grasp the concept of human rights that is actually operative in it. Thus, its main claim against traditional approaches is that the *content* of human rights cannot be determined solely by moral reasoning divorced of any reference to the distinctive functions that human rights play in contemporary practice. The traditional approach may lead to a successful conceptual analysis of some morally significant rights while simultaneously failing to identify the concept of human rights that is actually operative in contemporary human rights practice. If so, discrepancies between the philosophical reconstruction of the traditional approach and the realities of current practice may lead to prescriptions for revision of the latter that seriously undermine its goals by undermining its ability to perform the functions that are necessary to reach them. The failure to properly appreciate the distinctive functions that international human rights are supposed to play in contemporary practice will likely lead to proposals for revisions of that practice that may be at best useless and at worst harmful. In contradistinction, discrepancies

5 The main representatives of the practical approach are J. Rawls, J. Raz, J. Cohen, T. Pogge and C. Beitz. C. Beitz, *The Idea of Human Rights* (Oxford, 2009) offers the most extensive and in depth account of the practical approach available to date. For this reason, I focus mostly on this work.

between current practice and a critical reconstruction that is based on an accurate understanding of its distinctive functions are likely to issue proposals for revision that aim to improve the practice's ability to reach its own goals. In fact, one of the main attractions of the practical approach is the promise of fruitful guidance in helping the human rights project to achieve its goals.

In light of this brief characterization of the practical approach, it should be obvious that the identification of the overall aim or purpose that guides contemporary human rights practice is one of its most essential features. By grasping the aims of the practice and understanding its significance we obtain the central interpretative clue that allows us to answer the question of what human rights actually are through the indirect path of figuring out what distinctive functions they play in practice. Given this general methodological strategy characteristic of the practical approach, it is hard to overestimate the impact that the initial theoretical move of identifying the practice's overall aim has on the answer of what human rights are, as well as on the subsequent answer of what human rights there are. Since the theoretical strategy consists in determining what human rights are through the indirect method of figuring out what they are *for* within a given practice, nothing can have a deeper impact on the answer to that question than the specific answer given to the prior question of what the overall practice itself is for. As I said before, it is by understanding the *point* of the practice of human rights that we understand what human rights actually are.[6]

This can be easily illustrated by Rawls's *Law of Peoples,* which is generally identified as the first account of human rights that follows the practical rather than the traditional approach. According to Rawls, the main goal of human rights practice is to determine the limits of toleration between peoples. In light of this goal, the distinctive function of human rights is to "specify limits to a regime's internal autonomy," such that the regime's fulfillment of the rights of its citizens "is sufficient to exclude justified and forceful intervention by other peoples, for example, by diplomatic and economic sanctions or … by military force."[7] It is not coincidental that an interpretation of the function of human rights as (defeasible) triggers for coercive intervention against states[8] yields a notoriously truncated list of rights that bears little resemblance to the list of rights actually contained in

6 This also gives us a relatively independent standard to judge the plausibility of different accounts of human rights. In examining any proposed conception of human rights, if it turns out that the purported human rights are such that they could not play the key roles that the current practice of human rights requires them to play, we can safely conclude that it is an account of something other than human rights. It may be an account of moral or natural rights, but not of international human rights as they are understood in the contemporary legal and institutional practice.

7 J. Rawls, *The Law of Peoples* (Cambridge, 1999), pp.79–80.

8 J. Tassioulas, "Are Human Rights Essentially Triggers for Intervention?," *Philosophy Compass*, 4/6 (2009): pp. 938–50.

the major human rights conventions and treaties, which have been signed by a majority of states.[9] Rawls's list of human rights proper is limited to the

> right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly).[10]

Rights to political participation, to an education or to full equality and non-discrimination are conspicuously absent. However, as some have argued, if Rawls is right and the distinctive function of human rights is to trigger coercive intervention against states, his list may actually be too expansive. In light of the highly problematic nature of this kind of international action, hardly anything beyond genocide or massive violations of the right to life may safely qualify for inclusion among the list of human rights proper.[11] I don't want to assess here the plausibility of Rawls's highly revisionary account of human rights. Instead, I just wish to highlight the crucial importance that the initial identification of the goals of contemporary human rights practice has for the resulting account of human rights as well as for the practical guidance that it can be expected to provide.[12]

Now, in light of these observations, it seems advisable to keep a crucial distinction in mind. The *methodological* assumption that is constitutive of the practical approach, that an understanding of the political function of human rights in contemporary practice is essential for a proper understanding of what human rights are, must not bleed over into specific *substantive* accounts that different authors may provide of what that political function in particular consists of. Although the distinction may seem straightforward, it is actually quite remarkable that proponents and critics alike seem to take it for granted that adopting the practical approach is tantamount to accepting that the political

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9 The major human rights conventions are the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social, and Cultural Rights*, the *Convention on Eliminating All Forms of Discrimination Against Women*, and the *Genocide Convention*. For a complete collection of these and other human rights documents see I. Brownlie and G. Goodwin-Gill, (eds), *Basic Documents on Human Rights*, 6th ed., (2010).

10 J. Rawls, *The Law of Peoples* (Cambridge, 1999), p. 65.

11 See A. Buchanan, *Human Rights, Legitimacy, and the Use of Force* (Oxford, 2010), p. 47

12 For a criticism of Rawls's narrow understanding of the distinctive function of human rights as triggers for coercive intervention see J. Nickel, "Are Human Rights Mainly Implemented by Intervention?," in R. Martin and D. Reidy (eds), *Rawls's Law of Peoples. A Realistic Utopia?* (Oxford, 2006), pp. 263–77. He offers a list of 14 functions that human rights norms play in contemporary practice of which providing standards for coercive intervention is just but one of them (see p.270).

function of human rights is to specify constraints against state sovereignty.[13] There is space for variation in how this function is interpreted by different proponents: Human rights can be seen as triggers for external intervention or as benchmarks of a state's political legitimacy. But regardless of the details, everyone seems to agree that commitment to the practical approach implies commitment to a state-centric conception of human rights, according to which the main function of human rights is to regulate the behavior of states towards their own people. Now, it is true that most defenders of the practical approach happen to endorse a state-centric conception of human rights.[14]

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13 Since Rawls's approach refers to "peoples" rather than "states," his own wording is slightly different. His own description of the function of human rights is to "specify limits to a regime's internal autonomy." Butthis terminological difference is insignificant in our context.

14 See Rawls *The Law*, p. 79–80; J. Cohen, "Minimalism about Human Rights," *Journal of Political Philosophy*, 12 (2004): p. 195; Beitz, *The Idea*, p. 13; J. Raz, "Human Rights without Foundations," in S. Besson and J. Tassioulas (eds), *The Philosophy of International Law* (Oxford, 2010), p. 328. Raz's views on the issue are unclear. On the one hand, he explicitly affirms the state-centric view when he claims: "Following Rawls I will take human rights *to be rights which set limits to the sovereignty of states*," but what he adds to this is interesting. He continues "in that their actual or anticipated violation is a defeasible reason for taking action against *the violator* in the international arena." (ibid.) However, this second feature of human rights norms does not require the violator to be a state. Puzzlingly, Raz recognizes this a little bit later when he says: "I will continue to treat human rights as being rights against states. But I do not mean that human rights are rights held only against states, or only in the international arena. Human rights can be held against international organizations, and other international agents, and almost always they will also be rights against individuals and other domestic institutions. The claim is only that being rights whose violation is a reason for action against states in the international arena is distinctive of human rights, according to human rights practice." (p. 329). This sounds reasonable, however, as a consequence it seems to follow that Raz has not given us an appropriate characterization of what human rights are. He first makes the very strong claim that he takes human rights "*to be* rights which set limits to the sovereignty of states" and he then withdraws that claim later without giving us an alternative account of what human rights are. As he puts it later, strictly speaking his claim is that "observation of human rights practice shows that they are taken to be rights which, whatever else they are, set limits to the sovereignty of states, and therefore arguments which determine what they are, are ones which, among other things, establish such limits." His claim is therefore reduced from a very strong definition of human rights (one that provides both necessary and sufficient conditions) to a pretty weak identification of one of their properties (thus at best a necessary but by no means a sufficient condition for something to qualify as a human right). However, it is far from evident that immunity from international intervention against state sovereignty is actually a necessary condition for something to qualify as a human right (cf. 336). This is the strong claim that leads to a pretty truncated list of human rights proper, especially if intervention is understood in the coercive sense of economic sanctions and military intervention. The situation with Pogge is unclear in a different way. Although he does not explicitly endorse it, his conception of human rights is often included

Insisting on this distinction is important for the prospects of defending the practical approach against critics who hold, rightly in my view, that the state-centric claim is false.[15] Moreover, the state-centric conception finds quite widespread support outside the confines of the practical approach as well.[16] Still, it should be clear that there is no internal connection between endorsing the *methodological* claim that is constitutive of the practical approach and accepting the *substantive* claim about the distinctive function of human rights that characterizes the state-centricsconception. Whereas defenders of the traditional approach may reject the state-centric conception of human rights and still hold on to their respective accounts of what human rights are (for example, protections of human agency, autonomy, freedom, and so on), defenders of the practical approach who endorse the state-centric conception are committed to the strong identity claim that human rights *are* norms to regulate state behavior. Thus, if the statecentric claim proves to be untenable, so does their account of what human rights are. Nothing else is left to hold on to.

There is a pretty straightforward way to show the untenability of the state-centric claim within the framework of assumptions characteristic of the practical approach. Recall that, according to this approach, it is by understanding the *point* of contemporary human rights practice that we understand the distinctive function that human rights play in that practice, and, in understanding their distinctive function, we thereby come to understand what human rights actually are. Now, according to the state-centric view, human rights are norms that regulate the behavior of states

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among those representative of the practical approach. In addition, many interpreters ascribe to him a state-centric conception of human rights based on a quote from his book *World Poverty and Human Rights* (Cambridge, 2002), where it is claimed that "human rights are, then moral claims on the organizations of one's society" (p. 64). However, interpreting Pogge's institutional view of human rights as endorsing a state-centric conception is clearly incorrect in light of his other claims, such as that "human rights are moral claims on any coercively imposed institutional order, *national or international.*" (T. Pogge, 'The International Significance of Human Rights,' *The Journal of Ethics,* 4/1 (2000): pp. 45–69) or, even more clearly, that "human rights are moral claims on global institutions" (T. Pogge, "Menschenrechte als moralische Ansprüche an globale Institutionen," in S. Gosepath and G. Lohmann (eds), *Philosophie der Menschenrechte (*Frankfurt, 1998), pp. 378–400). Thus, it seems more charitable to take the following definition of human rights from his book as his considered view, namely, "a human right to X entails the demand that, insofar as reasonably possible, *any coercive social institutions* be so designed that all human beings affected by them have secure access to X." (p. 46; my emphasis).

15 For some examples see Tasioulas, "Are Human Rights," pp. 945ff and J. Griffin, "Human Rights: Questions of Aim and Approach," *Ethics*, 120/4 (2010): 741–60.

16 For some examples see Donnelly, *Universal*, pp. 34ff.; R. Martin, "Human Rights: Constitutional and International" in D. Reidy and M. Seller (eds), *Universal Human Rights* (Oxford, 2005), pp. 37–58; J. Nickel, *Making Sense of Human Rights*, 2nd ed. (Oxford, 2007), p. 7; W. Talbott, *Which Rights Should be Universal* (Oxford, 2005), p.3; Talbott, *Human Rights,* p. 10.

towards their own people. From this it follows that if there were no states (or if the relevant functions of states were transferred to other types of political units such as non-state organizations) there would be no human rights. As many critics have pointed out, this claim seems utterly implausible.[17] Based on past experience, we have plenty of reasons to believe that the protection of human rights would be a meaningful practice under any plausible division of political space.

Now, what is important to notice in our context is that this argument against the state-centric view is not an argument against the practical approach per se. For what this argument shows is precisely that the state-centric view *misidentifies* the function of human rights in current human rights practice. Since this practice would still have a point in the absence of a division of political space by states, it cannot be the case that the distinctive function of human rights is to regulate the behavior of states by setting limits on their sovereignty. If this is so, what the practical approach demands is an alternative, more accurate account of the *point* of contemporary human rights practice.

An Alternative Account of the Practical Approach to Human Rights

Now, rejecting the state-centric conception of human rights does not require denying that one of the functions of human rights is to regulate the behavior of states towards their own people. A rejection of the state-centric conception merely denies that this is their distinctive function if for no other reason than the fact that this is the distinctive function of the domestic citizens' rights that are embedded in each state's legal system. If human rights served the exact same function as domestic constitutional rights then they would be redundant.[18] Moreover, the constitutional rights of many modern states are the result of a long-standing practice of regulating the power of government. Citizens engaged in this practice

17 Tassioulas aptly expresses the objection in the following terms: "If states are the sole bearers of the primary duties to implement human rights, this would have the peculiar upshot that a universal moral right ceases to be a human right simply because the primary responsibility for its fulfillment has shifted to nonstate organizations." (Tassioulas, "Are Human Rights," p. 945.)

18 This claim has no direct bearing on the question of whether international human rights and domestic constitutional rights coincide or differ in content. Instead it is simply a claim about their different functions. The practical conception of human rights is committed to the view that in order to understand what international human rights are we need to understand their specific function "in a normative practice to be grasped *sui generis*" (Beitz, *The Idea*, p. 12). Different conceptions of the function of human rights may lead to different views of their proper scope. Rawls, for example, defends the view that human rights are a proper subset of the constitutional rights of citizens in liberal democracies (Rawls, *The Law*, p. 81). But, as we saw above, his notoriously narrow conception of the scope of human rights follows from his narrow conception of the proper function of human rights and not from his endorsement of the practical approach per se.

well before anything like contemporary human rights practice emerged in history. Thus, if we are to understand the *point* of contemporary human rights practice, it seems clear that we need to bring some other element into the picture beyond states and their citizens.

As we saw before, according to Rawls the point of human rights practice is to set the limits of toleration between peoples. This already indicates that their primary function is not domestic but international. Rawls's claim that "human rights play a special role in a reasonable Law of Peoples"[19] indicates that the additional element needed to make sense of human rights practice, beyond states and their citizens, is an international community whose members commit themselves to abide by a reasonable Law of Peoples which includes the protection of human rights as one of its core ingredients. However, this implies that the necessary condition for the existence of such practice is not simply mutual toleration but above all *cooperation* among its participants. If their joint commitment to assure the protection of human rights is to have any point at all, what needs to be identified is not so much the limits of their toleration but instead the triggers of their active cooperation such that their shared goal can be achieved. In fact, this is often pointed out in the standard accounts of the emergence of contemporary human rights practice at the beginning of the twentieth century.

According to the standard view,[20] the human rights project emerged at the dawn of a Westphalian conception of international relations, the so-called law of separation, which aimed at the mere co-existence among absolutely sovereign states.[21] Many scholars identify the emergence of an international economy derived from the industrial revolution as an important development that paved the way for a slow shift in international relations towards a law of cooperation instead of a law of separation. The creation of the League of Nations is often identified as the first example of this shift in the conception of international relations because of its explicitly proclaimed aim "to promote international cooperation and peace and security." In spite of the League's notorious failure to prevent war and its subsequent demise, the awareness of its members that such common interests and normative goals could only be achieved through cooperation led to the creation of the UN and its Charter after World War II. In addition, the horrors of the Nazi regime, epitomized in the Holocaust, provided an important motivation for adding the protection of human rights to the goals of peace and security in the UN Charter. Its signatories committed themselves to "take joint and separate action in cooperation with the organization" to promote "universal respect for, and observance of, human

19 Ibid., p. 79.

20 Some authors disagree with the claim that contemporary human rights practice originates with the creation of the UN after WWII and situate their origins more recently, towards the end of the Cold War. For an example see S. Moyn, *The Last Utopia: Human Rights in History* (Cambridge, 2010).

21 For an example of this view see M. Salomon, *Global Responsibility for Human Rights* (Oxford,2007), pp. 21ff.

rights and fundamental freedoms for all" (United Nations 1945, article I.3). Thus the UN Charter laid down the principles of *universal respect* for the human rights of all persons and of *international cooperation to protect and promote* human rights. Shortly after the approval of the Charter in 1945, a UN committee was charged with writing an international bill of rights. This emerged in 1948 as The *Universal Declaration of Human Rights*, which gave specific content to the international community's commitment to the protection of human rights.[22] The Preamble of the *Universal Declaration of Human Rights* (UDHR) states that

> the General Assembly proclaims this Universal Declaration of Human Rights … to the end that every individual and every organ of society … shall strive … to promote respect for these rights and freedoms and by progressive measures, national and international, *to secure their universal and effective recognition and observance*.

After the Preamble, a list of rights follows that indicates the kind of human interests that human rights norms are meant to protect (interests in personal or economic security, freedom of expression, and so on), some of the standard threats[23] to those interests (torture, slavery, arbitrary arrest, and so on), as well as important institutional means for their protection (equal protection under the law, due process, free elections, and so on). Towards the end of the document, the aim of securing human rights protections worldwide mentioned in the Preamble is expressed again in Article 28, which makes it explicit that "everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."

All of this suggests that the complex legal and institutional phenomenon that we currently identify as contemporary human rights practice goes back to a joint commitment freely undertaken by the members of the international community to the global political project of "securing the universal and effective recognition and observance of human rights." This provides a straightforward answer to the question of the overall aim or purpose of this practice. Now, if we take the goal of securing the protection of human rights worldwide as the overall aim of human rights practice, we can see why the state-centric claim that the distinctive function of human rights norms is to regulate the behavior of states towards their own people is something of a near miss. Indeed, since the abuse of power by states is a

22 In fact, the rights included in the declaration were taken from the already existing national bills of rights. The key difference between them is not their respective content, but the fact that human rights are supposed to apply to all persons in all countries. For an excellent exposition of the drafting process that culminated in the UDHR see M. A. Glendon, *A World Made New. Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York, 2002).

23 This expression was originally coined by H. Shue, *Basic Rights*, 2nd ed. (Princeton, 1996), but its use has become customary in current accounts of human rights.

particularly salient source of threats to the human rights of their members, limits on state sovereignty are a powerful means to the end of securing the protection of human rights worldwide. However, such limits may not be the only or the most effective means to that end. In fact, depending on the circumstances such limits may prove insufficient or simply useless. The previously mentioned counterfactual scenario of a world without states as its basic political units highlighted such a possibility. But, as the examples of Guantanamo and Haiti indicate, there are already sufficient real world scenarios to illustrate the problem without any need to appeal to remote possible worlds.

The identity claim that human rights are rights that regulate the behavior of states towards their own people runs into some difficult counterexamples when one turns to urgent debates concerning so-called extraterritorial human rights obligations. These are cases in which states are accused of violating the human rights of persons in other countries as a result of actions or omissions in their international cooperation or foreign policy.[24] The precise scope of these obligations is hotly debated and thus open to a variety of interpretations, but the meaningfulness of the question among legal practitioners and scholars suffices to show that the identity claim just cannot be right. There are at least two reasons why an account of human rights norms in which extraterritorial human rights obligations are *ruled out by definitional fiat* seems problematic. On the one hand, since human rights, as opposed to the domestic rights of citizens, are not territorial but universal, it is hard to see why a territorial understanding of human rights norms should be essential to the very concept of human rights. On the other hand, limiting the obligation of states to respect the human rights of those persons within their jurisdiction runs counter to the principle of universal respect for the human rights of all persons, to which all signatories of the UN Charter are bound.

An even better way to generate counterexamples to the identity claim is by focusing on current debates regarding non-state actors and their adverse impact on human rights protections. These non-state actors include individuals .for example, non-state armed guerrilla leaders who engage in ethnic cleansing), multinational corporations that collaborate with governments in violating human rights, and international financial institutions such as the WTO, the IMF and the World Bank whose regulations can have a tremendously negative impact on the protection of human rights, especially those of citizens in poor countries. As with the case of extraterritorial human rights obligations, here too we need not agree on the details of any specific case where a non-state actor is accused of violating human rights in order to see the implausibility of the state-centric identity claim. Since the practical approach takes current human rights practice as authoritative for an understanding of what human rights are, it is important to point out that key elements of current practice, such as human rights campaigns lead by NGOs and

24 For a good overview of the legal complexities of this issue see M. Gibney, M. and S. Skogly (eds), *Universal Human Rights and Extraterritorial Obligations (*Philadelphia, 2010).

reactions from global public opinion, do not seem to be at all sensitive to the distinction between human rights violations perpetrated by state or by non-state actors (nor are they sensitive to the distinction between a state's violations of the rights of its own nationals and the same state's violation of the rights of members of other countries). Of course, if the aim of human rights practice is to secure the protection of human rights worldwide, why should it matter to participants whether potential violators are states or non-state actors?[25] In fact, the policies and regulations of the WTO, the IMF and the World Bank are as much the focus of protests by human rights organizations and the subject of reports to the UN Human Rights Council as are the actions of governments towards their own people.[26] The human rights obligations of these institutions as well as the compatibility of their policies and regulations with international human rights law are also the focus of extensive analysis and debate among scholars of international law.[27]

All these recent developments in human rights doctrine seem hard to account for in a reconstruction of the practice that is based on state-centric assumptions. If Nickel's claim were correct and "the most basic idea of the human rights movement is … the idea of regulating the behavior of governments through international norms" the inclusion of non-state actors within the focus of attention of participants in the human rights movement would make no sense at all. Or, if as Beitz claims, human rights "consist of a set of norms for the regulation of the behavior of states"

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25 In light of this question, the state-centric account of the overall aim of human rights practice seems pretty implausible. According to Beitz, "human rights are the constitutive norms of a global practice whose aim is to protect individuals against threats to their most important interests *arising from the acts and omissions of their governments*." (Beitz, *The Idea*, p. 197; my italics). This account of the aim of human rights practice suggests that if the exact same threats originate from the governments of other states or from non-state actors then they are not a matter of human rights and thus not a matter of concern to the international community. However, no indication is offered of the normative reasons that could possibly justify this restriction in the eyes of those participating in current human rights practice.

26 Some notorious examples are recent human rights campaigns against the patent rights for pharmaceuticals established by the WTO, as well as long standing criticisms by scholars and NGOs of the structural adjustment programs of the IMF or of the involuntary resettlements involved in the big infrastructural projects funded by the World Bank.

27 For some recent examples see P. Alston (ed), *Non-State Actors and Human Rights* (Oxford, 2005); A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford, 2006); T. Cottier, J. Pauwelyn and E. Bürgi (eds), *Human Rights and International Trade* (Oxford, 2005); M. Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (Oxford, 2003); H. Herstermeyer, *Human Rights and the WTO. The Case of Patents and Access to Medicines* (Oxford, 2007); G. Marceau, "WTO Dispute Settlement and Human Rights," *European Journal of International Law*, 13/4 (2002): pp. 753–814; Salomon, *Global Responsibility*; S. Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (London, 2001); G. Zagel, "WTO and Human Rights: Examining Linkages and Suggesting Convergence," *Voices of Development Jurist Paper Series* 2/2 (2005): pp. 1–37.

the view held by many legal scholars that international financial institutions have human rights obligations would not simply be questionable or contested, as it currently is, but rather senseless. If one buys into state-centric assumptions, then the legal debate about the human rights obligations of international financial institutions ought to be seen as a puzzling misunderstanding of what human rights practice is all about.[28] Beitz defends his state-centric interpretation of the practical approach to human rights by claiming that the model he proposes should be descriptively accurate of current practice and thus should not be changed unless the practice itself changes.[29] This may seem like a feasible defense of the state-centric model, but in fact it only highlights its problems. Precisely because such changes are perfectly conceivable,[30] the fact that the state-centric model would not survive them provides additional evidence of its untenability. The *continuity* of human rights practice throughout those changes is precisely what the state-centric model would not be able to account for. Since the state-centric conception of human rights practice takes a particular distribution of human rights obligations at a given time not as a means for the realization of the human rights project but *as its very goal*, any significant changes in such distribution must lead to the conclusion that the resulting practice is a different project with a totally different purpose.

Now, since individuating human rights norms by identifying states as their primary addresses seems problematic in light of the emergence of powerful non-state actors in the international arena, let's take a look at the other distinctive function that human rights norms play according to the state-centric model. Given

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28 In fact, the UN itself would seem to misunderstand human rights practice as well. According to the UN Human Development Report of 2000, (http://hdr.undp.org/en/reports/global/hdr2000.) the shift from a state-centric approach to human rights obligations to a pluralist approach is one of the key shifts needed to advance human rights in the next quarter century. Among "the 6 shifts from the cold war thinking that dominated the 20th century" that the report identifies, the first two are most significant in our context: "*From the state-centered approaches to pluralist, multiactor approaches*—with accountability not only for the state but for media, corporations, schools, families, communities and individuals" as well as "From the national to international and global accountabilities—and *from the international obligations of states to the responsibilities of global actors*." (p. 13; my italics)

29 Beitz, *The Idea,* p. 124.

30 In fact, many legal scholars claim that these changes have already happened. Salomon, *Global Responsibility* offers an example. Referring to the legal context, she claims that "there is widespread consensus that the traditional view of human rights, which focuses solely on the individual obligations of states, is now outdated." (p. 6) It should be clear that the plausibility of my argument does not depend on the truth of this empirical claim. But I mention it just to point at what seems to me a significant disconnect between the state-centric conception of human rights obligations that is predominant in philosophical debates on human rights and the current discussion on human rights among legal scholars of international law where the issue of the human rights obligations of non-state actors is one of the main foci of current debates.

that defenders of this model maintain that the point of human rights practice is setting limits on state sovereignty, this commits them to the claim that human rights are essentially triggers for justifiable intervention against a state's sovereignty by external agents. There is perhaps a difference in emphasis among these authors as regards the types of interventions they envisage. Whereas Rawls's analysis, as we saw, seems to emphasize coercive interventions such as economic sanctions or even military intervention,[31] Raz and Beitz identify a wider variety of actions (some of which areenon-coercive) as appropriate methods of intervention. Raz expresses the underlying idea as follows:

> I will take human rights to be rights which set limits to state sovereignty, in that their actual and anticipated violation is a (defeasible) reason for taking action against the violator in the international arena.[32]

Here again, if we take the goal of securing human rights worldwide as the point of human rights practice rather than the goal of setting limits on state sovereignty, we can then see why the state-centric claim that the distinctive function of human rights norms is to trigger external intervention is also something of a near miss. For, indeed, coercive andenon-coercive interventions by members of the international community that seek to regulate the behavior of states towards their own people are a powerful means to the end of securing the protection of human rights worldwide. But such interventions may not be the only methods available. Again, depending on the circumstances, such interventions may be insufficient or simply useless. If what is hampering the protection of the human rights of a group of people in some country, let's assume, is some policy imposed by the IMF, some project funded by the World Bank, or some trade regulation of the WTO, then it seems that the only appropriate action to be taken by members of the international community would be to change those policies or regulations. The usual interventions that seek to regulate the behavior of states won't solve the problem at all.

Now, it should be clear that by characterizing the state-centric focus on intervention as a near miss I agree that it captures something important about the distinctive function of human rights. In my view, the practical approach does indeed require adherents to endorse the view that human rights are essentially triggers for international action.[33] However, nothing in the practical approach

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31 It is not clear to me that coercive interventions play a more distinctive role than non-coercive ones in Rawls's *Law of Peoples*, since Rawls also contemplates non-coercive interventions, such as providing assistance to burdened societies, which seem intrinsically related to the function of human rights in a reasonable Law of Peoples. Be that as it may, in the present argumentative context nothing turns on determining this issue.

32 Raz, "Human Rights" p. 328.

33 In my opinion, this is a necessary, but not a sufficient condition for something to qualify as a human right. So, this claim by no means rules out that human rights fulfill many other functions. For a list of some of these functions see note 12 above.

justifies limiting the appropriate international action in question to interventions against a state's sovereignty in particular. Let me briefly explain why.

As mentioned before, the complex legal and institutional phenomenon that we identify as contemporary human rights practice goes back to a joint commitment by the members of the international community to secure the protection of human rights worldwide. This commitment is what lends practical significance to the claim that human rights are a matter of concern for the international community. Thus if members of the international community were to officially deny that potential or actual violations of human rights provide a (defeasible) reason for taking action in the international arena, this act would have the *performative* significance of withdrawing the original commitment on which international human rights practice rests. As a consequence, the practice as we know it would collapse.[34] The Westphalian view of international relations as a law of separation among absolutely sovereign states would be reinstated as the official doctrine of international law.

However, nothing in this argument justifies the additional claim that appropriate international action must take the form of interventions against a state's sovereignty. From the perspective of the practical approach, what the most appropriate type of action turns out to be in each specific case cannot be determined in advance. The right answer seems contingent on what happens to be the most adequate and efficient means to reach the practice's own goals. Whereas a critical reconstruction of the norms that underlie contemporary human rights practice justifies the identity claim that human rights are rights whose actual or anticipated violation is a defeasible reason for action against the violator by members of the international community, nothing about the norms constitutive of this practice justifies the restriction of possible "violators" to states and of the appropriate "actions" to interventions against a state's sovereignty.[35] Taking this contingent feature of current practice as one of its constitutive norms seems to be a clear case of giving undue authority to the status quo. However unintended, this argumentative move serves the ideological purpose of closing off—by conceptual fiat—substantive normative questions that ought to be open to serious debate

34 This claim should not be misunderstood as involving any optimistic assessment regarding the seriousness with which members of the international community take their commitment to protect human rights. From the point of view of identifying one of the enabling conditions of contemporary human rights practice, it is enough that they continue to offer at least lip service to that commitment. This is the minimally needed basis for the legitimacy (as well as the potential *power*) of the actions of other participants in human rights practice such as NGOs, UN human rights agencies, and so on.

35 At the beginning of his book, *The Idea,* Beitz, mentions that "it is not clear why a practice that aims to protect individual persons against various threats should assign responsibilities primarily to states rather than to other kinds of agents." (p. 2) I could not agree more. However, given his acceptance of the state-centric conception of human rights, this claim suggests that he may provide some justificatory answer to this question later in the book. But if so, I must confess that I have not been able to find it.

within the practice, namely, the nature and extent of human rights obligations held by non-state actors, the appropriate actions of members of the international community in light of new global threats to human rights,cand so on. In light of the international community's commitment to secure human rights worldwide, the only normatively plausible interpretation of the above mentioned function of human rights norms is an understanding of "violators" as whoever happens to be actual violators in each specific case and an understanding of "actions" as whichever available actions would be most effective for avoiding or remedying the violations at issue. It is hard to see how any other interpretation of human rights norms could avoid the objection that "the practice's norms are ill-suited to advance its aims," to use Beitz's own expression.

This critical reconstruction of contemporary human rights practice has revisionary consequences. However, they are quite different from those of other proposals that follow the practical approach. As was noted before, in the case of Rawls's account of human rights, his interpretation of the function of human rights norms as triggers for coercive intervention against a state's sovereignty lead to a revision of the list of human rights proper that bears little resemblance to the rights included in the Conventions and treaties that have been already signed by most countries. However, one may wonder whether my alternative proposal does not suffer from the opposite defect. By broadening the meaning of "intervention" beyond the well-defined limits of the state-centric conception, this interpretation may fail to offer any guidance at all in determining the set of human rights proper. As I will try to show in what follows, I think that this fear is unfounded.

The Dynamic Character of Human Rights Norms

Even in its broad interpretation, accepting the identity claim that human rights are essentially triggers for international action has substantive implications, for it imposes significant constraints on what can plausibly be claimed to be a human right. As Raz puts it, "international law is at fault when it recognizes as a human right something which, morally speaking, is not a right or not one whose violation might justify any kind of international action"[36] against the violator. Two important constraints follow from accepting the view that human rights are essentially a matter of concern for the international community. Human rights are not simply rights worthy of protection. They are those rights (1) whose protection can be meaningfully achieved by institutional means, and (2) whose actual or anticipated

36 Raz, "Human Rights," p. 329. I quote here only the first part of Raz's statement, with which I agree. However, his complete statement adds a qualification that restricts international action to actions against states. It reads: "International law is at fault when it recognizes as a human right something which, morally speaking, is not a right or not one whose violation might justify international action against a state, as well as when it fails to recognize the legitimacy of sovereignty-limiting measures when the violation of rights morally justifies them."

violation provides a (defeasible) reason for some type of action against the violator by the international community.

These constraints help avoiding the danger of over-inclusiveness that is likely to result from traditional approaches to human rights that do not include this kind of considerations (for example, those approaches that define human rights simply as moral rights that all human beings have in virtue of their humanity). Adding these constraints explains why the core human rights documents do not contain rights such as the right to be told the truth or not to be betrayed in personal relations. It is true that adding these constraints does not provide a criterion that singles out once and for all the definitive list of human rights proper. But in my opinion, this is not a weakness but rather a strength of this interpretation of the practical approach. For it highlights a crucial feature of human rights practice that any plausible conception of human rights has to be able to account for, namely, their essentially *dynamic* character.[37]

This important feature of human rights norms can be illustrated by paying attention to their internal complexity. Following the description we used before to characterize the list of human rights contained in the UDHR, we can say that human rights are norms to protect all human beings against standard threats to some of their most important interests by the most reliable institutional means available at any given time.[38] On the basis of this schematic definition, we can distill three core elements of human rights norms:

1. The fundamental interests that have the moral significance of grounding human rights ethat is. of grounding protection claims),
2. The standard threats against those interests .that is, the range of social, economic or political dangers and abuses that are likely to occur in a given social context), and

37 On the dynamic character of the content of human rights see Beitz, *The Idea,* pp, 31, 44; also A. Buchanan, *Human Rights, Legitimacy, and the Use of Force* (Oxford, 2010) pp. 57, 75. My exposition follows Buchanan's account of the consequences of taking the dynamic character of human rights serioussly, although it is not clear to me whether he would situate himself among those who defend a practical approach of the kind I am defending here.

38 In my view, the human interests that have the moral significance of grounding human rights are those whose satisfaction is needed for leading a dignified human life. I cannot address this issue in depth here, but I will just mention that all of the main human rights documents make reference to the notion of human dignity, whereas none of them mentions some of the alternative notions that are often referred to in philosophical accounts of human rights such as "minimal" or "urgent" interests or those whose satisfaction is needed for a minimally "decent" life, and so on. In fact, I agree with Beitz that the normative standards identified in the existing human rights documents far from minimal are actually quite demanding. Moreover, I think that the notion of "human dignity" contains an element of equal status and therefore its satisfaction is a comparative issue and not a matter of meeting some fixed threshold of minimal "decent" conditions.

3. The appropriate (institutional) means for their protection .that is, the range of national and international actions that can reliably prevent or remedy their violation)

It is true that in order to identify the human interests to which human rights norms refer a plausible justification is needed as to why those human interests in particular have the moral significance of grounding human rights, and this step indeed requires ordinary moral reasoning. However, in light of the empirical nature of the other two elements of human rights norms it is also clear that their content cannot be *solely* specified b determining the first element, namely, these permanent features that are shared by all human beings in virtue of their humanity. The (2) relevant standard threats as well as (3) the appropriate institutional means of protection against them are essential elements of the very *content* of human rights norms.[39] In fact, many of the rights specified in the existing human rights documents do not necessarily refer to the underlying interests shared by all human beings. As we mentioned before, some of the rights refer to the standard threats against those interests that can be expected in modern societies .for example, the right against arbitrary arrest or torture) or to specific institutional means for their protection .for example, the right to equal protection under the law or to free elections). However, since these two elements of human rights norms change over time and under varying social circumstances, the precise content of human rights norms is in need of ongoing legal and institutional specification and cannot be determined once and for all by ordinary moral reasoning alone in the way that philosophical accounts of natural rights have traditionally proceeded.[40]

Seen from this perspective, the main difference between the practical and the traditional approach is not that the former can dispense with the philosophical task

39 See Ibid., p. 86.

40 In light of their internal complexity and dynamic character, human rights norms are best interpreted as "unsaturated" placeholders, to use Habermas's expression. They are abstract norms essentially in need of ongoing legal and institutional specification according to the changes in social and historical circumstances. In *Between Facts and Norms,* Habermas defends this interpretation of the various bills of rights contained in national constitutions. See J. Habermas, *Between Facts and Norms*, trans. W. Rehg (Cambridge,1999) pp. 123–31. On the basis of what he calls a procedural paradigm of law, he claims that national constitutions are best understood as ongoing historical projects in need of specification and revision in light of changing social and historical circumstances. The same seems obviously true of human rights norms. As much as national constitutions are best understood as historical projects, human rights practice is an ongoing global political project. As social, institutional and historical conditions change, so do the relevant standard threats to human interests as well as the available institutional means to their protection and thus the specification of the *content* of human rights must change accordingly. Thus any account of human rights that does not pay attention to these essentially empirical and changeable components won't provide an account of human rights as the elements of contemporary human rights practice, but of some other kind of moral or natural rights.

of providing a plausible account of the first element ethat i., an account of which human interests have the moral significance of grounding human rights and why).[41] In fact, this task is not only a legitimate philosophical enterprise, but one that has practical significance, since it seems necessary for proper adjudication in cases of potential conflict among rights.[42] In my view the crucial difference between both approaches is that the practical approach acknowledges the essentially *dynamic* nature of human rights norms, and thus rejects as wrongheaded the static assumption behind the traditional project of trying to derive a definitive list of human rights from some fundamental value or principle that stands upon the basis of moral reasoning alone. For even if one assumes that the fundamental interests of human beings which have moral significance to ground human rights are universal and do not change, the other two components are contingent, change historically, and need to be adapted to new circumstances. The standard threats to important human interests as well as the most effective institutional arrangements available for their protection vary with the different social, political, economic and cultural circumstances in which human beings find themselves. However, all three elements are equally relevant for the task of determining the full *content* of human rights.[43]

From the practical perspective it is easy to understand why the standard threats as well as the most appropriate institutional arrangements for protection against them are essential components of human rights norms. For they address the crucial question of the counterpart *obligations* to those rights. By indicating the kinds of actions or omissions relevant to human rights protections they help answer the question of which actors have which obligations with regard to which rights. And this is a question that cannot be settled just by providing plausible justifications of the moral significance of the interests to be protected. What is required, in addition,sare plausible justifications of why some specific agents rather than others have the obligation to contribute to their protection, why some agents rather than others should bear the costs of their implementation, why it is not unreasonably

41 However, even if the need to accomplish this philosophical task is recognized, focusing on the distinctive roles that human rights norms play in contemporary human rights practice gives two significant advantages to the practical approach: (1) it can go a long way in clarifying very important aspects of that practice without having first to determine which of the possible ways of grounding human rights norms on different conceptions of human nature or human freedom is correct and (2) it can leave open the possibility that a plurality of such conceptions may be able to support the same human rights norms from within a variety of cultural context and traditions.

42 Since most human rights documents appeal to the concept of human dignity as the key consideration in order to determine among all possible human interests those that ground human rights, this makes reflection about what human dignity requires unavoidable in order to resolve conflicts among rights. For an interesting analysis of this crucial function of the notion of human dignity for legal adjudication see C. McCrudden, "Human Dignity and Judicial Interpretation of Human Rights," *European Journal of International Law,* 19/4 (2008): pp. 655–724.

43 See Buchanan, *Human Rightts*, p. 5.

burdensome for them to do so,cand so on. As Beitz convincingly argues, by focusing on the philosophical task of determining the fundamental interests that ground human rights (on the basis of some fundamental principle or value) traditional approaches tend to be too recipient-oriented and their account of human rights neglects the question of the proper allocation of the obligations that correspond to those rights. Indeed, the allocation of obligations is treated as a subsidiary issue that has no direct bearing on the content of human rights. However, it seems obvious that a practice that seeks to achieve the protection of human rights through institutional means and international action must involve considerations regarding (1) the proper allocation of human rights obligations from among those agents in a position to act and (2) the proper identification of the most effective institutional protections from among those available at any given time. A practice that can only achieve its goals by identifying appropriate agents and actions cannot view allocation issues as simply a subsidiary question. Whether a right is amenable to protection by institutional means, whether its protection could provide some intelligible reason for action by members of the international community, and whether some permissible form of international action could effectively protect it are *essential* considerations to determine whether or not a putative right is a human right proper. On this point I totally agree with Beitz. However, in my opinion he fails to appreciate all the implications of acknowledging the *dynamic* character of human rights.

If the proper allocation of human rights obligations essentially depends on the kind of actions and agents required for human rights protections and this in turn necessarily depends on the nature of the standard threats to be expected as well as on the most effective institutional arrangements for protection against those threats that are available in a given social context at a given historical time, then the historical and social dimension of *contingency* inherent in these two factors implies that *no specific allocation of human rights obligations can be taken as definitional of what human rights are*. If the intrinsically dynamic character of international human rights endorsed by the practical approach is correct, it follows that the appropriate answer to the question of which agents have which obligations cannot be determined in advance, since it is contingent on the nature of currently existing threats, the feasible institutional means to confront them, the agents who are in a position to implement those means,cand so on. Changes in social circumstances cause new threats to emerge and new institutions to be created and this can give rise to *new* rights that were not previously conceived.[44] These changes may in turn necessitate a new determination of which agent or agents and which institutional safeguards are best suited to provide the relevant protections. This suggests that, contrary to what is generally assumed, *adopting the practical approach is actually incompatible with taking the state-centric distribution of human rights obligations as an intrinsic feature of human rights*

44 See McCrudden, "Human Dignity," pp. 721ff; J. Habermas, "The Concept of Human Dignity and the Realistic Utopia of Human Rights," *Metaphilosophy,* 41/4 (2010): pp. 464–80; Buchanan, *Human Rights*, p. 57.

practice. Adhering to any particular allocation of human rights obligations without taking stock of the changes in standard threats to fundamental human interests or of the changes in the available institutional means that can reliably contribute to their protection would predictably undermine the ability of the practice to reach its goals. Thus, if participants in the practice take these goals seriously, if they accept that human rights are rights whose actual or anticipated violation is a defeasible reason for action against the violator by members of the international community, then there is no possible justification for the *a priori* restriction of possible "violators" to states and that of the appropriate "actions" to interventions against a state's sovereignty. The only norm suited to reach the practice's goals is one that interprets "violators" as whoever happens to be the actual violators in a given case and that interprets appropriate "actions" as those actions that would actually be effective for avoiding or remedying the violations at issue.

Still, I do not mean to deny that accepting such an unrestricted or pluralistic norm would require a revision of the current view of human rights obligations by the international community.[45] But, if my general argument is plausible, there are many ways to revise the state-centric allocation of human rights obligations that

45 I disagree with two elements of Beitz's own description of the current allocation of human rights obligations. According to Beitz's "two-level model of human rights," states have the primary responsibility to respect and protect the human rights of their own citizens (Beitz, *The Idea*, p. 108) This claim seems incorrect. According to the UN Charter and all human rights documents, the responsibility to *respect* the human rights of all persons is universal and thus binds everyone. But I do agree that states have the primary responsibility to *protect* and *promote* the human rights of their citizens. However, regarding the secondary responsibilities of the international community, Beitz's description seems to me weaker than what it is currently recognized. According to him, the actual or anticipated violation of human rights provides merely *pro tanto* reasons for outside agents to act, but this falls short of a strict obligation to protect from violations by third parties of the kind that states have *vis-a-vis* their own citizens. As Beitz puts it, "a human rights failure in one society will not *require* action by outside agents." (Ibid., p. 117) This is surely true for many violations of human rights. However, by signing the document of the 2005 World Summit, all members of the UN General Assembly have explicitly recognized their responsibility to protect all persons from violations committed by third parties in an analogous manner to the responsibility to protect that states have with regard to their own citizens—even though the scope is so far limited to just four specific cases of international criminal law (genocide, war crimes, ethnic cleansing and crimes against humanity). Although Beitz does not mention this development, I think that it provides direct support to his repeated claim that participants in human rights practice have, since its inception, contemplated some role for international action aimed at protecting human rights. In my view, this is not just a contingent, empirical claim that may turn out to be false. It is a conceptual claim. Since contemporary human rights practice originates in a commitment by members of the international community to secure the protection of human rights worldwide, this is the *point* of the practice and not just one of its contingent features. From this perspective, the explicit recognition of the responsibility to protect expressed in the 2005 World Summit Outcome document is just a further specification of the exact meaning and implications of

would nevertheless be recognizable continuations of current human rights practice to the extent that they are perfectly compatible with its core normative principles and its justifying goals. In fact, as I will briefly indicate in what follows, some recent developments of human rights practice already point in that direction.

A Pluralist Conception of Human Rights Obligations: the Principle of Universal Respect for the Human Rights of All Persons

When thinking about potential "violators" from the perspective of the alternative account defended here, the unrestricted interpretation of the meaning of human rights norms requires members of the international community to explicitly extend the circle of actors whose behavior is subject to international human rights norms beyond states to any non-state actors with the capacity to hamper the protection of human rights.[46] To some extent, this has already occurred in the domain of international criminal law, but it could be extended to other domains. This extension could be carried out in different ways, some of which are perfectly compatible with ascribing primary responsibility to states for the protection of the human rights of their own members. If, following what has become standard terminology, we distinguish between the duties to *respect*, *protect* and *fulfill* human rights,[47] it is clear that the obligation to "protect" human rights can have very different meanings. These different meanings depend on whether obligations are interpreted in the narrower sense of (merely) *respecting* human rights or in the more expansive sense of (actively) *fulfilling* human rights. Whereas in the second, more expansive sense it is indeed very plausible to claim that states bear the primary responsibility in providing the protections, entitlements and services necessary for *fulfilling* ethat i., promoting and enforcing) the human rights of their citizens, it does not seem at all plausible to claim that states are the only actors that bear primary responsibility for *respecting* the human rights of their citizens. The obligation of respecting the human rights of all persons in the sense of not contributing to their violation is a universal obligation and thus one that binds states just as much as non-state actors.

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the original commitment to protect human rights that enables and sustains human rights practice as we know it.

46 To use Pogge's terminology, what makes any actor's behavior subject to international human rights norms is specifically their capacity to undermine the *secure access* to the object of human rights. See Pogge, *World Poverty.*

47 This particular terminology was introduced by A. Eide, *The New International Economic Order and the Promotion of Human Rights. Report on the Right to Adequate Food as a Human Right*, UN Doc E/CN.4/Sub.2/1987/23. The conceptualization of the multiple obligations structure applicable to all human rights expressed in this tripartite division was originally proposed with a different wording by Shue in his 1980 edition of *Basic Rights*.

As far as global governance institutions such as the WTO, the IMF or the World Bank are concerned, the relevant difference between promoting and respecting human rights is the difference between *taking the fulfillment and enforcement of human rights as their own goal* (that is, becoming a human rights organization) and *accepting the obligation to ensure that the regulations they implement in the pursuit of their respective goals* (that is, trade liberalization, financial stability, economic growth, and so on.) *do not hamper the protection of human rights worldwide*. In light of this distinction, it seems clear that the question of whether or not these institutions ought to make the goal of actively promoting and enforcing human rights part of their legal mandate or whether this function ought to be left to states and human rights institutions, has no bearing on the quite different question of whether they are bound by international human rights law to *respect* human rights by making sure that the regulations they implement (in pursuit of their own specific goals) do not have an adverse impact on the protection of human rights. Whereas the former question is complex and its appropriate answer is therefore highly contested, the positive answer to the latter question seems hardly questionable from a normative point of view.[48] As many legal scholars argue, global governance institutions such as the WTO, the IMF or the World Bank could acknowledge their obligation to *respect* human rights by creating institutional mechanisms to ensure that the policies and regulations they enforce do not impair the enjoyment of human rights. They could discharge their obligation to exercise human rights *due diligence*, for example, by engaging in human rights impact assessments of their proposed policies and regulations before enforcing them.[49] Acknowledging the legal obligation to respect

48 For a comprehensive overview of the vast legal literature on this issue see Skogly, *The Human Rights Obligations* and M. Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law*, (Oxford, 2003).

49 The standard of due diligence has been recently recognized by the UN Human Rights Council as appropriate to discharge the responsibility to respect human rights by transnational corporations. In June 2008, the Council explicitly confirmed the responsibility of transnational corporations to respect human rights and requested the Special Representative of the Secretary-General on this issue, John Ruggie, to "elaborate further the scope and content" of that responsibility (see paragraph 4(b) of Resolution 8/7, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf). In his Report to the Council in April of 2009 this responsibility is interpreted as requiring "an ongoing process of human rights due diligence, whereby companies become aware of, prevent, and mitigate adverse human rights impacts." (available at http://www2.ohchr.org/english/issues/globalization/business/docs/A.HRC.8.5.pdf.) This process should include four elements: adopting a human rights policy, undertaking—and acting upon—a human rights impact assessment, integrating the human rights policy throughout the company, across all functions, and tracking human rights performance by monitoring and auditing processes to ensure continuous improvement. These four ways of operationalizing the standard of due diligence in the activities of MNCs seem easily applicable to international financial institutions. For an in depth analysis of the possibilities and difficulties in institutionalizing human rights impact assessments of trade agreements

human rights in this strict sense falls well short of an obligation to actively *protect* and promote human rights of the kind that states and human rights agencies have and it is perfectly compatible with maintaining the latter.[50]

From a normative point of view, applying the due diligence standard to global governance institutions is clearly the minimum requirement compatible with maintaining a credible commitment from the international community to ensuring the protection of human rights worldwide. In fact, many legal scholars argue that global institutions already have this legal obligation under international law, since their members are legally bound by the UN Charter to respect the human rights of all persons.[51] From a viewpoint of somber realism, there is no denying the fact that if members of the international community were to take legal steps in that direction it would indeed be an extraordinary achievement. However, the utopian character of this revision pales in comparison to the revisions that the unrestricted interpretation of human rights norms defended here would involve regarding the range of appropriate actions that could be expected or required from members of the international community. Here is where the revisionary potential of this reconstruction of human rights practice really shows its normative teeth.

A Structural Approach to Human Rights Protections: the Principle of International Cooperation to Protect Human Rights

By freely undertaking a commitment to ensure the protection of human rights worldwide, members of the international community have imposed on themselves an obligation that goes beyond the universal "duty to respect" that actors can fully discharge simply by exercising human rights due diligence, that is, by making sure that their actions do not contribute to the violation of human rights. They have undertaken a "responsibility to protect" against human rights violations perpetrated by third parties, notably (but not exclusively) states. In fact, the UN General Assembly explicitly recognized this responsibility in the

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in the WTO see S. Walker, *The Future of Human Rights Impact Assessments of Trade Agreements* (Oxford, 2009), and Zagel, "Human Rights Accountability." For an analogous analysis regarding the IMF and the World Bank see Darrow, *Between Light*.

50 I offer an overview of various institutional proposals for legally entrenching the obligation to respect human rights in international financial institutions that are currently under discussion among legal scholars in C. Lafont, "Accountability and Global Governance: Challenging the state-centric Conception of Human Rights," *Ethics & Global Politics*, 3/3 (2010): pp. 193–215.

51 For an interesting example of this line of legal argument that focuses on the human right to food see S. Narula, "The Right to Food: Holding Global Actors Accountable Under International Law," *Colombia Journal of Transnational Law*, 44/3 (2006): pp. 692–800. Although the author recognizes that globalization requires challenging the state-centric ascription of human rights obligations, her argumentative strategy consists in deriving the human rights obligations of global governance institutions such as the IMF or the World Bank from the obligations of their member states.

outcome document of the 2005 World Summit.[52] This document only concerns the international community's "responsibility to protect" against four types of violations of international criminal law (genocide, war crimes, ethnic cleansing and crimes against humanity) and it therefore only makes reference to the types of peaceful and coercive actions that the international community may justifiably take with regard to these specific types of violations. Nevertheless, this is an important first step in the ongoing process of legally specifying the precise content and scope of the international community's "responsibility to protect" human rights. This process is far from accomplished and is therefore still open to a diversity of possible interpretations among the different participants of contemporary human rights practice. However, as previously argued, the practice's own aims rule out the possibility that the future legal specification of this responsibility could amount to anything less than an acknowledgment that the actual or anticipated violation of human rights is a defeasible reason for some type of preventive or remedial action by members of the international community. For denying this would be tantamount to withdrawing the commitment to secure the protection of human rights worldwide on which human rights practice is based. Thus it seems that the logical extension of the "responsibility to protect" to other domains of international human rights law would require a specification of (1) the kinds of human rights violations or deprivations that are (defeasible) triggers for action by the international community and (2) the kinds of actions that can reliably prevent or remedy those types of violations.

Although this process is still in its early stages, some legal scholars cite the UN General Assembly Declaration on the Right to Development from 1986 as evidence that human rights practice is evolving in that direction. Among the many salient features of this human rights declaration, the most interesting feature for present purposes is that it involves adopting a *structural* approach to human rights protections.[53] The need to adopt this approach is strongly suggested by the affirmation (in Article 6.2) of the indivisibility and interdependence of all human rights (civil, political, economic, social and cultural rights)—something that has become the UN official doctrine ever since. According to the relatively weak interpretation provided by the Office of the High Commissioner for Human Rights, this doctrine states that "the improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others." To the extent that this is so, states must adopt a structural approach to human rights protections in order to successfully discharge their human rights obligations. In addition, the Declaration establishes a direct link between the right

52 On 15 September 2005, UN General Assembly Member States embraced the "Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity." See paragraph 139 of the Outcome Document of the 2005 World Summit: http://daccess-ddsny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf? OpenElement.

53 See Salomon, *Global Responsibility*, pp. 50–64.

to development and the existence of an international economic order in which all human rights can be fully realized.

On this basis, the structural approach to human rights protections is not limited to the specification of actions that states must take in order to discharge their primary responsibility to protect the human rights of their own people. The structural approach is also taken in order to specify the kinds of actions that members of the international community must undertake in order to discharge their own responsibility towards human rights protections which, in this Declaration, is designated as a "duty to co-operate" in order to ensure development and eliminate obstacles to development.[54] As is stated at the beginning of the Declaration, "efforts at the international level to promote and protect human rights should be accompanied by efforts to establish a new international economic order." Although the Declaration clearly falls short of specifying more precisely the kinds of actions that would be required to do so, it does indicate that the "duty to co-operate" includes direct assistance from developed towards developing countries in Article 4.2, which states that

> sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, *effective international co-operation is essential in providing these countries with appropriate means* and facilities to foster their comprehensive development.[55]

From this perspective, the UN Millennium Development Goals[56] can be seen as an attempt by the international community to specify the content of the "duty to co-operate" recognized in the Declaration to the Right to Development by indicating specific steps, actions and measures that must be taken in order to discharge the self-imposed obligation to secure the protection of human rights worldwide.[57]

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54 For a very interesting collection of analyses on how to integrate the human rights and development agendas see P. Alston and M. Robinson (eds), *Human Rights and Development. Towards Mutual Reinforcement* (Oxford, 2005).

55 Article 7 even suggests a specific reallocation of resources as one of the appropriate ways to reach that end, namely to use "the resources released by effective disarmament measures … for comprehensive development, in particular that of the developing countries."

56 See *UN Millennium Declaration*. General Assembly Resolution 55/2, 2000. www.un.org/millennium/declaration/ares552e.htm. For a critical analysis of the diluted scope of some of these goals compared to prior more ambitious commitments of the international community see T. Pogge, *Politics as Usual: What Lies behind the Pro-Poor Rhetoric* (Cambridge, 2010), pp. 57–74.

57 As some legal scholars argue, the duties specified in the Declaration to the Right to Development give specific content to the already existing legal obligation "to act jointly and separately for the realization of human rights" and "[for] economic and social progress and development" as stipulated in the UN Charter at Articles 55 and 56. On this point see S. Marks Marks, "Human Rights and Development," in S. Joseph and A. McBeth

At first sight, this may seem to amount to nothing more than a "duty of assistance" from rich to poor states and thus as perfectly compatible with a state-centric conception of human rights. However, a careful reading of the content that the Declaration gives to the "duty to co-operate" shows that this is not the case. For, in addition to providing assistance to developing countries, members of the international community are required to establish a new international economic order "based on sovereign equality, interdependence, mutual interest and co-operation among all states" (Article 3.3)

Needless to say, the seriousness of members of the international community in discharging any of the self-imposed obligations expressed in this Declaration is questionable, to put it mildly. But, unfortunately, this is true of the seriousness of members with regard to discharging the human rights obligations identified in any of the Declarations. The question that matters in our context, though, is not how realistic it is to expect that members of the international community will discharge any of their obligations, but rather what the most plausible reconstruction of the norms underlying contemporary human rights practice is. From this normative perspective, it seems to me that a state-centric conception of human rights has a hard time accounting for these recent developments of human rights practice. In fact, none of the accounts offered by defenders of the practical approach so far addresses them at all. But it is also hard to see how they could do so. If, according to the state-centric conception, the point of human rights practice is to regulate the behavior of states towards their own people and to impose limits to internal sovereignty when states fail to comply with human rights norms then it is hard to see how the Declaration of the Right to Development can be seen by its participants as a meaningful way to continue that very same practice. From the standpoint of a practice that distinctively aims at regulating the behavior of states towards their own nationals what possible rationale endogenous to that practice could ever explain an evolution in the direction of adding norms that impose a "duty to cooperate" on the international community to establish a new international economic order in which all states can participate as equals?

Moreover, it seems that neither the identified threats to the human right to development nor the institutional arrangements required for its protection fit the mold of the state-centric framework. For according to the Declaration, the major threat to the human right to development is not the behavior of any individual state towards its own people but rather the global economic order. Consequently, the protection of the righttto development requires some institutional arrangements that (1) cannot be implemented by individual states but instead only through cooperation among all members of the international community, (2) do not concern the behavior of states towards their members but rather towards all persons, and (3) require a kind of international action that is not adequately characterized as external

(eds), *Research Handbook on International Human Rights Law*, (Northampton, 2010), pp. 167–95.

intervention against the sovereignty of any state, but rather as cooperation among states to allow all of them to participate as equals in the global economic order.

Of course, defenders of the state-centric view may deny that the right to development is a human right. In fact, the worry of rights inflation is widely shared among human rights scholars, so perhaps there are good normative reasons to exclude this right from the list. However, this ought to be a debate internal to human rights practice based on substantive normative considerations about the merits of the case, like all other cases of controversial human rights. It should not be excluded simply because it is an anomaly within the state-centric conception of human rights. This seems especially important just in case it turns out that the current global economic order is indeed a major threat to the project of securing human rights worldwide and, therefore, that the statecentric allocation of human rights obligations is a major obstacle to the project of securing the protection of human rights in an increasingly globalized world.

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Chapter 4
Are Human Rights Moral Rights?

Andreas Niederberger

Philosophical Human Rights Theories and the Existing Human Rights Regime

Most philosophical theories of human rights assume that humanity has hugely progressed with the increasing political and legal recognition of human rights since 1945. But they also hold that the institutional, legal, and procedural forms, which attempt to secure human rights, have fallen short of what is normatively desirable or necessary. World hunger, genocides under the eyes of the world public, the return of torture in the "war on terror" or lack of measures against dictators who bombard their own populations are examples of situations in which human rights are violated and the existing human rights regime seems to fail or need expansion. This has occurred with regard to the unequivocal interpretation of cases as human rights violations (as for instance when the UN-Security Council developed the terminological difference between "genocide" and "acts of genocide," while the Hutu in Rwanda were committing genocide against the Tutsi),[1] with regard to available procedures, in which one can address human rights violations and decide on reactions against them, or with regard to ascriptions of responsibilities to act or to initiate measures, which would prevent or compensate violations.

In light of these major deficiencies of the existing human rights regime, philosophical theories of human rights cannot and do not want to limit themselves to reconstructing politically and legally established human rights or explain why these human rights are rightly in force.[2] Instead, they call for a foundation of human rights or structures implementing them, which, on the one hand, establish that human rights are put into effect for good or probably even necessary reasons. But, on the other hand, this foundation or these structures should also guarantee that human rights apply or are extended to the situations mentioned previously, so

1 Cf. on the strategic use of the difference between "genocide" and "acts of genocide" for justifying nonintervention in Rwanda, Samantha Power, *A Problem from Hell. America and the Age of Genocide* (New York, 2002), pp. 358–64.

2 Cf. for instance: "Even if the list of human rights in current international law is authoritative, which I see no reason to accept, it does not give us all that we need. […] It is a bad bargain to purchase autonomy for international law at the cost of a severe loss of explanatory power of action-guiding weight." James Griffin, "Human Rights and the Autonomy of International Law," in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford, 2010), pp. 339–55, here: p. 340.

that human rights themselves have motivational force or ascribe responsibilities, which transcend given political and legal structures. [3]

Philosophical theories of human rights relate to currently existing political and legal institutions, which have been established during the last 70 years. But they also transcend these institutions because they aim at detecting a basis for human rights, which would allow for the scrutinizing of given institutions in light of their function for human rights.[4] According to this view, human rights cannot originate or derive their validity from contingent historical or political developments, which have led to the "concession" of certain rights.[5] They are, in contrast, more basic than any factual political structure and they authorize claims even against states or other political institutions and organizations if they violate human rights or are unable to protect or guarantee them adequately. This view of human rights leads to essential differences between the political and legal human rights regime and the respective human rights theories in international law and political science on the one hand, and philosophical human rights theories on the other hand.[6] Political and legal theories often conceive of human rights within the narrow perspective of state obligations and the dependency of international organizations on states—and this also means within the horizon of the key role of statehood for human coexistence and for the international order, which is constructed on the basis of the *de facto* importance of states as the primary subjects of international law.[7] Philosophical theories differ from these approaches in underlining the limits of state rights.[8] In this line of thought, philosophical theories turn into theories of

3 Cf. Thomas W. Pogge, "Severe Poverty as a Violation of Negative Duties," *Ethics & International Affairs* 19 (2005), pp. 55–83, here: p. 78–83.

4 On this link between the currently existing political and legal entrenchment of human rights and the role of human rights in criticizing institutions and their limits see also the contribution of Cristina Lafont to this volume.

5 For a description of the *Universal Declaration of Human Rights* and its development based on a reflection on how "to implement any of these [philosophical] rights" and not as a *sui generis* legal and political declaration see Paul Gordon Lauren, *The Evolution of International Human Rights. Visions Seen* (Philadelphia, 2011 [3rd ed.]), pp. 207–19.

6 Cf. on a related description of differences, Marie-Bénédicte Dembour, "What are Human Rights? Four Schools of Thought," *Human Rights Quarterly* 32 (2010), pp. 1–20.

7 Cf., for instance, Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford, 2005), pp. 107–34.

8 The whole recent philosophical debate on human rights is closely related to the fundamental transformations of the state-based world order and its normative theory since the 1990s. Cf. for instance Matthias Lutz-Bachmann, "'Weltstaatlichkeit' und 'Menschenrechte' nach dem Ende des überlieferten 'Nationalstaats'," in Hauke Brunkhorst, Wolfgang R. Köhler and Matthias Lutz-Bachmann (eds), *Recht auf Menschenrechte. Menschenrechte, Demokratie und internationale Politik* (Frankfurt, 1999), pp. 199–215. For Saskia Sassen the growing importance of human rights since the end of the Cold War is, on the one hand, an expression of the changing role of states, but, on the other hand, an important tool in the redesigning of the international system and the future role of

legitimacy, which permit human rights to investigate the legitimate existence of the political and legal order in general. But they also widen the scope of human rights to include other collective agents such as international organizations or non-governmental organizations as duty holders with regard to human rights and their possible violators. And, finally, they point to individual responsibility, which the existence of states or other political institutions might not discharge.

Moral Theories of Human Rights and the Problem of Revisionism

Despite these abstract similarities among philosophical theories of human rights concerning the double purpose of, first, *reconstructing existing guarantees and mechanisms of human rights protection* and, second, *developing a new or extended foundation for human rights*, there are also major differences between the approaches. One important contrast results from different weights attributed to the two purposes: A first set of approaches searches for the strongest possible justification of human rights and, thus, develops a *moral* foundation for them. Such a foundation is supposed to show that human rights are valid universally and unconditionally, which means that they belong to all human beings everywhere and anytime and that they cannot be subject to limitations by unfavorable political, legal or social conditions *in principle*. These approaches search for such a "moral" foundation, because they assume that only such a foundation will link human rights to humanity as such. They object that political, legal or social theories of human rights make these rights depend ultimately on functional requirements for politics, law and society or on specific historic constellations. "Morality" in the "moral foundation" is, thus, understood to highlight normative duties and claims by and between human beings on the most basic level. Even though it might be true that these duties and claims can only be realized in political structures, this realization is not itself a condition for their validity as duties and claims.[9] One should rather understand that human rights must be realized as legal rights and securities or similar entitlements within societies or states.[10] This understanding

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states (which is why some states or state institutions also gain new weight)—see Saskia Sassen, "The Places and Spaces of the Global: An Expanded Analytic Terrain," in David Held and Anthony McGrew (eds), *Globalization Theory. Approaches and Controversies* (Cambridge, 2007), pp. 79–105, here: 96–7.

9 Cf. on such an argument Wolfgang Köhler, "Das Recht auf Menschenrechte," in Hauke Brunkhorst, Wolfgang R. Köhler, Matthias Lutz-Bachmann (eds), *Recht auf Menschenrechte. Menschenrechte, Demokratie und internationale Politik*, pp. 106–24.

10 Allen Buchan argues that human rights are rather "constraints on institutional arrangements" than "prescriptions for institutional design" giving societies a certain degree of discretion on how to fulfill human rights (which obviously assumes that there is already some kind of legal and political order in place). Cf. Allen Buchanan, *Justice, Legitimacy, and Self-Determination. Moral Foundations for International Order* (Oxford, 2004), pp. 125–7. Another argumentation for a close link between human rights and political institutions can

has the consequence that human rights can entail additional duties beyond the primary content of the obligations and claims: duties to build and maintain human rights protecting institutions. According to such an argument, the right of a person not to be tortured not only implies the duty not to torture this person, but it also entails the duty to prevent third persons from torturing her or to build a police force or a justice system able to prevent third persons from torturing her.

Such an interpretation of human rights as morally founded duties and claims that are directed towards primary interactions between individuals and the building of institutions and orders, can often be found in theories which conceive of human rights as *moral rights*—and this means as more than just *particularly well justified moral claims*.[11] Henry Shue, for instance, in his important book *Basic Rights* defines moral rights in this way:

> A moral right provides (1) the rational basis for a justified demand (2) that the actual enjoyment of a substance be (3) socially guaranteed against standard threats.[12]

According to this definition, moral rights have three dimensions: First, they rely on a moral justification.[13] Second, they aim at effectively realizing the good, right or "interest" in question.[14] And third, they cannot be mere entitlements, but must be rights guaranteed by social structures or institutions, through which rights holders can with relative certainty expect that their interests will be realized. Thus, they do not just entitle someone to raise a claim to the fulfillment of the interest or state in question, they also secure that the rights holder can really enjoy the interest. On the other hand, they authorize the coercion of second or third persons

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be found in Georg Lohmann, "Zur moralischen, juridischen und politischen Dimension der Menschenrechte," in Hans Jörg Sandkühler (ed.), *Recht und Moral* (Hamburg 2010), pp. 135–50.

11 In this chapter I will only focus on theories, which conceive of human rights as moral rights and not on other theories, which give no particular weight to the "rights"-element in human rights. On such a view of human rights, which often equates rights with interests, cf., for instance, Thomas W. Pogge, "How Should Human Rights be Conceived?," in Thomas W. Pogge, *World Poverty and Human Rights* (Cambridge, 2002), pp. 52–70.

12 Henry Shue, *Basic Rights. Subsistence, Affluence, and US Foreign Policy* (Princeton, 1996), p. 13.

13 Cf. on this also the further explanation of this point by Thomas W. Pogge, "Human Rights and Human Responsibilities," in Andrew Kuper (ed.), *Global Responsibilities. Who Must Deliver on Human Rights?* (New York, 2005), pp. 3–35, here: p. 10.

14 In this context, Shue notes that human rights are not rights for the sake of rights, but claims that a good or a state is really achieved: "A right is not a right to enjoy a right—it is a right to enjoy something else, like food or liberty. We do sometimes speak simply of someone's 'enjoying a right,' but I take this to be an elliptical way of saying that the person is enjoying something or other, which is the substance of a right, and, probably, enjoying it *as* a right." Henry Shue, *Basic Rights. Subsistence, Affluence, and US Foreign Policy*, p. 15.

into fulfilling or not violating the claims. Moral rights are claims to institutional or social structures that secure the interests in question without the need of rights holders to rely on the benevolence of others.[15] Thus, such a theory of human rights as moral rights confers a double entitlement: an entitlement to some good *and* an entitlement to a structure guaranteeing that this good is in fact provided.

It would be difficult to fulfill the second entitlement if the first entitlement had to be fulfilled under any circumstances because it is difficult to conceive of institutions or social conditions that could prevent possible cases of rights violations across-the-board.[16] Even for the relatively uncomplicated right not to be killed, an institution or structure could not implement a "police" that could ensure no murderous act for any situation imaginable. Shue, therefore, limits the second entitlement to generally discernible threat scenarios, for which there is an obligation to provide for safeguards.

The aforementioned approaches appeal to morality in order to reject the idea of limiting human rights in the event that politics or society require such limits to function or to be maintained. The moral character of human rights excludes referring to such functional conditions that result in relativizing their application. The moral foundation seeks a grounding of human rights which is supposed to accomplish three things. It should, *first*, single out the necessary basis for legitimizing the existence of political order. Human rights are supposed to explain, why and under which conditions it is reasonable for persons to enter a common social or political structure, which necessarily provides some people or institutions with considerable power.[17] This also implies that if an order is no longer able

15 Joel Feinberg presented the now classic argument against the option that rights are reduced to benevolence in his article "The Nature and Value of Rights," *The Journal of Value Inquiry,* 4 (1970): pp. 243–60.

16 It might be possible to conceive of institutions or social conditions that provide legal remedies for preceding rights violations in (almost) all cases. The problem of such institutions and conditions with regard to human rights violations is that remedies will often not be able to restitute the life or the physical or psychological integrity lost due to human rights violations.

17 Different theories attribute different weights to human rights (or corresponding "interests" or claims) in the legitimation of political order(s): For the "weakest" positions human rights are a necessary but not sufficient condition for the legitimacy of a political order. No order could be legitimate if it violates human rights, but political orders are not created and maintained just because they do not violate human rights. "Stronger" positions consider human rights to be necessary and sufficient conditions for the legitimacy of political order (sometimes at least under specific circumstances, like the absence of any political order or the impossibility of achieving a democratic or more just political system). Either these positions follow Kant (cf. note 29) in viewing human rights as principally dependent on institutionalization such that (absent any public order) a public political order must be created to establish legal human rights. Or they conceive of human rights as entitlements to (basic) justice and, therefore, require a basic institutional structure of society, which will provide everybody with the goods, options, and services in question. These positions

to secure the conditions indicated before, persons no longer have a (rational) reason to accept the respective order and can seek an alternative guarantee of the conditions or their basic claims.[18] However, the moral theory of human rights not only reminds us of the foundation of the political order and eventual constitutive preconditions for it. *Secondly*, it also stresses that it is admissible and necessary to arrange for guarantees of human rights within the borders of a single state, and also in structures and organizations that transcend it. Such guarantees can consist in constitutional courts, which provide justices with possibilities of vetoing even decisions which were taken in perfect democratic procedures, if the decisions violate moral rights. But similar discretionary powers can also exist in other agents, such as the executive or legislative branches of government.[19] These types of institutions are supposed to ensure that the orders in question will satisfy their most fundamental and necessary conditions of legitimacy, even when confronted with new threats, the shortage of resources or new opportunities for action.[20]

These kinds of philosophical theories of human rights aim at detecting the human rights foundation and conditions of maintenance of legitimate government. Since this is the aim, they are often closely related to liberal or libertarian theories of justice or more generally of legitimacy, which view themselves as explanations of normative individualism. But besides this aim, some moral theories of human rights also pursue another goal, which is meant to change the perspective on politics in general. They want to argue, *third*, that with regard to the most basic moral requirements, responsibility cannot be delegated. If we are dealing with *moral* duties and claims, each and everyone carries the responsibility to make sure that these duties are exercised and the entitlements fulfilled independent of procedures, institutions or orders with the specific tasks of guaranteeing their exercise and fulfillment.[21] If governments or international organizations fail to

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might not consider human rights protection or guarantee to be a sufficient condition for the legitimacy of a political order, if the option of a more democratic or just state exists.

18 Cf. in this sense the justification of a military government, if there is no state on a given territory or if an existing state is unable to guarantee human rights, in Allen Buchanan, *Justice, Legitimacy, and Self-Determination.*, pp. 235–9.

19 Cf. on a theory of judicial review by legislative bodies Richard Bellamy, *Political Constitutionalism. A Republican Defence of the Constitutionality of Democracy* (Cambridge, 2007).

20 Such an idea of the function of human rights in a system of judicial review is at work in much of the literature on global or transnational constitutionalism. Cf., for instance, Stephen Gardbaum, "Human Rights and International Constitutionalism," in Jeffrey L. Dunoff, Joel P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge, 2009), pp. 233–57 and Thomas Kleinlein, *Konstitutionalisierung im Völkerrecht. Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (Berlin, 2012). Cf. also the reflections on the dynamic character of human rights in Cristina Lafont's chapter in this book.

21 James Griffin, moreover, lists four types of cases in which it would be generally wrong or "premature to move from a moral to a legal human right": first, cases in which the

prevent genocide or to eradicate hunger, there is moral guilt and this also means the obligation to act lies with all persons and not (just) with governments and international organizations.[22] According to this approach, human rights theory has the purpose of ascribing responsibility and to counter inaction in the face of severe human rights violations.

All moral human rights theories are confronted with the big challenge to identify such a moral foundation and to give a convincing account of it.[23] This challenge is particularly large, if the theories pursue the three aims, previously described, within an approach which understands human rights as moral rights.[24] Therefore, one is aiming at a foundation of human rights which generally (and not only in cases where the agent is directly affected) empowers agents to act in order to protect or enforce human rights, be it directly or by way of establishing powerful institutions, even if these actions have the consequence that important interests of third parties are also affected.[25] If every single person has the duty to prevent genocide, this cannot also mean that it is necessary to wait for an authorization of the Security Council before one is allowed to intervene in a given situation. The Security Council could fail in its moral duties, which means that those who detect this failure are authorized or even required to intervene themselves. If everybody has the duty not to torture and to prevent torture, then one cannot also have the duty to fund a torturing police or secret service with taxes—even if this has the consequence that the police will completely stop operating.[26] And theories which consider the absence of hunger or the availability of means for one's own subsistence as human rights, often and consequently state that as long as some human beings still suffer from hunger, everybody is obliged to give up his or her

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content of a right is still not fully clear; second, cases where there are "competing claims on public funds"; third, cases where law would be too intrusive; and fourth, cases where other than legal institutions are better at implementing or enforcing rights. Cf. Griffin, "Human Rights and the Autonomy of International Law," pp. 354–5.

22 Cf. on this issue the controversy between Peter Singer and Andrew Kuper in Andrew Kuper (ed.), *Global Responsibilities. Who Must Deliver on Human Rights?* (New York, 2005), pp. 155–81.

23 It is noticeable in this context that many moral human rights theories describe the desired properties of the moral foundation and assert that such a foundation can be found—but in many cases they do not argue for any specific foundation.

24 If the point is "just" to argue for fundamental entitlements without justification for specific duties, responsibilities or empowerments to coerce others, then the burden of proof is certainly less demanding. The major part of this justification is then shifted to a "discourse of application" or into "non-ideal" theory.

25 This is one implication of Shue's "social guarantee" entailed by moral rights.

26 Cf. the example of the Arab spring in Egypt, where protests against a human rights violating regime temporarily led to a situation where the police completely disappeared from the public.

wealth or is even authorized to take away the wealth of others in order to reach the non-hunger threshold globally.[27]

Few people seriously deny that there is a globally shared or at least potentially shared core of moral convictions. Convergences in the most fundamental moral principles are quite strong, especially with regard to principles concerning the handling of conflicts about the application of moral principles.[28] But still, moral theories of human rights face two systematic and ethical difficulties: *First*, the concept of "moral rights," as such, is difficult to understand if it refers, as Shue demands, to particularly well-justified entitlements as well as to claims to the existence of procedures, institutions or social conditions. Such institutions or conditions necessarily—as Kant already in his *Doctrine of Right* very well shows with the reasons for and implications of leaving the state of private law for the state of public law[29]—require that the guiding reason for the agency of institutions and citizens is no longer morality, but rather public law or the "social conditions." This requirement might itself depend on the precondition that we only live in a legitimate legal system or society if it observes human rights. But conversely there can be no legitimate or human rights protecting action *without conformity* to a public order. If this is true, the conditions for the existence and maintenance of a public order must necessarily be taken into consideration, especially when morally motivated actions run the risk of being illegitimate or at least not legitimate.[30]

This is clear in Shue's argumentation: If there is a moral right to subsistence, the requirements for this right are only fulfilled if all people have the means for their subsistence (this means if the second condition is fulfilled: the "actual enjoyment of a substance") and if everybody can at least be sure that other persons will not prevent the use of these means (this means if the third condition is fulfilled: there are social guarantees protecting the right against standard threats).[31] With reference to Joel Feinberg's analysis of the status of rights holders, Shue points out that the third condition is not fulfilled in a philanthropic society where the wealthy typically and altruistically help persons in need. Rather, having a right means being able to claim it independently of the motivations of addressees and possibly even

27 Cf. most famously Peter Singer, "The Singer Solution to World Poverty," *The New York Times Magazine* Sep. 5, 1999, pp. 60–63.

28 Or to say it differently: I am not interested in the problem of moral relativism in this article. Cf. for a strong criticism of the idea of a shared moral core Mukua Matau, "Savages, Victims, and Saviors: The Metaphor of Human Rights," *Harvard International Law Journal* 42 (2001), pp. 201–45.

29 Cf. Immanuel Kant, *The Metaphysics of Morals* (Cambridge, 1996), pp. 84–6 (Doctrine of Right, §§ 41–2).

30 Cf. on this argument also Seyla Benhabib, "Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty," *American Political Science Review* 103 (2009), pp. 691–704.

31 Another question left open at this point is how to deal with "positive" rights, that is, rights, which not only require not to do certain things, but which, in contrast, require doing certain things.

against them and their motivations. This excludes the position that moral rights could legitimate actions without the consent of the rights' holder.[32] And because of this, there is a primary duty to enter into a common political and legal structure. Thus, it is difficult to affirm that there could be a form of empowerment to prevent genocide even without the authorization of the Security Council. Either there is a right to be protected against genocide—and this means there are structures and procedures protecting those affected from situations of standard threats—or there are morally motivated agents protecting people from others. In the second case we are not dealing with rights, because those protected cannot claim their right independently of those protecting them. What could it mean to say in this case that those protecting others act on the basis of "moral rights"? At most one could say that they act on the basis of well justified moral entitlements.[33]

In addition, the concept of moral rights raises the question, whether we can give a moral justification of claims and entitlements, which would not depend on intersubjective procedures and would, thus, already presuppose that the preconditions for such a procedure are fulfilled. This leaves one with two options: Either one would have to say that the intersubjective justification procedure can only "start" if basic human rights are already guaranteed. In this case, human rights are more fundamental than any such justification procedure (which implies that we need a different kind of justification for human rights). Or the preconditions for the procedure set limits to the securing and enforcement of human rights at least where the interests and realms of agency of those third parties who do not consent to the moral validity of the human rights in question are concerned. In any case, one must analyze if the aims of philosophical theories of human rights do not require one to reject certain procedural accounts of ethics—only because they would have the consequence of prohibiting the pursuit of some of the aims of the human rights theory.[34]

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32 Cf. in this respect the important difference between interest and will or choice theories of rights, for instance, in William A. Edmundson, *An Introduction to Rights* (Cambridge, 2012), pp. 96–107.

33 There is, thus, a crucial difference between acting on the basis of a right and acting on the basis of a moral entitlement: If I am acting on the basis of another's right, it is ultimately not important what I think about the moral justification of this right. The mere fact that the other has a right, is a sufficient reason for me to not violate it or to fulfill some corresponding duty—and this not because I acknowledge the right in any direct or indirect way, but because having a right means being in a relationship of "external liberties," where I can coerce the other into fulfilling the duty, even if she does not think she should fulfill it. Acting on the basis of moral entitlements, in contrast, fully depends on the acknowledgment of the entitlement and the moral motivation to act accordingly.

34 These questions are obviously crucial for the justification and role of human rights in theories following Jürgen Habermas' discourse ethical political philosophy and philosophy of law. For Habermas' most recent position, cf. his "The Concept of Human Dignity and the Realistic Utopia of Human Rights," *Metaphilosophy* 41 (2010), pp. 464–80. For related approaches cf., among others, Rainer Forst, "Die Rechtfertigung der Menschenrechte

But even if one succeeded in developing a non-contradictory concept of moral rights and in justifying a series of human rights which would not depend on any further procedures or political and legal structures to be valid any more, such a kind of human rights theory has a second implication, which needs to be clarified—and which in my view is an important reason why one should not consider it to be a convincing theory of *human rights*. Such theories are revisionist in the sense that they are unable to explain and justify all (or at least most of) the claims as human rights, which the current legal and political human rights regime establishes as human rights.[35] One could get the impression that philosophical theories of human rights would like to "re-invent" human rights (and some even suspect that many philosophers assume that human rights are "philosophical rights") and that this has the consequence that these theories claim validity for fewer human rights than the world already grants. The human rights declarations and covenants, which have been issued and agreed upon since 1945 are the basis of current human rights policies, of decisions and advice of courts and human rights institutions as well as of many political arguments. They contain not only the rights not to be killed and not to be tortured and entitlements to free speech and free association—this means the classical liberties, which were at the center of the early modern revolutions, where they were sometimes seen as "natural rights"[36]—but also many other rights. In addition, the manifold human rights covenants include *more specific versions* of the above-mentioned rights. And, finally, they include *rights, which are not in any evident way related to a moral foundation*, and they comprise *requirements for procedures and structures implementing the rights*. The covenants, for instance, not only contain a general right to education, but the claims to free access to institutions of primary education and to merit-based access to secondary and academic education. And there are entitlements to certain working conditions (including the right to paid leave), rights to the protection of the family (including

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und das grundlegende Recht auf Rechtfertigung. Eine reflexive Argumentation," in id., *Kritik der Rechtfertigungsverhältnisse. Perspektiven einer kritischen Theorie der Politik* (Berlin, 2011), pp. 53–92 and Klaus Günther, "Liberale und diskurstheoretische Deutungen der Menschenrechte," in Winfried Brugger, Ulfried Neumann, Stephan Kirste (eds), *Rechtsphilosophie im 21. Jahrhundert* (Frankfurt/Main, 2008), pp. 338–59.

35 Cf. on this problematic difference between human rights in international law and human rights in philosophical theories also Charles R. Beitz, *The Idea of Human Rights* (Oxford, 2009), pp. 102–6; James W. Nickel, *Making Sense of Human Rights* (Malden, 2007), pp. 9–21; Joseph Raz, "Human Rights Without Foundations," in: Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford, 2010), pp. 321–37.

36 Cf. on the discontinuity between the early modern claims of rights of man and the twentieth century human rights Stefan-Ludwig Hoffmann (ed.), *Moralpolitik. Geschichte der Menschenrechte im 20. Jahrhundert* (Göttingen, 2010); Akira Iriye, Petra Goedde and William I. Hitchcock (eds), *The Human Rights Revolution. An International History* (Oxford, 2012); Samuel Moyn, *The Last Utopia. Human Rights in History* (Cambridge, 2010). The opposing view of historical continuity in the discovery of human rights can be found in Lauren, *The Evolution of International Human Rights. Visions Seen*.

the important right [for migration policy] of family reunification), rights to the exercise of one's own religion as well as entitlements to the privacy of one's own data—just to mention a few. One could certainly come up with moral foundations to all these rights and specifications—but such foundations would obviously be much more contested and less universal than a moral foundation for the right not to be killed, for instance. It would be particularly difficult to derive the definiteness of these precise and heterogeneous rights from a single general moral foundation. Since this would not only meet the challenge of developing moral principles and values, it would also have to explain, in a definite way, how the principles and values must be concretized into specific duties and entitlements in light of singular circumstances or in the face of complex social and political constellations. And finally the covenants contain provisions for human rights courts, procedures for the monitoring of human rights situations (which, thus far, might be the most important mechanism for the enforcement of human rights) or even precise requirements for the conduct of court procedures and so on, which usually reflect legal and political developments of the last two centuries and not moral ideas.

Let me explain this in more detail with an example: The newly formed UN Human Rights Council is supposed to publish regular reports on each country. In 2009 it published a report on Germany[37] and in it some countries expressed complaints concerning the following human rights: German law's violation of the right of migrants to access citizenship status, the violation of the rights of parents by some public child protective services and the violation of the right to the free exercise of religion by prohibiting the wearing of headscarves in public service. One cannot explain why these should be violations of human rights, if one directly refers to moral foundations of human rights—or one would have to assume that the moral foundation provided migrants with an entitlement to access citizenship (including some particular dimension of this entitlement, because German law does not exclude, in principle, migrant access to citizenship), that parents have a right to fully dispose of their children or that there is an entitlement to display and enact one's religious beliefs in public service. It is certainly possible to come up with moral principles, which could justify such rights—but it is highly unlikely that such principles could constitute a largely shared consensus, which would be sufficient to claim these principles as the basis for human rights. Without any doubt, there are many different conceptions of how one qualifies for access to citizenship, and I myself would contest that parents have an absolute moral entitlement to decide on the well-being of their children.[38] Also, I am not convinced that there is an absolute *moral* entitlement to the exercise of religion in all aspects of a life (especially in all *public* dimensions of one's life).

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37 UN GA A/HRC/11/15 from March 4, 2009 accessed at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/ G09/117/39/PDF/G0911739.pdf?OpenElement on December 6, 2012.

38 Cf. on this issue also the recent debate on male circumcision in Germany, in which, at least in the view of some, the main point is the balancing between the right of the child to bodily integrity and the right of the parents to decide on the religious identity of their child.

Nevertheless, one can easily see in all three cases why they could constitute human rights violations and why it could be right to put forward these complaints in the report.[39] Moral human rights theories, in contrast, cannot account for these examples without rendering themselves implausible by extending the moral foundations of human rights. Because of this difficulty, they often become revisionist by either ranking the existing human rights into hierarchies of essential and less essential rights (which cannot be found in human rights documents themselves), or by coming to the conclusion that many of the legally and politically established rights are not human rights at all.[40] In addition, these theories cannot reconstruct the value of specific procedures and institutions for the protection of human rights. Instead they contribute to the relaxation of legal and political obligations by pointing out the much vaguer individual or collective responsibility to protect and fulfill human rights. That this really leads to strengthening "human rights," will fully depend on the (kind of) morality of respective agents—which is why moral theories of human rights open up many opportunities to relativize the validity of at least some human rights.[41]

A More Comprehensive Concept of Human Rights and the Problem of its Indeterminacy

The strategy to strengthen and better anchor human rights by basing them on moral foundations leads to the difficulties of developing a convincing concept of moral rights and highlighting and morally grounding some human rights, while—in a revisionist vain—many other human rights as well as procedures to implement and enforce them completely disappear from consideration or are thought to depend on (more) "essential" human rights. This raises the question, whether this is not too high a normative "price" to pay, when established claims and at least partially functioning mechanisms implementing and securing human rights are put into danger.[42] For this reason there are other approaches searching

39 Cf. on this the discussion of the three criticisms below.

40 Many philosophical discussions of human rights start by stating that there are some rights provided by human rights covenants that are "obviously" not human rights, like, for instance, the right to "paid leave" (cf., for instance, Griffin, "Human Rights and the Autonomy of International Law," p. 340). Typically it is assumed that, but not justified, why the rights in question could not be human rights.

41 My point here is not that the theories in question are wrong. They are often very important contributions to our understanding of basic moral duties and entitlements. However, they operate under the wrong name: They are human rights theories only under the condition that they themselves define what human rights are. And since such redefinitions always run the risk of undermining existing "definitions" or practices based on certain "concepts," they potentially contribute to a state of the world which obstructs their aims.

42 In this respect it is necessary to ask how to measure the degree to which existing human rights regulations have had or are having (beneficial) effects in the real world and

for an understanding of human rights‑that is sufficiently broad to include all or most of the rights contained in actual human rights covenants or that attempts to describe and normatively reconstruct the existing human rights practice.[43] Such an understanding does not conceive of human rights as all originating in the same, single source, such as human dignity, which would unfold in an array of many entitlements. It looks at the emergence of the different rights and reconstructs normatively, if and when reasons are behind these rights, and only after this it enquires the different rights or the reasons for them to form a coherent set.

If one looks at the emergence of human rights in the twentieth century, it is obvious that they were laid down first of all in reaction to the atrocities of the Nazi regime and—certainly to a lesser degree—to the developments of capitalism, imperialism and other forms of totalitarianism. For some persons involved in the negotiations on declarations and covenants, reflections on the moral foundations of human existence and their violations by the aforementioned atrocities were the point of reference, for others not. These others often cared more for the creation of powerful counter positions against powerful agents, which one can see, for instance, in the way former colonies related and, in part, still relate to human rights today.[44] And more generally, one can say that human rights have resulted from insights into possible threats or the dangers of modern political, social and economic structures, institutions and developments. Because states, societies and economic systems dispose of potentials to dominate and because these potentials constitute real threats, rights are formulated in order to provide those exposed to these threats with protection against them or with a status, with which they can put a stop to the domination or control the structures or agents

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this means which kind of approach entails more harm. One possible point of reference could be the policy of the UN-Security Council in the 1990s: Did its extension of "threats to international peace and security" to human rights violations strengthen human rights—which could have been the effect, for instance, of the no-fly-zones in Northern Iraq—or did this policy enable wars like the NATO war against Yugoslavia, which led to human rights violations by NATO itself? Cf. on this question Martti Koskenniemi, "The Police in the Temple. Order, Justice and the UN; A Dialectical View," *European Journal of International Law,* 5 (1995): pp. 325–48.

43 Some important publications on such approaches have already been mentioned before in note 35. Their main reference is often John Rawls' conception of human rights in his *The Law of Peoples* (Cambridge/MA, 1999), where he conceives of human rights as "a special class of urgent rights," which are—beyond self-defense—the only reasons that could justify waging a war against another state (pp. 78–81). Cf. for other publications in this line of argumentation Charles Beitz, "What Human Rights Mean," *Daedalus* 132 (2003): pp. 36–46; id., "Human Rights and the Law of Peoples," in: Deen K. Chatterjee (ed.), *The Ethics of Assistance. Morality and the Distant Needy* (Cambridge 2004), pp. 193–214.

44 Cf., for instance, Andreas Eckert, "Afrikanische Nationalisten und die Frage der Menschenrechte von den 1940er bis zu den 1970er Jahren," in: Stefan-Ludwig Hoffmann (ed.), *Moralpolitik. Geschichte der Menschenrechte im 20. Jahrhundert* (Göttingen, 2010), pp. 312–36; Moyn, *The Last Utopia*, pp. 84–119.

in question.[45] The reason for the establishment of human rights is, thus, not (or not directly) the insight into the nature of human beings or irreducible "positive" moral entitlements. It is rather the options of powerful agents and structures and the harm done to human beings going along with these options. Human rights are therefore regarded as an "invention" of the twentieth century and they could only be invented in the twentieth century. They are not successors to the claims to natural rights, which were important driving forces of the modern revolutions since the sixteenth century.[46]

This second type of approach operates with an inclusive definition of human rights: *Human rights are rights, which must be granted, because their non-granting would permit agents and institutions to dominate or fundamentally harm other persons*. This raises the question, whether and how we could determine when we are dealing with domination or fundamental harms. Especially with the broader perspective on the plurality of human rights laid down in covenants *de facto*, it must be clear that not every damage or limitation of another person is necessarily dominating or harming her. In which way could we say that working contracts without paid vacation dominate or harm persons? In this case it is particularly interesting to look at the historic discussions leading to the inclusion of this right into the 1948 *Universal Declaration of Human Rights*. The aim was not to ensure the physical and mental reproduction or well-being of workers. The focus was rather on the role of paid labor in modern societies and the conditions that enable persons to relate to themselves and to fully cooperate in social life and this means primarily to develop self-respect and to present themselves to others as equal citizens.[47]

But if these are rights, which do not depend on "natural" requirements, isn't there a need for moral criteria allowing us to determine when we are dealing with which kind of domination or harm? Could there be a human right to a car or to interstates without speeding limits (which is not such an absurd idea, if one looks into the discussions on climate justice and the attempt to identify necessary goods

45 The concepts of domination and control used here refer to key ideas in Philip Pettit's neo-republicanism, cf. on domination/non-domination his *Republicanism. A Theory of Freedom and Government* (Oxford, 1997), pp. 51–109 and on control his *A Theory of Freedom* (Cambridge, 2001), pp. 32–103. On the implications of a neo-republican perspective for international relations and human rights cf. also Andreas Niederberger, "Republicanism and Transnational Democracy," in: Andreas Niederberger and Philipp Schink (eds), *Republican Democracy. Liberty, Law and Politics* (Edinburgh, 2013), pp. 302–27.

46 In a more general perspective one could even argue that these earlier "rights" or "natural rights" have been absorbed in the requirement of democratic procedures and institutions. Cf. on such a position Marcel Gauchet, "Les droits de l'homme ne sont pas une politique" and "Quand les droits de l'homme deviennent une politique," in Marcel Gauchet, *La démocratie contre elle-même* (Paris, 2002), pp. 1–26, 326–85.

47 Cf. on the deliberations behind the Universal Declaration Mary Ann Glendon, *A World Made New. Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York, 2001).

for a successful life)? It is certainly possible that, in some cases, we might have to refer to moral argumentations in order to evaluate harms or their relevance. But in other cases there might be political and economic arguments or justifications from theories of justice or democratic theories. And often there will not be any "new" arguments, but only new interpretations of existing rights, justifications and decisions. The guarantee of equal rights for women in the choice of their profession did not depend on new moral, political or economic insights. It was rather implied in the already established claims to equal treatment under the law, to free choice of profession and to non-discrimination, which only needed fresh unprejudiced interpretations.

Even if some circumstances leading to the formulation of (new) human rights are singled out by moral arguments, the moral argument does not have to be the same for all circumstances and kinds of harm. Some of the arguments can relate to something required for human beings as such, others to what human dignity mandates[48] and still other arguments could be concerned about the way persons should form relationships or develop the conditions for a good life (and these are only the moral or ethical arguments, to which we would have to add non-moral considerations on justice or democracy). *À la limite* every human right must be justified in a singular way ("à la limite," because there are certainly "families" of connected rights, which becomes obvious when new rights are generated through the re-interpretation of existing rights). This also means that there is no clear hierarchy of human rights, because the plurality of justifications excludes a single discursive realm for the justification of human rights, which in turn makes it difficult to assert hierarchies between the justifications and their corresponding claims.[49]

This is not a problem, since extreme situations, in which presumably competing human rights must be balanced are rare, and in these situations it is often unclear if rights play a role. In contrast, many human rights have emerged exactly because balancing situations have been considered to present severe threats themselves, such that human rights are often "stoppers" to balancing. When, for instance, the European Charter of Basic Rights includes the right to control one's own data,[50] it includes this right knowing that there are potential "terror threats" or similar events/situations, where state agents could make use of the data to prosecute

48 The debate on the importance of human dignity to develop human rights is at the center of current philosophical research. But one should observe that human dignity is an important legal concept only in a few legal systems, like Germany or Israel. It does not appear or, at least, it is not central in most human rights covenants. Cf. Jürgen Habermas, "The Concept of Human Dignity and the Realistic Utopia of Human Rights,"; Jeremy Waldron, "Is Dignity the Foundation of Human Rights?," *Public Law & Legal Theory Research Paper Series Working Paper No.* 12–73 (2013) (http://ssrn.com/abstract=2196074, last accessed on March 29, 2013).

49 Cf. on the non-hierarchical character of human rights and their justifications James W. Nickel, *Making Sense of Human Rights*, pp. 92–105.

50 Art. 8.1: "Everyone has the right to the protection of personal data concerning him or her."

terrorists. One can rule out the justification that the prevention of killing ranks "higher" than the protection of data. There is no right for prosecutors or public officials to balance rights in these situations. If the two rights conflict with each other, we must understand their relationship in a different way than in a hierarchy.

It also follows from the various justifications of the different human rights that all rights do not have the same scope or the same requirements and authorizations to be enforced and implemented. The specific reasons for a right and its meaning can oblige different addressees in different ways. The complicated reflections on the effect of basic rights on third parties in many legal systems reveal that we should not understand a right, which obliges state institutions or public officials to act or not to act in certain ways, as immediately creating obligations for "private" or civil societal agents too. We need not assume that human rights oblige everyone in the same way. It is much more important that they contain—for each specific right and with regard to specific situations—clear information on the questions on who is obliged when and in which way to do what. Different scopes and requirements of rights might lead to difficulties in their interpretation and in dealing with discretionary powers. But human rights regulations can again address these difficulties, if there are experiences pointing to such problems.[51]

However, after all these reflections, we could ask: If human rights are plural and especially justifiable in many ways, why should they get the emphatic title of "*human* rights"? Where is the difference between human rights and other more trivial claims, which political orders, contracts, personal relationships or the membership in parties and associations can create? According to this approach, human rights are not particular with respect to their contents or their justifications. Rather, human rights are special since they are claims against instances and agents who have options at their disposal that affect people who have little or no control because of power relations or positional differences, and which, second, might result in harm with structural and permanent consequences for those affected. This is certainly an underdetermined definition, which barely excludes anything from turning into a human right. Philosophical reflection alone is, in most respects, insufficient to decide if and when something must be a human right (although it can obviously state that some things necessarily must be human rights).[52] What must be shown in each case is that we are dealing with a claim, which cannot be at the disposal of the agent obliged to fulfill it. Human rights are indeed characterized by the fact that they cannot be relativized. But this impossibility to relativize them does not necessarily depend on the nature of the claims to goods or actions,

51 In this sense I agree with Cristina Lafont's contribution in this volume: The human rights regime is a dynamic regime constantly reacting to new challenges and insights, but also to experiences with the given international law and its effects on municipal law and international relations.

52 But it is important to note that those things which "necessarily must be human rights" are not necessarily the core human rights, which must be ranked above all other human rights.

for which one would have to say that they must be fulfilled in exactly this way under all circumstances. It rather qualifies the status of the claims within political and legal systems and this means that *those obliged by them* are not allowed to relativize them. Human rights primarily indicate the specific legal and political nature of the relationship and only secondarily the nature of the specific claims.

Let me explain this by returning to the three complaints against Germany in the Human Rights Council's report: If it criticizes the difficulties that migrants have getting citizenship status in Germany, this is a human rights critique because it points out the relationship of migrants to a state apparatus and a society, in which migrants do not have the possibility to get their concerns and needs heard. If societies admit immigration, they cannot put themselves in a position where they dominate migrants. Such societies must grant migrants the possibility to join the rest of the society in deciding the way government is exercised.[53] We are dealing with a human right, because it cannot be up to the society in question to decide on access to citizenship status (at least, once the society has allowed for immigrants to come into the country).

Similarly one should understand the objections to the child protective services. They do not imply a general statement on the question, if parents should have absolute power to decide on the well-being of their off-spring or not (even though there are formulations to this respect in many human rights covenants and there are, for instance, German families demanding asylum in the USA because parents in Germany cannot decide to home-school their children). The complaints rather problematize that the public agents are in a position where they can make significant decisions impacting the life of those persons and families affected without allowing them a possibility to bring themselves to bear in the ultimate decisions.

And also with respect to the free exercise of religion, the question is if parts of a society can use their power to prohibit certain religious symbols used by another part of the society, in a way that excludes the latter party from control of the exercise of government and from full participation in social life. The decisive factor is not the "positive" claim to be allowed to exercise one's religion, but the "negative" threat that some parts of the society create a powerful position for themselves by excluding some from the self-government of the society in banning religious symbols.

What Can Philosophy Do for Human Rights?

Both approaches to philosophical human rights theories that I have discussed have their advantages and disadvantages: Moral theories are able to justify the

53 Cf. on this in more detail Andreas Niederberger, *Demokratie unter Bedingungen der Weltgesellschaft? Normative Grundlagen legitimer Herrschaft in einer globalen politischen Ordnung* (Berlin, 2009), pp. 416–17. Cf. also Seyla Benhabib, *The Rights of Others. Aliens, Residents and Citizens* (Cambridge, 2004).

validity of rights for a certain domain in such a way that they result in lasting obligations for each and everyone, even if there are institutional agents appointed to fulfill these obligations. Their disadvantage is that they are revisionist and this means they cannot reconstruct and confirm many of the rights and procedures which have been created and established during the last 70 years. Human rights theories which start more reconstructively with existing human rights and develop normative foundations on this basis do not have this disadvantage. They are open for different justifications of human rights and they consider respective human rights within the horizon of factual political and social constellations. But they, in turn, suffer from shifting the criterion for the normative discernibility of human rights to the meta-level, which is why they are undetermined with regard to concrete obligations and responsibilities.

But why should this be a problem? Do philosophers have the task to decide which human rights should be guaranteed and which not? In my view many philosophers ascribe themselves a political and social role, which philosophy cannot and should not assume, as long as it does not understand the effects it can have in the world by assuming this role. Philosophers should concentrate on analyzing which human rights claims are established or demanded in politics and law; also, they should consider if or to which degree one can justify these claims and which obligations they entail. Proceeding in this way, philosophy strengthens human rights much more directly—and it responds better to the expectations, which also moral human rights theories articulate with regard to the prevalence of human rights as rights. This more modest role for philosophy ultimately serves the aim of promoting human rights better than insisting on a particular "philosophical" competence in the field of human rights. And finally, philosophy will also "discover" that real human rights policies and law offer many more interesting points of departure than those cases in which the protection of human rights severely fails.

Much remains to be done because the insight presented at the beginning that human rights do not (yet) have the importance in our world which they should have, is still true. The mere fact that human rights have been laid down in covenants and that there are, in principle, procedures and institutions implementing and enforcing them, is no guarantee that human rights are not strategically used or abused. In this sense, one will still have to see in which way philosophical research can contribute to detecting relevant conflicts on human rights and to increasing the weight of "aspirational" claims, possibly even against strategic and powerful agents.

PART II
Human Rights and Cosmopolitanism with a Human Face

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Chapter 5
Human Rights and the Paradigms of Cosmopolitanism: From Rights to Humanity

Amos Nascimento

Cosmopolitanism is often considered as an ethico-juridical discourse that affirms individual autonomy, universal rights, institutional legitimacy through democratic procedures, and the connection of these dimensions with a particular social and political order identified with the Westphalian Nation-State and the advent of liberalism. Based on these views, there is an assumption that the current human rights paradigm in international relations ought to be based on liberal theory, strict juridical mechanisms, and state-centric approaches which supposedly dispose of the most effective institutional means to deal with the vicissitudes of the human condition. This is, however, only one among many paradigmatic possibilities available when discussing the connection between cosmopolitanism, human dignity, and human rights. There are other views that pursue the possibility of affirming the importance of human rights without reducing them to this tradition and recognize the necessity of seeing cosmopolitanism as compatible with both contextual sensibilities and contemporary global challenges.

Connecting contextualism and cosmopolitanism in this way is very controversial. Postmodernism and communitarianism are two examples of the risks and promises of this endeavor. After the heated debates on *modernity and postmodernity* in the 1980s— involving the representatives of discourse theory in Frankfurt (especially Jürgen Habermas, Karl-Otto Apel, Albrecht Wellmer, and Axel Honneth) and those representing poststructuralism in Paris (Jean-François Lyotard, Jacques Derrida, Michel Foucault, and others)—there was the assumption that the conversation was over, especially as postmodern authors were unanimously accused of being opposed to the Enlightenment project, espousing radical anti-universalist views, and contradicting the claims of critical and ethical theories. In the same way, the debates between *communitarianism and liberalism* involved socio-political philosophers (such as Charles Taylor, Alasdair McIntyre, and Michael Sandel) who insisted on the contextuality of what is collectively viewed as good and opposed the liberal emphasis on rights (thus questioning a position championed primarily by John Rawls at Harvard). They were also accused of anti-universalist views and labeled as particularists.

The problem with postmodern and communitarian positions is that they questioned universality and globalization but at the same time relied on moral arguments and an implicit view of universality to affirm their respective views. Therefore, they were invariably accused of committing the *performative self-contradiction,* that is, negating precisely what was the condition of possibility of their own discourse: They claimed universal validity for statements that questioned the possibility of universal validity. Despite all these verdicts, postmodern positions seem to be alive and well. Their arsenal has been used to critique liberal views on universal rights and political institutions because such views are identified with *meta-récits* directly connected to a particular form of cosmopolitanism that emerged in the eighteenth century. Similarly, communitarian philosophers fought back and questioned some of the normative and empirical aspects implicit in the liberal conception of human rights and cosmopolitanism, arguing that human rights should acknowledge particularities also. In both cases, there is an attempt to define a form of human rights that highlights the human condition and avoids external impositions or assimilations of different persons and cultures into a supposedly universal idea that does not acknowledge differences, diversity, plurality, and heterogeneity.

A current impact of these perspectives on human rights can be identified—even if indirectly—in Kwame A. Appiah's proposal for a *rooted cosmopolitanism*, Richard Bellamy's articulation of *liberal communitarian cosmopolitanism*, Toni Erskine's feminist approach to an *embedded cosmopolitanism*, and even Will Kymlicka's recent arguments for the possibility of a contextualized cosmopolitanism. In my view, this trend shows a possibility of connecting human rights, human dignity, and cosmopolitanism in a way that recognizes particularities and is compatible with contemporary Critical Theory. It is possible to talk of an *unfinished debate on postmodernism*—in the same way as Habermas once spoke of the "unfinished project of modernity" [*das unvollendete Projekt der Moderne*]—and conceive of *diversity and plurality*—in the same way as Rawls acknowledged a "fact of pluralism"—to sort out and assess recent discussions on cosmopolitan theories.

In what follows, I propose a more contextualized view of cosmopolitanism based on three general claims: First, contemporary discourses on human rights need to question the exclusive contemporary focus on strictly abstractive legal *rights* granted at the level of national frameworks; second, human dignity should be conceived of as a way to justify universal obligations, extend allegiances beyond national boundaries, and affirm *humanity* in a more inclusive way; finally, we ought to understand cosmopolitanism as the normative reference that prompts us to continue to promote universal *rights* while acknowledging multifarious concrete forms of being *human* at a global level. All things considered, what I am proposing is simply a transition from an utterly modern and epistemic reliance on *rights* alone to a more contemporary discursive conception of *humanity* in times of globalization, which can account for *human rights* as the way to address growing diversity, inequalities, cultural expressions, and forms of exclusion.

Critical Theory and Paradigms

The literature on international human rights has often used the term "human rights paradigm" to identify the growing acceptance of human rights norms as a legitimizing instance of the international order after 1945.[1] According to this understanding, human rights are a matter of international law, but its clauses should be binding only on nation-states. In one of his formulations, Abdullahi An-Na'im clearly defines this term in the following way:

> By the term "human rights paradigm," I mean the articulation and application of the same norms to every human being everywhere, a standard that presupposes the validity of cross-cultural moral judgment and requires systematic efforts to influence state policy and practice in matters that were previously deemed to be subject to the exclusive domestic jurisdiction of the state.[2]

This represents a traditional view that can be criticized on many grounds; it simply accepts an international model created in the nineteenth century, it does not recognize the insufficiencies in the protection of human rights in various states, it sees states as sole promoters of international human rights, and it does not recognize other individual, subnational or supranational agents. Surely, An-Na'im is very consistent in his use of the word "paradigm" to denote a state-centered conception of international law. In his view, although non-governmental actors may be active in claiming and supporting human rights globally, states and official governments are ultimately the ones legally bound by the *Universal Declaration on Human Rights* and other instruments. It is this legally-binding framework that he defines as paradigmatic. Thus, he adds:

> Due to the activism of civil society around the world, the human rights paradigm has become such a powerful legitimising force in national politics and international relations that no government in any part of the world today would openly reject or defy its dictates.[3]

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1 Ruti Teitel, "Human Rights Genealogy," *Fordham Law Review*, 66/2 (1997), pp. 301–17. See also Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia, 1999) and Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, 2010).

2 Abdullahi An-Na'im, "Human Rights and Islamic Identity in France and Uzbekistan: Mediation of the Local and Global," *Human Rights Quarterly*, 22/4 (November 2000), p. 907. Also by Abdullahi An-Na'im, "Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives," *Harvard Human Rights Journal*, 3 (1990), pp. 13–52 and "Human Rights in the Arab World: A Regional Perspective," *Human Rights Quarterly*, 23/3 (2001), pp. 701–32.

3 An-Na'im, "Human Rights and Islamic Identity in France and Uzbekistan: Mediation of the Local and Global," p. 937.

Unfortunately, this statement is contradicted by many other evidences. First, the *Universal Declaration of Human Rights* is an aspirational, non-binding document. Second, we now experience concrete events in Afghanistan, Argentina, Brazil, China, Rwanda, Sudan, the United States, and other countries in which we can detect various historic ways of contradicting human rights. Third, these states clearly defy the mandates of treaties and agreements to uphold human rights which they have signed. Finally, I would like to focus on the fact that this same term, "human rights paradigm," has been used loosely to characterize other kinds of arrangements denoted in specific expressions such as "United Nations human rights paradigm," "Christian human rights paradigm," "Catholic human rights paradigm,"[4] "disability human rights paradigm,"[5] and "dominant paradigm."[6] This varied use has the advantage of promoting plurality and acknowledging the application of human rights norms in a variety of settings. However, there is a double problem here: The term *paradigm* is seen either as the strict legal procedure in a technical understanding of rights or its use is so loose and widespread that its meaning seems to get lost in this process.

In the remainder of this section I want to step back, define this term, and relate it more explicitly to questions regarding a form of cosmopolitanism that affirms human rights without forgetting particular aspects of the human dimension. To do so, I will take the critical theory of discourse developed jointly by Karl-Otto Apel and Jürgen Habermas as my point of departure; adopt their view of a transition process from obsolete concepts and worldviews to new practices based on the pragmatics of communication; and identify historical discontinuities in a sequence of three main philosophical *paradigms* that can be applied to sort out discussions on human rights, human dignity, and cosmopolitanism.[7]

Notoriously, paradigm is a *terminus technicus*. The initial contemporary reference is Ludwig Wittgenstein,[8] who defined paradigm as standards, agreements before practices take place, and implicit general views bound to "forms of life" [*Lebensformen*] that cannot be reduced to particular statements, but require an

4 G. FitzGerald, "The Truth Commissions of Guatemala: Pluralism and Particularity Within the Human Rights Paradigm," *Culture: The Graduate Journal of Harvard Divinity School*, 5 (Spring 2010) accessed at: http://cultandculture.org/culture/index.php/issues/2-culture-2010-spring-issue/17-the-truth-commissions-of-guatemala-plurality-and-particularity-within-the-human-rights-paradigm.html on December 6, 2012.

5 Michael A. Stein, "Disability Human Rights," *California Law Review*, 95 (2007), p.74.

6 Teitel, "Human Rights Genealogy," p. 304.

7 Jürgen Habermas, *Postmetaphysisches Denken* (Frankfurt, 1988). For a typology of "paradigms of *prima philosophia*," see Karl Otto-Apel, *Selected Essays* (Atlantic Heights, 1994), pp. viii, 120, 207–30 and *Paradigmen der Ersten Philosophie* (Frankfurt, 2011), pp. 54–83.

8 Ludwig Wittgenstein, *Remarks on the Foundations of Mathematics* (Cambridge, 1937) II pp. 31, 41. See also *On Certainty* (Cambridge, 1969).

understanding of culturally embedded "language-games" [*Sprachspiele*].[9] This is precisely what I have in mind when I mention the plurality of cultures with their own narrative knowledge and their attempt to escape imposition or assimilation through globalization. The second reference is Thomas Kuhn, who borrowed this term from Wittgenstein in order to identify the hidden assumptions of scientific theories and practices. For him, a "global paradigm" is the implicit framework orienting a mature science while a "community paradigm" is the set of rules and practices accepted and followed by a given professional group.[10] When faced with new and persistent problems that are fundamental to their field, scientists may try to go beyond their specific community and search for a different worldview to guide their actions. This "paradigm shift" requires a radical break with tradition and has been applied to other areas beyond science. The third reference is the appropriation of this term by Apel and Habermas, who offer a new interpretation of Kuhn's views and use the term "paradigm" to identify three main worldviews that orient historical and philosophical evolutionary process: ontology or metaphysics, epistemology or science, and communication or discourse.[11] Habermas and Apel agree on the contemporary primacy of discourses for a new critical theory, but I would like to add a non-metaphysical view of humanity.

The radical discontinuities proposed by contextual approaches can be understood as part of this paradigm shift and related to cosmopolitanism and human rights. In fact, as antidote to metaphysical totality and fuzzy morality, Habermas himself proposes a move toward a *postmetaphysical thinking* which he applies to cosmopolitanism, human rights, and—more recently—human dignity. His initial move toward cosmopolitanism can be seen in his reconstruction of the system of rights in Western democracies and insistence on the articulation of "private and public autonomy, human rights, and popular sovereignty."[12] He then identifies a *postnational* constellation, acknowledges the challenges of globalization, extrapolates the reach of a constitutional rules beyond the Nation-State, and emphasizes the juridification of cosmopolitanism based on a legal—not metaphysical—understanding of "rights."[13] In this process, Habermas progressively includes the issue of multiculturalism in his analyses and,[14] in a

9 C.G. Luckhardt, "Beyond Knowledge: Paradigms in Wittgenstein's Later Philosophy," *Philosophy and Phenomenological Research*, 39/2 (December 1978), p. 245.

10 Thomas Kuhn, *The Structure of Scientific Revolutions* (Chicago, 1996), pp. 10, 43, 119.

11 Jürgen Habermas, *Postmetaphysisches Denken*, pp. 7, 12, 22–5 and *Postmetaphysisches Denken II* (Berlin, 2012), pp. 301–7; Karl-Otto Apel, *Selected Essays* and *Paradigmen der Ersten Philosophie* (Frankfurt, 2011), pp. 10–14, 64–75.

12 Jürgen Habermas, *Between Facts and Values* (Cambridge, 1996), p. 126.

13 Ibid., p. 26. See also *Eine Art Schadensabwicklung* (Frankfurt, 1987), *Die nachhollende Revolution* (Frankfurt, 1990), *Die postnationale Konstellation* (Frankfurt, 1998), *Der gespaltene Westen* (Frankfurt, 2004), pp. 113–92.

14 Jürgen Habermas, "Der multikulturelle Diskurs um Menschenrechte," in Hauke Brunkhorst, Wolfgang Köhler and Matthias Lutz-Bachmann (eds), *Recht auf Menschenrechte* (Frankfurt, 1999).

certain contrast to the liberal focus on *rights*, and finally inserts the dimension of *human dignity* more explicitly.[15] This inclusion of human dignity into the picture provides us with an entry point for the discussion about humanity.

Apel develops similar points in his dialogue with Habermas, and a good summary of his position can be read in his lectures in Louvain, published as *The Response of Discourse Ethics*.[16] He starts with the "human situation" as a challenge for ethics and provides an overview of cases of exclusion and negation of rights, from the cultures of the "axial times" to contemporary politics. With the broad perspective of an intercultural anthropology of human evolution, he reconstructs history and concludes that modernity seems to have exhausted its resources to deal with the variety of global challenges that emerged after 1945.[17] He partially agrees with Habermas that we must work toward the juridification of human rights, but at the same time he shows some skepticism toward legal systems because they often have been corrupted or made exclusionary.[18] However, he does not accept contextual relativism as an answer,[19] but proposes a transformation of Kantian philosophy in terms of a "discourse ethics of global co-responsibility" [*globale Mit-Verantwortung*]. In his application of such ethics, he deals with questions of law, economics, and politics, concluding that the legal codification of human rights is not enough because global challenges cannot be addressed by simply focusing on positive law at the state level and abstracting from universal moral justification.[20] In his view, an "ultimate justification" [*Letztbegründung*] of ethics is required, which is to be found in the reflexivity of human communicative interactions. Thus, he concludes that the right to participate in a communicative process is the foundation to both human rights and cosmopolitanism.[21] This position has been rejected as too abstract by Habermas[22] and Apel himself concedes that in order to avoid metaphysical problems he must conceive of cosmopolitanism as a "regulative ideal" and leave its realization open to the practices of particular communities and institutions.[23] This is definitely a challenge, for it brings him closer to the tension we identified at the beginning

15 Jürgen Habermas, "The concept of Human Dignity and the Realistic Utopia of Human Rights," *Metaphilosophy*, 41/4 (July 2010), p. 470.

16 Karl-Otto Apel, *The Response of Discourse Ethics* (Louvain, 2000).

17 Ibid., p. 12.

18 Ibid., p. 63.

19 Ibid., p. 65.

20 Ibid., pp. 83–90.

21 Karl-Otto Apel, "Kant's 'Toward Perpetual Peace' as Historical Prognosis from the Point of View of Moral Duty" in James Bohman and Matthias Lutz-Bachmann (eds), *Perpetual Peace. Essays on Kant's Cosmopolitan Ideal*, (Cambridge, 1997), p. 79. Rainer Forst proposes a similar idea in terms of a "right to justification" in *Das Recht auf Rechtfertigung: Elemente einer konstruktivistischen Theorie der Gerechtigkeit* (Frankfurt, 2007), pp. 23–40.

22 Jürgen Habermas, *Zwischen Naturalismus und Religion* (Frankfurt, 2005), pp. 84–105.

23 Apel, *Paradigmen der Ersten Philosophie*, pp. 358–61.

between contextualism and cosmopolitanism. Nevertheless, Apel provides an example of how one could maintain a strong universalist position and at the same time make room to accommodate the challenges of recognizing contextual and particular *human* interactions.

Taking all this into consideration, we can already draw a few initial conclusions. First, there are more affinities between Critical Theory and positions that recognize contextuality and humanity—such as postmodernism and communitarianism—than has been normally granted. Second, it is possible to conceive of a connection between *contextualism* and *cosmopolitanism* that is critical, focuses on humanity, emphasizes a plurality of views, and promotes a historical transition process. Such process would go from ancient metaphysical positions through epistemic conception of positive law to a more contemporary move toward discourses on particular ways of being human. Third, although modernity came to disregard metaphysical positions and give more weight to a positivist account of rights, this does not mean that we got rid of metaphysical assumptions or that an exclusive reliance on positive law is the only way out of metaphysics. Metaphysical, epistemic, and communicative categories remain available as paradigmatic references in debates on human rights, human dignity, and cosmopolitanism. Fourth, the transition from one to another of these paradigmatic references is neither necessarily historic and linear nor purely procedural because metaphysical, epistemic, and discursive approaches can appear simultaneously as discontinuity in different contexts—for instance, the conditions of democracy may not be given in certain contexts and this would certainly affect the understanding and implementation of rights, but other resources and references (including metaphysical views) can contribute to the process of claiming and implementing such rights. Fifth, paradigmatic references remain as alternatives available to individuals and cultures, thus allowing for transitions from one particular condition to another—thus, someone in a non-democratic context or state has the autonomy and ought to have the right to pursue ideals beyond this particular context. To understand these shifts we need to account for the plurality of social conditions, locations, and cultural markers. Finally, these contextual and historical differences affect definitions and practices of human rights, human dignity, and cosmopolitanism. I would like to explore more examples of this point as I focus on providing an overview of cosmopolitan theories.

Varieties of Cosmopolitanism

In this section I would like to apply the conclusions above and show some conceptual and practical transitions related to the very definition of cosmopolitanism. This concept can be understood according to a plurality of paradigms. Recognizing this plurality can help us shift our attention to the often neglected human dimension in contemporary mainline discussions and prepare our move toward an understanding of what a critical discursive cosmopolitanism could be.

Contemporary discussions offer several typologies of cosmopolitanism. There is a talk of "moral and institutional,"[24] "thick and thin,"[25] and "weak and strong" forms of cosmopolitanism.[26] Scheffler uses the terminology of "extreme and moderate" cosmopolitanism to contrast the strong requirement to justify obligations and commitments in light of a global cosmopolitan principle with the more accommodating view that relaxes this demand and excludes certain special obligations from this requirement.[27] These are variations mainly within a liberal political theory of human rights and they are summarized by Thomas Pogge in terms of a tension between "moral and legal cosmopolitanism."[28] Here I am more interested in approaches that take a larger perspective into account. Pauline Kleingeld has analyzed six varieties of cosmopolitanism in the eighteenth century, a typology that is very interesting but limited to the German context at a given time.[29] Beyond this specific national framework there are discussions on "prenationalist and postnationalist" as well as "cultural cosmopolitanism"[30] which offer wider perspectives that are more relevant to the goals of discussing the possibility of a critical cosmopolitanism.[31]

I follow this same path, but propose to step further back and—despite the risk of using traditional historical markers—refer to larger cultural frameworks that correspond to metaphysical, epistemic, and discursive paradigms of cosmopolitanism.

The Metaphysics of Ancient Cosmopolitan Dualism

Cosmopolitanism is an ancient theme. Obviously, this term is the combination of two important Greek words, *cosmos* and *polis*, which have deep roots in

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24 Charles Beitz, "Social and Cosmopolitan Liberalism," *International Affairs* 75/3 (July 1999), pp. 125–40; Roland Pierik and Wouter Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (Cambridge, 2010), Kok-Chor Tan, *Justice without Borders* (Cambridge, 2004).

25 David Held, *Cosmopolitanism: Ideals and Realities* (Cambridge, 2010), p. 75.

26 David Miller, *National Responsibility and Global Justice* (Oxford, 2007), pp. 24–31.

27 Samuel Scheffler, "Conceptions of Cosmopolitanism," in *Utilitas,* 11 (1999), pp. 255–76.

28 Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge: 2008), p. 175.

29 Pauline Kleingeld, "Six Varieties of Cosmopolitanism in Late Eighteenth-Century Germany," *Journal of the History of Ideas,* 60 (1999), pp. 505–24.

30 Pheng Cheah, *Inhuman Conditions: On Cosmopolitanism and Human Rights* (Stanford, 2010); Kwame A. Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (New York, 2006); Ulrich Beck, *Cosmopolitan Vision* (Cambridge, 2006).

31 Eduardo Mendieta, "From imperial to dialogical cosmopolitanism," *Ethics & Global Politics*, 2/3 (2009), pp. 241–58. See also *Global Fragments: Globalizations, Latinamericanisms, and Critical Theory* (Albany, 2007), and "From the Abolition of Politics to a Politics of Liberation: Globalizations from Below and the Cosmopolitanism of the Other: A Discussion" (unpublished manuscript).

pre-Socratic philosophy. It is in this context that an encompassing definition of *cosmos* as a metaphysical unity emerges, which was supposed to make sense of reality and find the adequate place of humans in the world. We thus have a series of views on *cosmos* in Thales of Mileto, Pythagoras, Heraclitus, and many other ancient Greeks. It is with Heraclitus, however, that we find a first move toward a definition of *cosmopolis* and *cosmopolites*. *Cosmos* has been generally translated as "universe," surely influenced by a Pythagorean view of the *cosmos* as "harmony," which anticipates the idea of integrating several parts into a consistent whole—for example, humans as part of the universe. However, it is a fragment by Heraclitus that provides a crucial view that will be constitutive to later discussions on this theme. As he states: "This *cosmos*, the same for all, no god nor man has made, but it ever was and is and will be: fire ever living, kindled in measures and in measures going out."[32] This is obviously very metaphysical and should be taken parsimoniously today.

According to Ruin, this is the oldest known preserved example of the very word *cosmos* being used not only to designate the wholeness of being but also to describe a special metaphysical realm in which all humans should participate. It is not an exaggeration to claim that this statement is, *in nuce*, a possible anticipation of universal citizenship claims.[33] Yet, a more obvious step in this direction can be seen in Plato and Aristotle. In Plato's *Timaeus* the *cosmos* becomes a realm of ideas, the essence of the world. It is in this sense that we speak of a metaphysical cosmology that orients his political project. Aristotle's views are more empirically oriented, but he shares with Plato the goal of designing a project for the Athenian *polis*, in which the citizen [*polites*] is sharply distinguished from the isolated person, stranger or non-citizen [*idiotes*] who did not participate actively in public affairs. In his *Politics*, Aristotle defined the citizen as "the one who participates in the decisions and rulings [*kriseos kai arches*] of the state," while the person who did not belong to a state was defined as alien [*apolis*].[34] There is a general conception of *cosmos* that seems inclusive, but if we ask about who is left out of the *polis*, a particular kind of humanity is revealed: children, women, slaves, and foreigners.[35]

New metaphysical views emerge. As Martha Nussbaum has reminded us, one of the earliest and most important references to *cosmopolis* is to be found in the

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32 Heraclitus, Fragment B4, in H. Diels and W. Kranz, (eds) *Fragmente der Vorsokratiker* (Hildesheim, 1989), I, p. 232.

33 Hans Ruin, "Belonging to the Whole: Critical and 'Heraclitical' Notes on the Ideal of Cosmopolitanism," in Rebecka Lettevall and My Klockar Linder (eds), *The Idea of Kosmopolis: History, Philosophy and Politics of World Citizenship* (Södertörns högskola, 2008), pp. 32–5.

34 Aristotle, *Politics* 1275a, cited by Ruin, "Belonging to the Whole," p. 40.

35 Lene Rubinstein, "The Athenian Political Perception of the *idiotes*," in Paul Cartledge, Paul Millett, and Sitta von Reden (eds), *Kosmos. Essays in Order, Conflict, and Community in Classical Athens* (Cambridge 1998), pp. 125–43.

Greek cynic, Diogenes of Sinope.[36] Asked by the Athenian citizens about his origin, belonging, and allegiance [*pothen eie*], Diogenes simply answered that he was a cosmopolitan [*cosmopolites*]. Although this statement was probably registered by Diogenes Laertius in the third century of the Common Era, long after Diogenes of Sinope allegedly affirmed it,[37] this expression is generally considered the birth certificate of cosmopolitanism.[38] This provocative answer was not only a radical way to affirm individual identity in view of the communitarian pressures that expected complete commitment and loyalty to the *polis*, the city-state, but also a form of affirming the possibility of being a citizen of the world, of being at home anywhere, of demanding the ancient right to hospitality and respect.[39]

The most elaborated conception of ancient cosmopolitanism, which expands on this political meaning, is found in the Stoic tradition. This tradition initiated with the teaching and writings of Zeno of Citium, who studied with Diogenes and defined *cosmopolites* as a way of living in the world while at the same time being connected to a higher sphere beyond the contingencies of a particular *polis*.[40] The Stoics were less concerned about constituting a particular state and focused their attention on defining a "community of all beings." For the early Stoic philosophy, this would require a common law [*koinos nomos*] applicable to all.[41] However, one needed to meet a series of qualifications and fulfill many conditions in order to have rights, participate in the *polis*, and aspire to becoming a cosmopolitan. Despite Heraclitus' earlier formulation, not "all" could aspire to such goals. The philosopher or wise man was cosmopolitan *par excellence* and occupied an ideal place in Stoic cosmology. In the end there is an elitist tone to cosmopolitanism because only those capable of the Stoic discipline and aware of its philosophical subtleties could aspire to participate in the *community of sages* that was equated to *cosmopolites*.[42] The Stoic view of *cosmopolites* did not mean to include the *idiotes*. My insistence on the transliteration of the Greek word is intentional. I

36 Diogenes Laertius, *Lives of Eminent Philosophers*, vol. II, trans. R.D. Hicks (Cambridge, 1925), p. 65. There is a growing recent literature on this subject. See Martha C. Nussbaum, "Kant and Stoic Cosmopolitanism," *Journal of Political Philosophy*, 5/1 (1997), pp. 1–25 and "Kant and Cosmopolitanism," in James Bohman and Matthias Lutz-Bachmann (eds), *Perpetual Peace. Essays on Kant's Cosmopolitan Ideal* (Cambridge, MA, 1997), pp. 25–57; Hans Ruin, "Belonging to the Whole: Critical and 'Heraclitical' Notes on the Ideal of Cosmopolitanism," p. 40. See also Eric Brown, "Die Erfindung des Kosmopolitanismus in der Stoa," in Matthias Lutz-Bachmann et al. (ed.) *Kosmopolitanismus: Zur Geschichte und Zukunft eines umstrittenen Ideals* (Weilerswist, 2010), pp.9–24.

37 Diogenes Laertius, *Lives of Eminent Philosophers*, vol. II, , p. 365.

38 John L. Moles, "Cynic Cosmopolitanism," in. R. Bracht Branham and Mari-Odile Goulet-Cazé (eds), *The Cynics: The Cynic Movement in Antiquity and Its Legacy* (Berkeley, 1996), pp. 105–20.

39 Nussbaum, "Kant and Cosmopolitanism," pp. 26–7.

40 Malcolm Schofield, *The Stoic Idea of the City* (Chicago, 1999), pp. 93–101.

41 Katja M. Vogt, *Law, Reason, and the Cosmic City* (Oxford, 2008), pp. 1–5, 161–4.

42 Ibid., pp. 73, 76–86.

want to mark this particular metaphysical understanding and somewhat freeze it in time, so that we can better appreciate what is involved and avoid the projection of our modern "cosmopolitan" sensitivities to an old metaphysical concept. By simply highlighting a few aspects, I hope to have shown that, obviously, this form of cosmopolitanism did not integrate "all."

A similar metaphysical structure guided the definition of the Roman *civitas*. Indeed, an important step in the metaphysical definition of cosmopolitanism can be found in the transition from Roman Stoicism to Christianity. As Martha Nussbaum explores the passage from Cynicism to Stoicism and provides a detailed reading of the tradition that goes from Zeno through Seneca to Cicero, she reminds us of the Stoic conception of humans as citizens of two communities: "the local community of our birth and the community of human argument and aspiration."[43] In the words of Plutarch, however, there should be only one way of life. Even though this single way is generally interpreted by Martha Nussbaum in moral and ideal terms, the Stoics definitely had an opportunity to develop institutions and contribute to the establishment of a real single world state in their epoch: the Roman Empire. A citizen was then a *civitas*, not only a member of a city, but also recognized as bearer of rights and owner of private property within the whole imperial jurisdiction. Moreover, Stoics held important political positions in the context of the Roman Empire: Cicero was a leader in the Roman *republica*, Seneca was a regent under Emperor Nero, Marcus Aurelius was emperor, and many other Stoics held important political positions.[44] As argued by Eric Brown, the Stoics applied their ideas to real local politics and then identified *cosmopolis* with the Roman *patria*, which was enlarged to include a variety of members and other cultures.[45] The Roman Empire was a unifying force in Europe and as exchange for the allegiance of different tribes and communities it conquered, it offered a valuable compensation, at least to those who had served in Roman legions and showed their commitment for a considerable amount of time. As it can be seen in the case of the Roman conquest of Palestina or later in Germania, these individuals could become Roman citizens after finishing decades of military duty.[46]

With Christianity, humanity is conceived of as *imago Dei* and seen as not limited to a particular community or empire: "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's."[47] This certainly appears as a more inclusive condition and Augustine is definitely the

43 Nussbaum, "Kant and Cosmopolitanism," p. 29.

44 Nussbaum "Kant and Cosmopolitanism," p. 30 and "Duties of Justice, Duties of Material Aid: Cicero's Problematic Legacy," in S. Strange and J. Zupko (eds), *Stoicism: Traditions and Transformations* (Cambridge, 2004), pp. 214–9.

45 Eric Brown, "Die Erfindung des Kosmopolitanismus," pp. 16–18.

46 C. Rüger, "Chapter 15: Roman Germany," in Alan K. Bowman, Peter Garnsey, and Dominic Rathbone (eds), *The Cambridge Ancient History: The High Empire, A.D. 70–192* (Cambridge, 2000), p. 502.

47 Matthew 22:21.

best reference here because he defined an alternative conception of *civitas* and democratized the Stoic elitist definition of cosmopolitanism. This yields a new view of cosmopolitan citizenship based on a dualism between the *civitas terrena* and the *civitas dei*. In order to strictly separate between historical contingences and cosmic or theological hope, Augustine allegorically differentiates between Babylon as the "city on Earth," with its Babelian confusion of languages and misunderstandings and Jerusalem as the "city of God." One is the diabolic city while the other is the spiritual community [*Ipsa est Hierusalem eodem modo spiritaliter, unde multa iam diximus. Eius inimica est civitas diaboli Babylon, quae confusio interpretatur*].[48] From this same perspective, Augustine interprets the internal tensions between the Roman culture and the Church.[49] The Roman Empire was about to collapse and Augustine proposed a view of a new polity oriented by Christian values. Thus, he adds that humans are citizens of two worlds: Not only the rights granted by the Roman Empire, but most importantly, the membership in the Kingdom of God. Yet, also here we ought to ask about what qualifies as humanity, for there were important demands conditioning the participation in the "community of saints:" The *universus* was identified with the Christian faith and connected to eternity, but Catholicism was becoming the official religion of the Roman Empire. This merging of the two cities implied repressive elements that negated certain identities. It is not surprising, therefore, that in comparison with the plurality of conceptions of time in ancient Greek philosophy—*chronos, hêmera, semeron, kairós, aíon*—Augustine saw Christianity as the inaugurator of a *tempus modernus* that not only disregarded but also came to repress the diversity of cultures characterized as *pagani*.[50] Moreover, as Pauline Kleingeld and Eric Brown affirm in their overview of ancient Greek and Roman cosmopolitanism, "while Augustine can stress that this allows citizens in the city of God to obey local laws concerning "the necessaries for the maintenance of life," he must also acknowledge that it sets up a potential conflict over the laws of religion and the concerns of righteousness and justice.[51]

Many other details could be presented about the different understandings of a dualistic metaphysical cosmopolitanism. Yet, we have enough material to yield a conclusion: Despite its metaphysical origin, cosmopolitanism was also applied *in concreto* to define rights to citizenship. On the one hand, the metaphysical aspect implies a view of humanity as part of the universe and, therefore, as free to move beyond a particular and contingent community with its idiosyncrasies. On the other, this understanding is surely applied to local cities and questions of private

48 Augustine, *Civitas Dei*, XVII, 16.

49 A.P. Orbán, "Ursprung und Inhalt der Zwei-Staaten-Lehre in Augustinus *De civitate Dei*," in *Archiv für Begriffgeschichte* XXIV (1980).

50 Augustine, *Confessions*, XI, xiv,17.

51 Kleingeld and Brown, "Cosmopolitanism," in Edward N. Zalta (ed.)*The Stanford Encyclopedia of Philosophy*, URL accessed on December 11, 2011 at: http://plato.stanford.edu/entries/cosmopolitanism/. See also *Civitas Dei* XIX 17

property, military service, and political organization, which bring about not only the affirmation of the totality of an encompassing imperial law, but also imposes important arbitrary limitations that might lead to elitism and repression of groups that are not seen as human enough. This ancient, religious, and metaphysical understanding of cosmopolitanism is definitively *dualistic* in a vertical sense and survives to this day in the very ambiguity of the word *cosmopolitan*. It is advisable, therefore, to qualify and differentiate it from the kinds of cosmopolitanism we find in modernity.

World Citizenship and the Epistemology of Modern Individual Rights

As we enter modernity, the term cosmopolitan reappears as part of the Enlightenment, when different cultures turned to ancient paganism and the Greek philosophy in order to question Catholic universalism.[52] There is, however, a subtle change that is often disregarded in contemporary discussions. Here we find a variety of terms in European languages—world citizen, *Weltbürger*, *citoyen du monde*, *världsmedborgare*, and many others—which no longer refer to the metaphysical and cosmological baggage we find in antiquity, but rather insist on a cognitive or rationalist form of cosmopolitanism. Works such as Christian Wolff's *Jus gentium methodo scientifica pertractatum* or Fougeret de Monbron's *Le Cosmopolite ou le Citoyen de Monde* can be seen as initial attempts to stress the modern, rationalist, political, and legal meanings of the term.[53]

As Pauline Kleingeld presents the debates on cosmopolitanism in eighteenth century Germany, she also provides a good overview of the varieties of cosmopolitanism in Europe and the different projects that used the designation "citizens of the world."[54] Going beyond the differentiation between moral and political forms of cosmopolitanism we find in the philosophical tradition, she turns to discussions on nationhood and patriotism in Germany in order to show six different types of cosmopolitan projects: moral cosmopolitanism, political cosmopolitanism, legal cosmopolitanism, cultural cosmopolitanism focusing on pluralism, economic cosmopolitanism aiming at establishing an international free market, and the romantic cosmopolitan ideal of humanity united by faith and love.[55] She also indicates several other meanings of the word, which range from "traveler"

52 Peter Gay, *The Enlightenment*, vol. 2 (New York, 1968).

53 Francis Cheneval, *Philosophie in weltbürgerlicher Bedeutung: Über die Entstehung und die philosophischen Grundlagen des supranationalen und kosmopolitischen Denkens der Moderne* (Basel, 2002). On Fougeret de Monbron, see Rebecka Lettevall, "The Idea of *Kosmopolis*: Two Kinds of Cosmopolitanism," in Rebecka Lettevall and My Klockar Linder (eds), *The Idea of Kosmopolis: History, Philosophy and Politics of World Citizenship* (Södertörns högskola, 2008), pp. 13–30, especially pp. 21–4.

54 Pauline Kleingeld, "Six Varieties of Cosmopolitanism," p. 505. This is expanded in book form in Kleingeld's *Kant's Cosmopolitanism* (Cambridge, 2011), p. 197–9.

55 Ibid., p. 506.

and "traitor" to "freemason" and "francophile." The authors she discusses include Christoph Martin Wieland, Immanuel Kant, Johann Gottlieb Fichte, George Foster, Dietrich Hermann Hegewisch, and Friedrich Schlegel, among others, but Kant's conception of world citizenship rights [*Weltbürgerrecht*] certainly constitutes the most important reference on this theme in modern times, so I will focus on his philosophy.

Kant's position on this topic is presented in several ways in different texts and notes. In his short essay, *Idea for a Universal History from a Cosmopolitan Point of View* (1784), he talks about a "situation of world citizenship," [*weltbürgerliche Lage*]. In lectures he gave in 1793–94—later published as the *Metaphysics of Morals Vigilantius*—he speaks of "world patriotism and local patriotism" [*Vaterlandsliebe*], adding that "both are required of the world citizen."[56] In the essay *On the Common Saying: "This May Be True in Theory but It Does not Apply in Practice,"* he advocates a world federative structure. All this culminates in his tract, *Towards Perpetual Peace* (1795), where world citizenship is presented as a cluster of different legal aspects that go from the individual to the global level.[57] Based on his ethical theory, Kant defended a right of humanity [*das Recht der Menschheit*] and insisted that individual autonomy, equality, and republicanism beyond the limits of the modern Nation-State would constitute the core of a cosmopolitan right or, more precisely, of a right to world citizenship [*Weltbügerrecht*]. He not only recognized that individuals move between states, traders visit different countries, and persons have cultural interests about different regions, but also stated in the third definitive article of *Perpetual Peace* that "cosmopolitan rights should be limited to the conditions of general hospitality" [*Hospitalität*]. With this criterion he implicitly recognized that individuals should be free to move in different parts of the world—thus, affirming a value that is compatible with liberal individual rights—and defined a norm to assess situations of oppression such as colonial exploitation and impediment to trade and interaction.

Towards Perpetual Peace also presents arguments for a global republican order, cites circumstances of conflict between states using military forces, and asks whether it was possible to establish a foundation for peace.[58] Kant begins his argument considering the demands of moral-practical reason, which mandates the end of all wars. In addition, he lists further concrete reasons that justify the elimination of war and colonialism. To develop this point, he goes from the case of the war between individuals in the state of nature to the situation of war between states, which are conceived analogously to the reciprocal relations among

56 Immanuel Kant in *Werke* [*Akademie Ausgabe*] (Berlin, 1902ff.), Band XXVII, 2.1, pp. 673–4. See Kleingeld, "Kant's cosmopolitan patriotism," *Kant-Studien* 94 (2003), pp. 299–316.

57 Kant Ibid., *Zum Ewigen Frieden*, Band. VIII. For a general assessment see James Bohman and Matthias Lutz-Bachmann (eds), *Perpetual Peace. Essays on Kant's Cosmopolitan Ideal*.

58 Ibid., Band. VIII, p. 343.

individuals.[59] This analogy is admittedly problematic, not only because nations are more complex structures than individuals—at least because a nation would include several individuals—but also because there are other kinds of relations involving individuals and states, states and individuals or states and states. Beyond a residual metaphysics that limits his views, there are some important and valuable aspects in Kant's cosmopolitanism which may be useful to affirm humanity. Among them, one could emphasize individual autonomy and the principle of hospitality, which affirms that an individual should be free to move as world citizen in different parts of the globe—provided that this individual behaves peacefully in another country and subsumes his or her individual legal person under categories of international law.[60] With this Kant provided a model that can be expanded to guarantee individual autonomy in the context of international processes,[61] recognize the participation of individuals in a community, and define a global framework within which persons can move and raise their claims.

These views are later expanded in Kant's *Doctrine of Right* [*Rechtslehre*]. He provides an internal differentiation that leads to a more precise view of world citizenship as membership in an extensive community. First, the relationship between individuals and the states they visit is now regulated by international law [*Völkerrecht*], which determines the conditions for individuals to move beyond borders and the responsibilities of states toward such individuals. This could be the purview of a liberal theory. Second, however, there is law of world citizenship [*Weltbürgerrecht*] which should grant—as *desideratum*—individual participation in world citizenship rights, that is, beyond particular states and, thus, beyond the traditional liberal framework.[62] Thus, Kant uses the concept of cosmopolitan right to demarcate a new area that emerges beyond the limits of the state. This resulted in the desideratum of a legal system with different levels that would correspond to national law [*Staatsrecht*], international or comparative law [*Völkerrecht*] similar to the traditional "law of peoples" [*jus gentium*], and a law of world citizenship [*Weltbürgerrecht*] beyond and above these particular instances.[63]

Today, there are many reasons to criticize, reassess, and transform Kant's philosophy as a vision for a new global order. His views on humanity need to be understood in light of modern colonialism and imperialism. As is well known, for Kant, women were excluded from the right to be active citizens.[64] Moreover, his position on race was very controversial. In some of his texts he often

59 Ibid., VIII, p. 349

60 Ibid., VIII, pp. 357–8.

61 Ibid., VIII, p. 366.

62 Ibid., *Metaphysik der Sitten*, Band VI. For a cosmopolitan review of Rawls' liberalism and critique of its outmoded conception of peoples and states see Gillian Brock, *Global Justice: A Cosmopolitan Account* (Oxford, 2009), pp. 19–44.

63 Ibid., VI, § 62. See Sharon Byrd and Joachim Hruschka, *Kant's Doctrine of Right. A Commentary* (Cambridge, 2010), pp. 205–11.

64 Ibid., VI/ 3, pp. 14–15.

expresses chauvinistic views about the superiority of the German culture [65] and, according to recent studies, his understanding of physical geography reveals a series of limitations in the definition of world citizenship.[66] For Lyotard, Kant's cosmopolitanism is surely negative when it is affirmed as one of the metanarratives of modernity which are no longer credible and have no legitimacy because it becomes inhuman.[67] Derrida criticizes Kant for proposing a right to "hospitality" and then restricting it, thus creating the precedent for the special conditions imposed today on immigrants, asylum seekers, and refugees.[68] Yet, Derrida affirms that it is still possible to talk about cosmopolitanism, provided that we deconstruct it by putting more emphasis on particular meanings and contextual interpretations of norms.[69] Thus, cosmopolitanism is tenable only if it rejects the marginalizing of particular traditions and avoids the claim that one particular form of politics, culture or norm should have a universal status and be imposed upon others.

Indeed, as Habermas has shown, some aspects mentioned by Kant to illustrate the movement of people beyond the limits of states have been radicalized in contemporary society, but after more than 200 years we can update and transform Kant's philosophy as a tool to address the challenges of globalization.[70] We need to be mindful, however, that Kant actually spoke of "world citizenship." Although this should not be confused with metaphysical cosmopolitanism because it includes the dimension of individual autonomy, there is a deficitary view of humanity related to the overly emphasized epistemic dimension of "rights." The critique of this limitation leads to a third moment, related to the communicative paradigm.

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65 Susan Shell, *The Embodiment of Reason: Kant, on Spirit, Generation, and Community* (Chicago, 1996), Robert Bernasconi "Who invented the Concept of Race? Kant's role in the Enlightenment Construction of Race," in Robert Bernasconi (ed.) *Race* (London, 2001), pp. 11–36 and "Will the Real Kant Please Stand Up: The Challenge of Enlightenment Racism to the Study of the History of Philosophy," *Radical Philosophy*, 117 (Jan/Feb 2003): pp. 13–22.

66 Stuart Elden and Eduardo Mendieta (eds), *Reading Kant's Geography* (Albany, 2011).

67 Jean-Francois Lyotard, *L'Inhumain: causeries sur les temps* (Paris, 1991), pp. 25–30 and Jean-François Lyotard and Jean-Loup Thebaud, *Just Gaming* (Minneapolis, 1985), p. 100.

68 Jacques Derrida, *Cosmopolitanism and Forgiveness*, pp. 12–18. Garrett Brown, "The Laws of Hospitality, Asylum Seekers, and Cosmopolitan Right: A Kantian Response to Jacques Derrida," *European Journal of Political Theory*, 9/3 (2010), pp. 308–27.

69 Jacques Derrida, *Cosmopolitanism and Forgiveness* (London, 2001); "Force of Law: The Mystical Foundation of Authority," in D. Cornell, M. Rosenfeld, and D.G. Carlson (eds), *Deconstruction and the Possibility of Justice* (London, 1992) pp. 3–67; *Limited Inc* (Evanston, 1995). Richard Beardsworth, *Cosmopolitanism and International Relations Theory* (Cambridge, 2011), pp. 189–97, 218–21.

70 Jürgen Habermas, *Die Einbeziehung des Anderen* (Frankfurt, 1996).

Pragmatic Discourses and Global Human Interactions

What can we derive from what we have seen thus far? Moving beyond Kant implies a critique of universalism and the radical affirmation of one's particularity, understood as a critique of the move of stepping outside a local context in order to affirm universality without any mediation. Without acknowledging these limitations, we run the risk of imposing one particular view upon others. Therefore, if a cosmopolitan approach beyond metaphysical and epistemic impositions is still possible at all, it will have to include some form of contextual, local, and personal dimension as corrective criteria. This claim surely appears contradictory or at least iconoclast, for it seems to be another performative contradiction. How can we be cosmopolitan and affirm a contextual dimension? This claim can be understood as an echo of the classical cosmopolitan ideal that seeks to eliminate any limits to the participation in a moral community. However, instead of a metaphysical authority, today we have only the contingency of particular events. Instead of a subjective and individualistic moral obligation based on legal liability and allegiance to a national state, we now expand the spectrum to include neglected collectivities—such as women, ethnic minorities, the poor, and victims of gender discrimination—and claim responsibility in other parts of the world.

These ideas are progressively finding echo in contemporary debates on cosmopolitanism.[71] This new kind of cosmopolitanism can be related to the work of Thomas Pogge, Martha Nussbaum, and Seyla Benhabib, among others who insist precisely on the point that cosmopolitanism is always rooted and needs to have a human face that reflects the contemporary reality of globalization. Moreover, they express the solidarity with the *stranger* who is displaced or dislocated beyond the borders of acceptability as well as beyond the limits of legally, politically or economically institutionalized structures. Eduardo Mendieta summarizes many of these positions, saying that "this grounded, placed, rooted, and patriotic cosmopolitanism acknowledges the contingency and thus fragility of the kinds of institutions that enable our enacting cosmopolitanism or cosmopolitan iterations."[72] Let me briefly consider some of these authors and highlight why their proposals advance ideas that may be constitutive to a form of postmodern cosmopolitanism.

Thomas Pogge tries to analyze human rights discourses by paying attention to terms such as *natural law*, *natural rights*, and *human rights*. To him, this simple detail (the adding of "human" into the picture) is what makes a difference. Pursuing this point, he shows continuities, discontinuities, and new subtle accents in these terms. As he affirms,

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71 See Mendieta, *Global Fragments*, pp. 7–13; and "From Imperial to Dialogical Cosmopolitanism," pp. 241–58.

72 Mendieta "From Imperial to Dialogical Cosmopolitanism," p. 253.

> By violating natural rights one wrongs the subject whose right it is. These subjects of natural rights are viewed as sources of moral claims and thereby recognized as having certain moral standing and value.[73]

In talking about different languages or idioms for human rights, Pogge criticizes the natural-law idiom for its references to God or to a harmonious order of the cosmos, and complements that "the adjective 'human'—unlike 'natural'—does not suggest an ontological status independent of any and all human efforts."[74] Moreover, he adds "universality" beyond particularities, because all humans should have the same rights and participate in a collectivity that guarantees such rights. This leads to an institutional understanding of human rights that involves two claims: (1) a social order is unjust if it denies or deprives some or all of its participants' rights; (2) persons share a collective responsibility to promote the justice in this social order.[75] It is obvious that Pogge puts the accent on the human dimension and uses it as criterion for the institutional approach.

A similar point is made by Seyla Benhabib.[76] In *Situatimg the Self: Gender, Community, and Postmodernism in Contemporary Ethics,* she turned to postmodernism to consider their critique of homogeneity and totalitarianism, but at the same time, she criticized postmodern views on rationality and normativity. She then questioned communitarianism for similar problems, especially due to the danger of totalitarian exclusion in communitarian positions.[77] Most importantly, however, was her critique of the "generalized other" depicted in liberal ethics. She proposed a consideration of a "concrete other" based on Carol Gilligan's feminist revision of Lawrence Kohlberg's theory of moral development.[78] As she establishes a dialogue with Lyotard as well as Linda Nicholson, Nancy Fraser, Judith Butler, and other feminist thinkers, Benhabib concludes that feminism is part of the broader transformations that have questioned modernity and affirmed a "situated criticism."[79]

This is expanded in *The Rights of Others: Aliens, Residents, and Citizens* and in the very title of Benhabib's Tanner lectures, *Another Cosmopolitanism: Hospitality, Sovereignty, and Democratic Iterations*. In *The Rights of Others* she

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73 Thomas Pogge, *World Poverty and Human Rights*, p. 189.

74 Ibid., p. 191.

75 Ibid., p. 193.

76 Seyla Benhabib, *Situating the Self: Gender, Community, and Postmodernism in Contemporary Ethics* (Cambridge, 1992); *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton, 2002); *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge, 2004); and *Another Cosmopolitanism* [with Jeremy Waldron, Bonnie Honig, and Will Kymlicka] (Oxford, 2006).

77 Benhabib, *Situating the Self*, pp. 71–82.

78 Ibid., pp. 164–70. Toni Erskine develops this point further in *Embedded Cosmopolitanism: Duties to Strangers and Enemies in a World of 'Dislocated Communities'* (Oxford, 2008), pp. 150–80.

79 Benhabib, *Situating the Self*, pp. 225–8.

follows critical theory to review the positions of Immanuel Kant, Hannah Arendt, and John Rawls; she then updates their views on hospitality, "the right to have rights," and "the veil of ignorance" in a way that integrates situated agents such as refugees, immigrants, and asylum seekers. In *Another Cosmopolitanism* Benhabib sides with Habermas and critical theory, but she does acknowledge that his views on cosmopolitanism still fail to account for "bounded communities" and do not necessarily enlarge the scope of what counts as human:

> because the discourse theory of ethics articulates a universalist moral standpoint, it cannot limit the scope of the *moral conversation* only to those who reside within nationally recognized boundaries; it views the moral conversation as potentially including all of *humanity.*[80]

After discussing Kant's cosmopolitanism and the international human rights regime,[81] she identifies a "disaggregation of citizenship"[82] as exemplified by concrete cases of tensions with immigrants in Europe, especially the question about Muslim women wearing a scarf in France or in Germany. Borrowing the term "iteration" from Derrida, Benhabib shows that when such discriminated individuals insist on affirming their identity, context, and contingencies, they exercise democratic iterations that augment the "*meaning of rights claims*" and promote the "*growth of the political authorship by ordinary individuals*."[83]

Benhabib has questioned the conception of cosmopolitan rights that blindly accepts the power of national states and their imposition of very limiting citizenship conditions for the granting and exercise of rights.[84] In her view, rights are not dispensations from state-centric structures, but rather a legitimate and inalienable aspect of individuality and agency. Individuals are bearers of cosmopolitan rights and have, therefore, the possibility of questioning the imposed limits of the Nation-State and moving beyond such limits. Based on this view, she proposes a rooted cosmopolitanism that ought to recognize the rights of immigrants and promote hospitality as a way to acknowledge "concrete others" at the local and global levels. Also here, it is obvious that the accent on humanity opens new venues for cosmopolitanism.

Martha Nussbaum follows a similar strategy but focuses on the inclusion of women and peoples with disability. Some authors have identified her with liberal theories on individual rights, but she has proposed important corrections and additions to these theories. Beyond her reconstruction of cosmopolitanism in

80 Benhabib, *Another Cosmopolitanism*, p. 18.
81 Ibid., pp. 20–31.
82 *The Rights of Others*, pp. 171–76, 183–202.
83 Benhabib, *Another Cosmopolitanism*, p. 49.
84 Ibid., pp. 171–5. See also *The Rights of Others*, pp. 176–81.

Stoic and Kantian philosophy,[85] she questions the limits of the liberal discourses that insist solely on "rights." Rather, she stresses the need to highlight the human dimension at play in universal human rights, including the role of emotions, the dimension of sexuality, and the acceptance of disabilities.[86] She starts with the assumption that humans are not necessarily equal, but have differences that need to be recognized and compensated in certain situations, so that all humans have the right to pursue their full potential as humans. To say, for example, that women are *de facto* equal to men is to disregard centuries of oppression and to pretend that a simple nominal equalization would be able to repair this damage. Similarly, we cannot merely affirm that all humans are equal when we discriminate against people with disabilities. As Nussbaum explains, focusing on discourses,

> the language of rights has a moral resonance that makes it hard to avoid in contemporary political discourse. But it is certainly not on account of its theoretical and conceptual clarity that it has been preferred. There are many different ways of thinking about what a right is, and many different definitions of 'human rights.'[87]

Along these lines, Martha Nussbaum questions, first, whether only individuals have rights. Other entities, families, ethnic, religious, and linguistic groups may claim rights as well. Secondly, she also questions the correlation between duties and rights, and asks what rights entitle us to. This answer may refer to goods, processes, goals, and other variables. For all these uncertainties and difficulties, she concludes, third, that the language of rights is limited. As an alternative, she develops a long exposition of her "capabilities approach." Her proposal for *human* rights includes the rights to life, bodily health, senses and imagination, emotions and friendship, play and control over one's environment.[88] As a good Aristotelian, however, her final point is related to goals and purposes:

> Capability must be the goal because of the great importance the capabilities approach attaches to practical reason, as a good that both suffuses all the other functions, making them human rather than animal. [89]

She does not deny the importance of rights, but insists on the need to make room for basic human capabilities. Thus, she adds more arguments to the repertoire I

85 Nussbaum, "Kant and Cosmopolitanism" and "Patriotism and Cosmopolitanism," in Martha Nussbaum and Joshua Cohen (eds), *For Love of Country? Debating the Limits of Patriotism* (Boston, 1996).

86 Nussbaum, *Hiding From Humanity: Disgust, Shame, and the Law* (Princeton, 2004).

87 Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge, 2001), pp. 97–8.

88 Ibid., pp. 96–101.

89 Ibid., p.105.

have shown so far, which supports my claim that we need to counterbalance the sole accent on rights with a reference to humanity in relation to human rights, human dignity, and cosmopolitanism.

The authors I was able to review within the context of the discursive paradigm emphasize the need for a focus on concrete and situated humans and the ways we communicate with and about them. They also refer to conceptions such as cultural, embedded or rooted cosmopolitanism as well as critical or dialogical cosmopolitanism. They criticize universalism and affirm a more diverse form of universality. Surely, these contemporary ways of considering cosmopolitanism and world citizenship are less concerned with formal rights and more sensitive to questions concerning the meaning of humanity, human dignity, human suffering, and human capabilities. They share a different paradigm. Therefore, an inversion in terms may be necessary to characterize their views. I conclude, therefore, that they can be characterized as a critical form of contextual cosmopolitanism which is not blind to the conditions and situations of humans who are the subject of rights. This new kind of cosmopolitanism is deeply linked to the idea of human rights, even though it questions that a stress on rights, state-centric approaches, or limited international law correspond to *the* "human rights paradigm." As this new form of cosmopolitanism downplays the dimension of rights to highlight humanity, it affirms the plurality of paradigms and the corresponding varieties of cosmopolitan projects.

These positions are in counterpoint with the philosophy of Karl-Otto Apel and Jürgen Habermas, who identify this new wave of considerations as part of the communicative paradigm. According to Apel, any discussion on ethics, human rights, and international law needs to take the global human situation as point of departure and have the unlimited participation in communicative processes as the normative criterion to judge their practices. For him, emphasis should be given to a communicative form of moral cosmopolitanism. In Habermas' view, it is possible to adopt a discursive paradigm and, instead of throwing the baby out with the water, (that is, giving up liberal rights and constitutional guarantees due to limitations in their implementation) to complement discourses on rights with discourses on humanity. He states that both concepts of *rights* and *humanity* as co-originary [*gleich-ursprünglich*] and, therefore, constitutive to an indivisible conception of *human rights* that serves as backbone to contemporary cosmopolitanism. As he concludes,

> human dignity' is not only a classificatory expression, an empty placeholder, as it were, which lumps a multiplicity of different phenomena together, but the moral 'source' from which all of the basic rights derive their sustenance.[90]

Based on this point, we can conclude that achieving a more *human* conception of cosmopolitanism and human rights requires an updated cosmopolitan project

90 Habermas, "The Concept of Human Dignity and the Realistic Utopia of Human Rights," *Metaphilosophy,* 41/4 (July 2010), p. 470.

that keeps the conversation going and adds new interlocutors to this dialogue, so that the claims of subaltern, forgotten, and oppressed peoples can be heard, their rights respected, and their humanity acknowledged.

Conclusion

I have attempted to show that a contextual dosage and accent on humanity can serve as both a criticism of a positivist or state-centric understanding of the "human rights paradigm" and as correction to certain forms of cosmopolitanism. We currently have a series of discourses on cosmopolitanism and many typologies that attempt to make sense of them, so we need to identify which forms are susceptible to this critique. In my view, many typologies acknowledge varieties within the modern and liberal cosmopolitan theories that advocate for global citizenship as an individual right to be guaranteed by the *Universal Declaration of Human Rights*, but they do not adequately recognize and differentiate the metaphysical claims that are proper to ancient views and contemporary religious perspectives that defend a dualistic conception of citizenship and affirm the primacy of a supernatural realm. Neither do they account for many recent views on cultural cosmopolitanism which focus on discursivity or cosmopolitan discourses that reveal or occlude certain groups.

Taking into account a variety of positions, the proper place for a new kind of cosmopolitanism can be identified. Although I painted this scenario in large strokes, the plurality within cosmopolitan and human rights discourses becomes obvious. This plurality remains available and is not simply a matter of historical references to a distant past or a distant culture, but rather a consideration of positions that form the philosophical repertoire of cosmopolitan views. Based on this, some conclusions can be drawn. First, there is not only one *paradigm of human rights* or one form of *cosmopolitanism* but a plurality of views in a historical transition process that goes from ancient metaphysical positions through epistemic views on positive law to a more contemporary move towards cosmopolitan discourses. Second, in this historical evolution many came to disregard metaphysical positions and give more weight to a positivist account of citizenship and rights, which corresponds to what is often defined as a liberal cosmopolitanism that claims to be global. Recently, another perspective has emerged, which focuses on contextual plurality, humanity, and capabilities, and discourses. Third, these paradigms are not merely historic or indicative of linear evolution because metaphysical, epistemic, and discursive references remain available to a culture and allow a society to move from one paradigm to another. According to the demand that we account for the plurality of social conditions, locations, and cultural markers that influence individuals and groups, it is possible to observe a move between paradigms and the various understandings of cosmopolitanism in different contexts.

Finally, as I described this variety, I proposed to relate the paradigmatic forms of cosmopolitanism to their own terminology: Metaphysical positions insist on

a dualist cosmological perspective, being adequately named *cosmopolites* while modern views based on the Nation-State or international law adopt the language of rights and speak rather of a *world citizenship*. What would be the term to characterize a critical and communicative conception of cosmopolitanism? This could be called *global human rights*.

Part of the reason why we need to move beyond the sole emphasis on *rights* is the neglect of the *human* dimension, disregard of cultural differences, and lack of acknowledgement of contextual conditionings. This turn to the human dimension can be observed in recent philosophical views that are related to the communicative paradigm and understand human rights as discourses. As we pay more attention to their categories and concepts, we realize that they are providing better descriptions of what is involved in the process of conceiving of and giving value to humanity. Therefore, I believe the focus on discourses—beyond the traditional view of a human rights paradigm related solely to the Nation-State—constitutes a unique contribution toward a new paradigmatic form that can be defined—at least for now—as a critical contextual cosmopolitanism that promotes a transition from *rights* to *humanity*.

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Chapter 6
From Imperial to Dialogical Cosmopolitanism

Eduardo Mendieta

We can now survey the ruins of a Babelian tower of discourse about cosmopolitanism. We speak of "elite travel lounge," "Davos," "banal" as well as of "reflexive," "really existing," "patriotic," and "horizontal" cosmopolitanisms. Here, an attempt is made to extract what is normative and ideal in the concept of cosmopolitanism by foregrounding the epistemic and moral dimensions of this attitude toward the world and other cultures.[1] Kant, in a rather unexpected way, is profiled as the exemplification of what is here called "imperial" cosmopolitanism, which is both blind and dismissive of its own material conditions of possibility. Then, through a discussion of the works of Nussbaum, Appiah, Mignolo, Butler, Benhabib, and Beck, I elaborate a version of cosmopolitanism that is grounded, enlightened, and reflexive, which corrects and supersedes Kant's own Eurocentric cosmopolitanism. We do not live in an age of cosmopolitanism, but in an age of cosmopolitization. Democratic iterations that are jurisgenerative are matched at the global level by cosmopolitan iterations that are both jurisgenerative and affect generating.

Introduction

By now, so much has been written about cosmopolitanism that when we try to survey this work what we encounter are the veritable ruins of a tower of Babel. After reading the two outstanding collections by Pheng Cheah and Bruce Robbins, and Daniele Archibuigi,[2] I was able to gather the following list of

1 An early version of this paper was presented and discussed at session of philosophers in Jesuit education, which was held at the Eastern Division Meeting of the American Philosophical Association, December 27–30, 2008. I thank David Ingram for the invitation and the impetus to write this text. I wrote the essay while I was a fellow at the Institute of Advanced Study at Durham University, England. A previous version of this paper was published in *Ethics & Global Philosophy* and benefited from the criticism of anonymous readers. I want to thank the editors of this journal for allowing me to use the text for this publication.

2 Pheng Cheah and Bruce Robbins (eds), *Cosmopolitics: Thinking Beyond and Feeling Beyond the Nation* (Minneapolis, MN and London, 1998); Daniel Archibugi (ed.),

inflections and adjectival forms of cosmopolitanism: imperial; post-modern; patriotic; discrepant; multicultural; rooted; elite; non-elite; left; consumerist; soft; attenuated; comparative; and actually existing. Ulrich Beck, in his indispensable *Cosmopolitan Vision* not only talks about "banal cosmopolitanism," but also introduces a term that I hope to appropriate productively in this essay, namely "reflexive cosmopolitanism" and "cosmopolitization."[3] To this list I would like to add "Davos," "Benetton," and "Frequent Flyer," "Elite," or "One World" cosmopolitanism, those are what Beck would call "banal cosmopolitanism."[4] Indeed, someone's cosmopolitanism, is someone else's provincialism; someone's ethical stance is someone's effortless privilege; someone's deliberate knowingness is someone else's jejune acceptance. In this Babelian proliferation of modified, localized, and historicized forms of cosmopolitanism there are tensions that deserved to be disaggregated and properly diagnosed. The aim would be to discern that which is worth both preserving and defending in cosmopolitanism.

Cosmopolitanism, at the very least, is a way of relating to the world. The question would be, what is the nature of that relationship? From the Greek stoics, through the Medieval Christians with their universalistic Gospel, through the Byzantine Empire, to the Enlightenment *philosophes*, to be cosmopolitan was to think oneself citizen of the entire world. The implicit claim was that one's loyalty should be to a larger "we" than that of one's local city-state, ethos, nation, or even empire. Nothing human would be stranger to the cosmopolitan citizen of the world. Already in this minimalist definition of cosmopolitanism we find at play several forces: The implicit recognition of the force of locality and place that claims one; the reference to both an epistemic and ethical or moral outlook; and the projection or stipulation that this epistemic and moral outlook would turn into a substantive political project. For the moment, then, we can say that cosmopolitanism implicitly recognizes the power of locality, for it stands in tension with it. Cosmopolitanism is both an epistemic and moral relationship to the historical world of humans, for it seeks to know and recognize humanity in everything that humans have accomplished. Cosmopolitanism, therefore, even if in an attenuated form, also entails a "cosmopolitan" project in which some sort of legal-political institutional framework would allow for the cohabitation and mutual thriving of all that is singular, and thus different, and differentiating in humanity. Another way of putting this, perhaps in a more schematic and formalized way would be to say that cosmopolitanism is the dialectical interplay between singularity and universality, placedness and displacement, rootedness and rootlessness, home and homelessness, stationariness and mobility. One is never cosmopolitan without setting out from some locality, whether it be spatial

Debating Cosmopolitics (London, 2003).

3 Ulrich Beck, *Cosmopolitan Vision* (Cambridge, 2006). Beck had already introduced the term in Ulrich Beck, "The Cosmopolitan Perspective: Sociology of the Second Age of Modernity," *British Journal of Sociology* 51/1 (January/March, 2000), pp. 79–105.

4 Beck, *Cosmopolitan Vision*, p. 10.

or temporal. One is never simply rooted, localized without that indexicality being deciphered with reference to some view of the global map. To be local is to be on some sort of map, a map that aims to provide a glance at the whole. A locality is a trajectory from a distance to a place, and from that place back toward that horizon of distantiation.

As Craig Calhoun put it, "[c]osmopolitanism has been a project of empires, longdistance trade, and of cities."[5] Indeed, cosmopolitanism is born out of privileges: economic; political; cultural; and even linguistic. How much easier it is to be cosmopolitan when most that is "worth reading" is translated into English and when the lingua franca of both the global public sphere and the global financial markets is also English. But it is part and parcel of a cosmopolitan orientation to recognize the materiality of its own privilege orientation. Calhoun is right to note that "would be cosmopolitans" would succumb to a self-defeating and anathema naïveté were they not to also recognize from the outset the extent to which "cosmopolitan appreciation of global diversity is based on privileges of wealth and perhaps especially citizenship in certain states."[6] There is a materiality to cosmopolitanism that enables not just the kind of candor and sanguinity that Calhoun calls for here, but also the very "epistemic" and "moral" stances that are implicit in cosmopolitanism. It is this play of materiality and ideality that I want to focus on in this essay. I want to foreground the ways in which the materiality that enables cosmopolitanism must itself be part of the self-reflection on how to be and not to be cosmopolitan. Against a form of cosmopolitanism that is naïve about its own material conditions of possibility, I want to juxtapose a form of cosmopolitanism that reflects about its own material locatedness, its own "material locus of enunciation" to use Walter Mignolo's language.[7] The former type of naïve cosmopolitanism I will call, evidently invidiously, imperial, while the latter I will call, evidently in praise, dialogical. The aim here is not solely negative, that is, it is not merely denunciatory and critical. It is also positive and constructive. I will argue that dialogical cosmopolitanism is mature (*mündig*) cosmopolitanism, that is, a type of epistemic and moral stance toward the world that is cognizant of both its privileges and thus limits, and which reflects about these from the standpoint of the other, to whom it reaches to learn from and with.

I will analyze the differences between these two forms of cosmopolitanism by taking a look at Immanuel Kant's contributions to the development of cosmopolitanism, but from an unusual and unexpected angle. I will approach Kant's cosmopolitanism from the standpoint of his pedagogy as this took its unique form in his lectures on anthropology and physical geography. Kant's

5 Craig Calhoun, "The Class Consciousness of Frequent Travelers: Towards a Critique of Actually Existing Cosmopolitanism," in Daniel Archibugi (ed.), *Debating Cosmopolitics*, p. 89.

6 Ibid., p. 112.

7 Walter Mignolo, "The Many Faces of Cosmo-polis: Border Thinking and Critical Cosmopolitanism," *Public Culture* 12/3 (Fall 2000), pp. 721–48.

career as a professional philosopher begins at the same time that he begins to teach physical geography, which later will spawn his lectures on anthropology. Now, both of these disciplines, at the time in their earliest years of infancy, constitute a type of knowledge of the world that in Kant's view was indispensable to the citizen. I will also argue that these lectures provide us with insight into the "presuppositions" or "foundations" of Kant's own legal and political form of cosmopolitanism. The claim is that we replicate the colonial and imperial implications of Kant's universalistic cosmopolitanism if we remain blind to its geographical and anthropological grounding. In a second section I will overview some important attempts to go beyond Kant, albeit not abandoning the insights worth preserving. In the final section I hope to offer the lineaments of a theory of dialogical cosmopolitanism. The method will be to argue immanently, that is to move from within the different positions to show that a next argumentative step must be taken, one that is implicit but not fully elaborated or argued. Evidently, lineaments are the mere contours of a theory, the building blocks, and not yet either the full architectonic or flesh-out theory. Here we are trying to show a direction, not the destination itself. In our age of globalizations and exclusions, we are in need of a different form of cosmopolitanism, one that emerges from below, from the below of those who are the majority of the planet. This form of cosmopolitanism is one that speaks from the standpoint of what Boaventura de Sousa Santos has called "subaltern cosmopolitanism,"[8] but which combined with Mignolo's call for a "decolonized" and "decolonial cosmopolitanism,"[9] has become reflexive of its own epistemic standpoint as well as of those with whom it aims to engage in a solicitous hermeneutics of mutual understanding. This form of cosmopolitanism is what I call dialogical cosmopolitanism, and it is the cosmopolitanism of the other.

Let me be clear about what I want to accomplish by using the expression "dialogical cosmopolitanism." I will show that the types of cosmopolitanism elaborated by many scholars recently (Appiah, Archibugi, Calhoun, Nussbaum, Habermas, Held et al.) have not gone far enough into what cosmopolitanism as a basic orientation towards the world and others both reveals and commands. By this I mean the following. Cosmopolitanism names the recognition that what is fundamental to the human condition, and above all in our age, is that we are citizens of the entire world because we are no-where at home. In other words, no place is our home because our proper dwelling is yet to be constructed. Whatever place we occupy is always conditional, relational, and dependent on other localities. Again, but in an alternative formulation, cosmopolitanism names the denaturalization of every dwelling place of the human being—especially our

8 Boaventura de Sousa Santos, "Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality," in Boaventura de Sousa Santos and César A. Rodriguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge, 2005), pp. 29–63.

9 Walter Mignolo, "Cosmopolitanism and the De-Colonial Option," *Studies in Philosophy and Education*, Vol. 29, No. 2 (March 2010), 111–27.

own. If no abode is natural to us, all that remains is for us to construct it. At the same time, since no abode is natural to humans, then every attempt to fashion one is always a human accomplishment. If there is no dwelling that is proper, then all could be proper. The only measure or standard of comparison is a negative one. We could thus enunciate a cosmopolitan imperative: Only those dwellings are to be rejected that do not celebrate and nurture human flourishing. It is for this reason that I take it that dialogical cosmopolitanism as a revelation about our global condition commands that we be resolutely open to the lessons about human dwelling from other cultures, from other pictures of human happiness and accomplished excellence. Cosmopolitanism names our transcendental homesickness, to paraphrase Novalis.

Cosmopolitanism, it is my argument, demands more than a passive and aesthetic contemplation of all that is human. Instead, cosmopolitanism is intrinsically active and solicitous. Cosmopolitanism proper is thus dialogic in the sense that we must be gratuitously obsequious towards the human lessons that come from other cultures, and other experiences of the human condition. It is for this reason, then, that I take it as a given that when I named my version of cosmopolitanism dialogic, I am perhaps coining a semantic redundancy that is merely meant to foreground what is always already essential to all reflexive, non-naive, non-vertical, non-insouciant cosmopolitanism. I also take it that as a form of denaturalization of politics and ethics, cosmopolitanism is also always already a critical attitude, and above all a critical attitude towards one's own unquestioned allegiances and commitments. Arguably, then, to declare oneself cosmopolitan is to confess one's provincialism, to acknowledge that one's own culture is too comfortable, at best, or perhaps not the best that is to the height of our own political and moral commitments, at worst. In *Minima Moralia*, in response to the xenophobic and genocidal being at home of the Nazis, which rendered so many homeless and without nationality, Theodor W. Adorno argued that "[I]t is part of morality not to be at home in one's home."[10] Dialogical cosmopolitanism is the ethos that lives in accordance with this new categorical imperative. To declare oneself cosmopolitan is to invite to be educated by the cosmopolitanisms of others. One is never cosmopolitan enough[11].

It would be contrary to the hermeneutical orientation of this chapter, then, to not acknowledge that we are only cosmopolitan to the degree that we solicitously seek to be educated by other cosmopolitanisms and the cosmopolitanism of the other. It is for this reason that I am less interested in critiquing many of the thinkers I rely on, than in building on what they have already elaborated.

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10 Theodor W. Adorno, *Minima Moralia: Reflections on a Damaged Life* (London: 2005 [1951]), p. 39

11 I developed these ideas further in my essay "World Society, Public Sphere, and Cosmopolitanisms," which I presented at X International Congress for Intercultural Philosophy: Towards a Just Universality (Vienna, May 2013)

Kant's Imperial Cosmopolitanism

Immanuel Kant is the *de rigueur* point of reference for any discussion on cosmopolitanism.[12] Yet, his form of cosmopolitanism is what I will call "imperial cosmopolitanism." I will call it this way, as I will show, because Kant consciously and uncritically assumed the privileges of his citizenship and location within the Austrian Empire in the eighteenth century. Additionally, it is a form of "imperial cosmopolitanism" because while its political and legal world order calls for a republican arrangement that is respectful of national differences, it is nonetheless a cosmopolitanism that projects a moral and political hierarchy that is grounded and justified by Kant's geographical and anthropological assumptions about the capacities of culture to meet the requirements of such a cosmopolitan legality and politics. The 1780s was one of Kant's most productive decades. After giving us the three critiques, which laid down the foundations for his critical philosophy, Kant proceeded to develop a philosophy of history, of the state, of law, of virtue, and above all of cosmopolitan right. It is not without justification that Kant is the foremost point of reference for any discussion about cosmopolitanism. Indeed, Kant is to many the titan of cosmopolitanism. In the following I want to suggest that while Kant may have been one of the founding fathers of modern cosmopolitanism, his form of cosmopolitanism is grounded in a series of assumptions and preconceptions that make it suspect, if not entirely unusable in our post-metaphysical, post-secular, and post-colonial or decolonial context. In fact, I contend that what Kant offers us is a form of "imperial cosmopolitanism" that is partly improved by what I will call naïve cosmopolitanism, but which does not yet overcome its imperial material foundations and hubristic epistemic orientation. I will argue that critical and situated cosmopolitanism opens the way for forms of dialogical cosmopolitanism that are able to criticize and overcome Kant's imperialistic and naïve cosmopolitanism. This path from imperial to dialogic cosmopolitanism will be guided by brief discussions of Kwame Anthony Appiah, Ulrich Beck, Seyla Benhabib, Judith Butler, David Harvey, Walter Mignolo, and Martha Nussbaum. The goal is not to simply offer a report on the recent literature, but to show how dialogical cosmopolitanism must be developed logically and consequently from those inchoate but not fully acknowledged arguments in those positions that may be called naïve, and later critical and reflexive cosmopolitanism.

The last of his books that Kant personally edited and saw to press was *Anthropology from a Pragmatic Point of View*, which was published in 1798. This book was based on his lecture course on Anthropology, which he had been offering on a yearly basis since 1772. This course in turn had emerged from his Physical Geography lecture course he had been offering since 1756. Early in his

12 See James Bohman and Matthias Lutz-Bachman (eds), *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (Cambridge, 1997). See especially Martha Nussbaum's chapter "Kant and Cosmopolitanism." See also Allen Wood, "Kant's Project of Perpetual Peace," in Pheng Cheah and Bruce Robbins (eds), *Cosmopolitics*, pp. 59–76.

teaching, Kant discussed the physical, natural, terrestrial character of the human being under a general discussion of the earth. He gave both sets of lectures until his retirement in 1796. Kant lectured on these popular topics not just because he needed to make a living. As a lecturer without an official post, he earned his living by the number of students he was able to enroll. It is clear that from the outset Kant saw his "Physical Geography" as part of his civically minded pedagogy that aimed to provide citizens of Prussia with what he called *Weltkenntnis*, a term that has been translated by Kant scholar Holly Wilson as "cosmopolitan knowledge."[13] The "Physical Geography" lectures will finally appear in English within the next few years in the *Cambridge Edition* of Kant's works. The translation, expertly executed by Olaf Reinhardt, however, is based on a corrupt edition of the German manuscript. This is the Rink edition, which Kant authorized, but which Kant himself did not oversee or approve, for as we know by 1802, when the Rink edition appeared, Kant was no longer able to read and many speculate that he had lost his rational faculties.[14] Now, Kant's Physical Geography lectures are perhaps one of the best ways in which to gauge Kant's cosmopolitan presuppositions and goals.[15] Like arctic ice, and some very ancient red woods on the West coast, this course registers Kant's intellectual growth and his own education into cosmopolitanism. In them we can track what Kant was reading and how he was reading it. German scholar Werner Stark has spent decades reconstructing the sequence of these lectures and providing us an insight into what was added and dropped as Kant modified, expanded, updated his lectures. Much work has been done in Germany, by Stark and his colleagues, which remains barely known in the USA. This aspect of Kant's work remains *terra incognita*. Yet, I will argue that Kant provided us with a hermeneutical key that will allow us to make sense of what he sought to do in both his Physical Geography and Anthropology lectures. This hermeneutical key is to be found in a footnote in the foreword to his *Anthropology from a Pragmatic Point of View*. The note, not accidentally, comes as a clarification to the following statement: "Travel belongs to the means of broadening the range of anthropology, even if it is only the reading of travel books. But if one wants to know what to look for abroad, in order to broaden the range of anthropology, first one must

13 Holly L. Wilson, *Kant's Pragmatic Anthropology: Its Origin, Meaning, and Critical Significance* (Albany, 2006), pp. 7–26.

14 For a detailed discussion of the problems, as well as what is sure to be a major point of departure for Kant scholarship, see Stuart Elden, "Reassessing Kant's Geography," *Journal of Historical Geography,* 35 (2009): pp. 3–25. Stuart Elden and I have organized two seminars on these lectures and have edited a volume about them, Stuart Elden and Eduardo Mendieta (eds), *Reading Kant's Physical Geography* (Albany, 2011).

15 David Harvey has argued that neglect and ignorance of how Kant's legal and political cosmopolitanism has prevented modern cosmopolitan thinkers from disengaging the cosmopolitan promises of Kant's project from its colonial and imperial assumptions and implications. See David Harvey, *Cosmopolitanism and the Geographies of Freedom* (New York, 2009). See especially chapter one, on Kant's lectures on anthropology and geography and the chapter on "The New Cosmopolitans."

have acquired knowledge of human beings at home, through social intercourse with one's townsmen or countrymen."[16] This statement is fascinating because, in light of what we know about Kant's reading habits, namely that he loved to read "travel books," he is providing an *apologia ante re* for his own anthropology, which is not based on personal travel experience, but on the reading of secondary material, brought to Königsberg by sailors docking in the city's ports. The remark is also peculiar because while Kant was known for his youthful participation in the *Königsbergische Tischgesellschaft*, later in his life Kant became if not a recluse at least a more private person than he had been in his youth.

The fact that he also remained a bachelor and did not father children could be a background for this remark. Be that as it may, Kant appends the following note after those sentences, and I quote at length, because it is so pivotal:

> A large city such as Königsberg on the river Pregel, *which is the center of a kingdom*, in which the provincial councils of the government are located, which has a university (for cultivation of the sciences) and which has also the right location for maritime commerce, a city which, by way of rivers, has the advantage of commerce both with the interior of the country and with neighboring and distant lands of different languages and customs, can well be taken as an appropriate place for broadening one's knowledge of human beings as well as of the world, where this knowledge can be acquired without traveling.[17]

This is a remarkable passage for its innocence, its confessional character, and its evident lack of self-reflexivity. Kant's cosmopolitanism presupposes as both epistemic and material condition of possibility the imperial location of its subject of knowledge. Kant is the beneficiary of the metropolitan location of Königsberg, a capital of a Reich, an Empire, a Kingdom, which is also the mercantile center of the north Atlantic maritime market that is controlled by England, but that Germany and Prussia benefit from directly. The cosmopolitan philosopher, pedagogue of the citizenry, announces without so saying that his project of cosmopolitan education is product of the imperial locus of its production. The content of these lectures, furthermore, is hardly an exploration and compendium of the most enlightened type of knowledge that was to be had in the eighteenth century. Kant's lectures, spanning his entire teaching career, are replete with the reproduction and transmission of some of the worst prejudices of the seventeenth and eighteenth century, from Montesquieu, Buffon, and Hume, but also from sailors and merchants docking in the ports of Königsberg. As David Harvey has noted, these lectures constitute an embarrassment. Harvey writes:

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16 Immanuel Kant, *Anthropology from a Pragmatic Point of View*, trans. Robert Louden (Cambridge, 2006), p. 4.

17 Ibid., Italics added.

> When projected into a world of sovereign democratic and republic states, it conjures up a threatening image of unwashed Hottentots, drunken Samoyeds, conniving and thieving Javanese and hordes of Burmese women lusting to get pregnant by Europeans, all clamoring for the right to cross borders and not be treated with hostility. It is precisely in such geographical "circumstances" that we can better understand why Kant included in his cosmopolitan ethic and in his notion of justice the right to refuse entry (provided it does not result in the destruction of the other), the temporary nature of the right to hospitality (provided the entrant does not create any trouble) and the condition that permanent residency depends entirely on an act of beneficence on the part of a sovereign state that in any case always has the right to deny rights of citizenship to those that create trouble. Only those who exhibit maturity, presumably, will be granted the right to stay permanently.[18]

This is what I call Kant's imperial cosmopolitanism. More of this sordid and embarrassing cosmopolitanism is exemplified in the numerous manuscripts of his *Physische Geographie* lectures that are slowly being made available through the editorial efforts of Werner Stark. I want to underscore here that Kant links, naïvely but effectively, his pedagogical project to the imperial locus of the alleged cosmopolitan philosopher. What is perhaps noteworthy is that there is a convergence between what Kant claims in his *Anthropology* and his *Physische Geographie*, and his project for a *Perpetual Peace*. In fact, as both David Harvey and Jeff Edwards have shown, we cannot make proper sense of Kant's cosmopolitan legal and political order without the most minimal understanding of the way in which the roundness and thus finitude of the earth, as well as the social unsociability of human nature compels human to propagate and contend for every corner of the planet.[19] The second and third "definitive" articles of perpetual peace contain explicit references to both the "maliciousness of human nature" and the spherical surface of the earth that prevents humans from scattering "without limit," thus being forced to "tolerate one another as neighbor" (Ak 8: 355, 358).[20] Kant's philosophy of history, as well as his work on cosmopolitan right, belong to the last decades of his life, but they also belong to the period of his work when he is trying to see a convergence between what humans make of themselves and what nature requires, compels, them to do. There is no space here, and perhaps it is unnecessary, to cite the numerous passages throughout Kant's corpus that reflect how he thought that white Europeans were the most developed instantiation of humanity, and how Western institutions represented the fulfillment of the plan

18 Harvey, *Cosmopolitanism and the Geographies of Freedom*, p. 12. I am quoting from Chapter 1 of the manuscript.

19 See David Harvey and Jeff Edwards chapters in Stuart Elden and Eduardo Mendieta, *Reading Kant's Physical Geography*.

20 Immanuel Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (New Haven, 2006), pp. 79 and 82, respectively.

of nature and the highest accomplishment of what humans make of themselves through the enlightened use of reason.[21] References to the works by Emmanuel Eze and Robert Bernansconi should suffice, for the moment.[22] Yet, Scott L. Malcomson has captured succinctly what is unsettling in Kant's attempt to make his putative cosmopolitanism converge with his anthropology and philosophy of history when he wrote: "Unfortunately, Kant also thought that Europe would be at the helm of nature's world historical adventure. His progressive "system" begins in Greece and on to Rome, skips past the notoriously disappointing 1400 years that followed Constantine, and ends up in Enlightenment Europe, from which he is able to discern 'a regular process of improvement in the political constitution of our continent (which will probably legislate eventually all other continents).'"[23] Malcomson is quoting here from Kant's famous "Idea for a Universal History with a Cosmopolitan Purpose." The Kant scholar Allen W. Wood has in fact offered a similar reading, albeit without the anti-imperial and anti-colonial sentiments expressed by Malcomson. Wood writes:

> The unity of Kant's philosophy may be thus viewed as the unity of the *historical* task of enlightenment. Looking at it in this way, the project of perpetual peace emerges as the central focus of Kant's critical or enlightenment philosophy. As distinct from the progress of morality of each individual, of knowledge in particular sciences, of justice in independent states, perpetual peace is the global or cosmopolitan project in which the human race must unite if it is to advance in its historical vocation, and hence preserve its nature as a species destined to turn natural discord into rational accord. The three Critiques, and the system of philosophy which is to be built upon them, aim at a rational system of thought whose historical actuality as human activity is vitally bound to the project of perpetual peace, for this project is the condition of the historical possibility of every other end of both nature and reason regarding the human species.[24]

Implicit, thus, in this codependence of the Kantian cosmopolitan project on an anthropologically grounded philosophy of history is the epistemic and moral attitude that would impugn all alleged provincialism with a righteous cosmopolitanism.

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21 I have engaged many of these references in my essay "Geography is to History, as Woman is to Man: Kant on Sex, Race and Geography," in Stuart Elden and Eduardo Mendieta, *Reading Kant's Physical Geography*.

22 Emmanuel Chukwudy Eze, (ed.), *Race and the Enlightenment: A Reader* (Malden, 1997); and Robert Bernasconi, "Kant as an Unfamiliar Source of Racism," in Julie K. Ward and Tommy L Lott (eds), *Philosophers on Race: Critical Essays*, (Malden, 2002), pp. 145–66.

23 Scott L. Malcomson, "The Varieties of Cosmopolitan Experience," in Phen Cheah and Bruce Robbins (eds), *Cosmopolitics*, p. 237.

24 Allen W. Wood, "Kant's Project for Perpetual Peace," in Pheng Cheah and Bruce Robbins, (eds) *Cosmopolitics* pp. 71–2.

For the measure of the cosmopolitan world, federation is determined by a moral and legal outlook that assumes from the outset that Europe's and the Europeans grasp of what is both morally desirable and legally acceptable is the absolute and unquestioned standard. That Kant could admit, as when he did when writing against Herder, the "happy inhabitants of Tahiti" destined to live in their "tranquil indolence," would be no different than had their island been inhabited by "happy sheep and cattle," had they not been redeemed by their encounter with European man, who would awaken them to their indolent moral slumber (Ak 8:65). Not only is there no cosmopolitanism of the other, but there is also no way in which a different narrative about human accomplishments and path toward cosmopolitanism may be told in such a way that we may for the moment attenuate our own claims to cosmopolitanism. Imperial cosmopolitanism is thus arrogant, insouciant, autarchic, and impatient. It is arrogant because it abrogates for itself the role of measuring what is moral maturity and human accomplishment. It is insouciant because it does not consider the adverse effects of its own impact on other cultures and the world in general, assuming these merely to be inevitable and exculpable. It is autarchic because it never acknowledges that all human excellence and accomplishment is neither individual, national, racial nor even civilizational, but of the entire human species. Curiously, this is a point where Kant contradicts himself, for as he argues against Herder also, the human species advances, but as a species, not through individual accomplishment.[25] Yet, Kant himself cannot admit the contributions of other cultures, or the excellence of other races. Finally, it is impatient, for it already has established the goal, the means, and the time line. Indeed, once we have undone the "traces" of racist and Eurocentric anthropological and geographical assumptions and preconceptions in Kant's cosmopolitanism, little may remain. As Bernansconi has argued, those who seek to undo the effects of European racism and dehumanizing colonial mindset with a dose of enlightened cosmopolitanism may have to look somewhere else than Kant's corpus.[26]

Critical and Reflexive Cosmopolitanisms

Martha Nussbaum appears to follow in Kant's pedagogical steps[27] in as much as public education has an indisputable role in providing citizens with knowledge about other nations, cultures, and civilization. Yet, Nussbaum goes beyond

25 See part two of the Contest of the Faculties (Ak 7:79 ff), and Kant, *Toward Perpetual Peace and Other Writings*, pp. 150 ff. See also the "On the character of the species" toward the end of the Anthropology from a pragmatic point of view, Ak 7: pp. 321–30.

26 Robert Bernasconi, "'Kant's Third Thoughts on Race," in. Stuart Elden and Eduardo Mendieta (eds) *Reading Kant's Physical Geography*.

27 The following builds on the introduction to my book: Eduardo Mendieta, *Global Fragments: Globalizations, Latinamericanisms, and Critical Theory* (Albany, 2007).

Kant's sexist, racist, and Eurocentric pedagogical and geographical assumptions.[28] Nussbaum's contribution is a much needed correction and antidote to the arrogant and impatient cosmopolitanism of a Kant.[29] In contrast to Kant's "embarrassing prattlings," Nussbaum has taken very seriously the perspective of non-European cultures, as it is exemplified in her work on India as well as the contributions of minorities in the USA.[30] In an essay published in the fall of 1994 in the *Boston Review*, Martha Nussbaum succinctly and eloquently elaborated and defended a form of civic cosmopolitanism, which she juxtaposed to parochial and jingoistic patriotism. The aim of the essay, however, was not just to defend cosmopolitanism and reject patriotism, but also to endorse cosmopolitanism as the focus of civic education.[31] For Nussbaum, who has philosophized extensively on pedagogy, the relevance of the debate is determined by how it would impact the way we would educate citizens. Thus, for Nussbaum, cosmopolitanism is not an abstract, philosophical stance, but rather a very practical and result-oriented attitude. If we educate citizens to see themselves primarily as citizens of a world community, as opposed to members of narrow, special, chosen, and exceptional communities,

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28 I tried to show to what extent Kant's thought is not just Eurocentric and racist, but also sexist in "Geography is to History as Woman is to Man: Kant on Race, Gender, and Geography," in Stuart Elden and Eduardo Mendieta (eds) *Reading Kant's Physical Geography*, (Albany, 2011). See also the following excellent articles by Allegra De Laurentiis, "Kant's Shameful Proposition: A Hegel-Inspired Criticism of Kant's Theory of Domestic Right," in *International Philosophical Quarterly* XL, 3 (September 2000), pp. 297–312; and Jane Kneller, "Kant on sex and marriage right," in Paul Guyer (ed.) *Kant and Modern Philosophy*, (Cambridge, 2006), pp. 447–76; Holly L. Wilson, "Kant's Evolutionary Theory of Marriage," in *Autonomy and Community: Readings in* Jane Kneller and Sidney Axinn (eds) *Contemporary Kantian Social Philosophy*, (Albany, 1998): pp. 283–306. See also Hannelore Schröder, "Kant's Patriarchal Order," in Schott (ed.) *Feminist Interpretations of Immanuel Kant* (University Park, 1997), pp. 275–96.

29 In fact, Nussbaum is critical of Kant's failure to appropriate the stoic idea of educating the passion so as to lead us to a cosmopolitan outlook and *modus vivendi*. See her wonderful essay "Kant and Cosmopolitanism," in James Bohman and Matthias Lutz-Bachman (eds), *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*, (Cambridge, 1997), pp. 25–57.

30 See Martha C. Nussbaum, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* (Cambridge, 1997); and Martha C. Nussbaum, *The Clash Within: Democracy, Religious Violence and India's Future* (Cambridge, 2007).

31 What is interesting is that part of impetus for engaging in her critique of patriotism was to confront Richard Rorty's embrace of both patriotism and avowed ethnocentrism. Yet, Nussbaum's and Rorty's views on the role of affect, education, the importance of inculcating empathy and solidarity with others are very similar. Rorty is closer to Nussbaum than she was willing to acknowledge in this book. See for instance Richard Rorty, "Human Rights, Rationality, and Sentimentality," in Richard Rorty (ed.) *Truth and Progress. Philosophical Papers*, vol. 3, (Cambridge, 1998), pp. 167–85. See also Richard Rorty, "Justice as a Larger Loyalty," in Richard Rorty (ed.) *Philosophy as Cultural Politics: Philosophical Papers*, vol. 4, (Cambridge, 2007), pp. 42–55.

then these citizens would be less likely to engage in the rituals of blood that are so indispensable to patriotism, and would instead be more responsive and engaged with the cultures and welfare of communities across the globe. Thus, Nussbaum's essay elaborates four arguments for why a cosmopolitan-oriented and guided civic education is a greater benefit to the USA, and others as well, than patriotically oriented civic education. First, because "through cosmopolitan education, we learn more about ourselves." Second, we are better prepared to solve problems that "require international cooperation." Third, "we recognize moral obligations to the rest of the world that are real and that otherwise would go unrecognized." Fourth, we learn to "make consistent and coherent" arguments which we are prepared to defend intelligibly.[32] It is difficult not to be sympathetic with the pedagogical aims of her defense of cosmopolitanism.

While it is true that we are socialized and nurtured in local ethical communities, we are faced with global problems that command that we look to the world, even as we are indisputably rooted in specific ethical traditions. What I want to underscore and take from Nussbaum's four arguments in defense of a cosmopolitan focused on civic education is her fourth reason. Being educated to think as a member of global community raises the epistemic bar on what kinds of distinctions and arguments we are capable of making. What Nussbaum is pointing out, I think, is that cosmopolitanism is not just an emotive or affective stance toward the claims of others, but that it is also a theoretical and conceptual stance that commands us to assess the cogency of our claims from the standpoint of sometimes abstract others, but sometimes very concrete others who happen to be on different continents.

Cosmopolitanism is thus about entering a space of reasons that is borderless and has, putatively, no excluding membership requirements. In this sense, Nussbaum has already taken us beyond Kant's circumscribed and Eurocentric cosmopolitanism. In contrast to Kant, who assumes that white Europeans discover the best reasons for a cosmopolitan world order, Nussbaum sees these reasons to be discerned through a dialogue with others.

Kwame Anthony Appiah, who was one of the respondents to Nussbaum's essay, published in 2006 a book entitled *Cosmopolitanism: Ethics in a World of Strangers*.[33] Appiah, who has written on questions of identity, multiculturalism, race, imperialism, and nationalism extensively, frames his book in terms of investigating what would be the proper concept to use in order to confront the challenges of the modern world: whether globalization, multiculturalism, or cosmopolitanism. He settles on the last, although he notes that its meaning is contested and it can be argued that cosmopolitanism is both an ideal and a particular stance. Appiah,

32 Martha C. Nussbaum, *For Love of Country?* (Boston, 2002), pp. 11–14. This book, which contains Nussbaum's original essay, also contains responses and critiques by 16 other major scholars such as Elaine Scarry, Benjamin Barber, Kwame Anthony Appiah, Michael Walzer, Sissela Bok, Judith Butler, Emmanuel Wallerstein, and many others, and a response by Nussbaum to them.

33 Anthony Appiah, *Ethics in a World of Strangers* (New York, 2006).

however, proceeds to profile two distinct "strands" within cosmopolitanism. One strand underscores the idea that we have obligations to others. The other strand affirms that we must "take seriously the value not just of human life but of particular human lives, which means taking an interest in the practices and beliefs that lend them significance."[34] Human difference, for this second strand, is an intrinsic good and must be preserved, celebrated, and most importantly, learned from. As with Nussbaum, for Appiah cosmopolitanism has eminently pedagogical benefits, and like her, he also thinks that cosmopolitanism entails a moral orientation. This moral orientation imposes on all certain duties and responsibilities. Much of what follows in his book is about profiling these duties and responsibilities, and the contexts in which they become most evident and what elements and forms of thinking and knowing obscure these obligations toward strangers.

There is, however, an argument in Appiah's book that is implicit in his distinction between two strands within cosmopolitanism but that only becomes explicit much later in the book. In the chapter entitled "The Counter-Cosmopolitans," Appiah discusses the neo-fundamentalist, Christian, Muslim, and so on, reaction to the cosmopolitan challenges. There he writes: "If cosmopolitanism is, in a slogan, universality plus difference, there is the possibility of another kind of enemy, one who rejects universality all together. 'Not everybody matters' would be their slogan."[35] Indeed, whether you are a religious, market economy, or American supremacy über *alles* fundamentalist, and think therefore that there are a lot of others who do not matter and that their interests, knowledge claims, local histories, threatened traditions, and endangered forms of life are unimportant and not worth our respect, even then, these fundamentalists are still within the space of reasons. Appiah is clear about this: "Once you start offering reasons for ignoring the interests of others, however, reasoning itself will usually draw you into a kind of universality."[36] This is an extremely important insight, one that Appiah arrives at through a *via negativa*, that is, when those who want to take a stance against cosmopolitanism draw up their reasons, they are unwittingly in the grip of universal reason. Yet, I would argue, not only the countercosmopolitan but also the avowed cosmopolitan is in the grip of some sort of "universality." Both are in the space of reasons. Consequently, I can make the claim that cosmopolitanism is an ethical orientation that puts reason on call, on guard, to use Derrida notion of a critique of reason that puts reason on call.[37] Universality, consequently, must be rearticulated, defended, expanded, and made concrete.

Cosmopolitanism must therefore entail a self-critique of one's prejudices, as well as a confession and disclosure of one's own epistemic standpoint. In this way, then cosmopolitanism is reflexive, to use Beck's terminology. The reason of the cosmopolitan must be a cosmopolitan reason that aims to an as yet to be

34 Ibid., p. xv.
35 Ibid., p. 151.
36 Ibid., pp. 152–3.
37 See Jacques Derrida, *Rogues: Two Essays on Reason* (Stanford, 2005).

specified universality. For this reason, one can speak of a naïve, or ideological cosmopolitanism, the kind that makes communitarians and conservatives bristle with contempt but that also makes those critical of cultural imperialism impatient and highly critical of dehistoricized enunciations of universal reason. This type of cosmopolitanism, exemplified in Kant's version, which refuses to submit its own universality claims to critique, to enter the space of reasons in a symmetrical and egalitarian way with others who are at the table of cosmopolitanism, can turn into a form of epistemic arrogance that like a fig leaf barely conceals contemptuous disregard and brutal self-interest. Unfortunately, the history of the modern world furnishes plenty of examples of such forms of naïve, and in most cases, imperial cosmopolitanism.

Neither Nussbaum nor Appiah are naïve cosmopolitans. No one can accuse them of offering fodder for the canons of neo-liberal globalism and Western neoimperialism. Their work on cosmopolitanism, absolutely indispensable, must be extended and supplemented. The opposite of naïve, and imperial, cosmopolitanism, it may be argued, would be a critical cosmopolitanism. Walter Mignolo has in fact defended and articulated such a form of cosmopolitanism. He has done so weaving in a magisterial way a critical history of Western colonialism with incisive insights into key philosophical figures in a decolonized philosophical canon. In a brilliant essay "The Many Faces of Cosmo-polis: Border Thinking and Critical Cosmopolitanism"[38] he illustrates *in actu* the virtues of a critical cosmopolitanism by distinguishing among three different global-imperial designs and what were their corresponding cosmopolitan projects. According to Mignolo, to the global designs of the Spanish and Portuguese empires, from the sixteenth through the seventeenth century, corresponded the cosmopolitanism of the Christian mission, that is, cosmopolitanism as evangelization and Christianization of the pagan and heathens. To the French and English imperial designs during the eighteenth and nineteenth centuries corresponded the cosmopolitan mission of civilizing, that is, cosmopolitanism as civilizing the barbarians. To the USA, translational, global, and neo-colonial imperial designs during the twentieth century, corresponded the cosmopolitan mission of modernizing, that is, cosmopolitanism as modernization, or globalization, of the premodern and traditional. One does not need to subscribe to this particular chronology or the corresponding organizing principles (missionizing, civilizing, and modernizing) in order to recognize the validity of the critique of the ways in which certain embodiments of cosmopolitanism have, explicitly or implicitly, condoned, justified and legitimated colonialism, imperialism, and neo-colonialism. Mignolo's task, in this essay as well as in most of his work, is not just deconstructive and critical; it is also positive and constructive. The point of this critical cosmopolitanism is to open it up to other voices and others who challenge the reason of imperial and global designs that have resulted in so much inequality and human suffering. The task of critical cosmopolitanism,

38 Walter Mignolo, "The Many Faces of Cosmo-polis: Border Thinking and Critical Cosmopolitanism," pp. 721–48.

then, is to rescue, retrieve, and make audible and visible the voices of those local histories that have been rendered subaltern and silent by the imperial ethos that rolls over with military might those it deems as resistance. As Mignolo put it "Critical and dialogic cosmopolitanism as a regulative principle demands yielding generously ('convivially' said Vitoria; 'friendly' said Kant) toward diversity as a universal and cosmopolitan project in which everyone participates instead of 'being participated.'"[39] Critical cosmopolitanism, therefore, is oriented to a form of universality that Mignolo calls diversality, a combination of diversity and universality. To paraphrase what was written above, the reason and universality of critical cosmopolitanism is a cosmopolitan diversality and rationality, or more precisely diversal rationality. In Mignolo's words:

> diversality should be the relentless practice of critical and dialogical cosmopolitanism rather than the blueprint of a future and ideal society projected from a single point of view (that of abstract universality).[40]

What Mignolo is making explicit is that cosmopolitanism is caught in what has been called by Karl-Otto Apel a "performative contradiction," that is to say, there is a way in which all cosmopolitan claims are *de facto* deferred and thus awaiting further specification by that in the name of which we are called to respect, celebrate, and heed: the claims of the others, the claims of strangers, as Appiah calls them. Interestingly, Judith Butler has made this exact point in her response to Martha Nussbaum's essay "Patriotism and Cosmopolitanism." Butler's response takes up the "performative contradiction" character of universality claims implied in cosmopolitan claims and argues for a universality that must be articulated by and through the challenges to "its existing formulation, and this challenge emerge[s] from those who are not covered by it, who have not entitlement to occupy the place of the 'who,' but who nevertheless demand that the universal as such ought to be inclusive of them."[41] This universality that is always deferred and caught in its own insufficiency is what Mignolo has called "diversality." Both Mignolo and Butler agree on something far more important than on signaling that all cosmopolitan enunciations of universality demand that the universal itself be held in suspension, as an asymptotic horizon, a counter-factual, without-which but also against which, we must engage in order to enable a proper response to the other. They agree more dramatically on the place of the other in this pedagogy of the universal, in the expansion and enlightenment of universality itself. Mignolo has argued that critical cosmopolitanism is sustained in its critical stance when it

39 Ibid., p. 744.

40 Ibid.

41 Judith Butler, "Universality in Culture," in Martha C. Nussbaum (ed.), *For Love of Country*, p. 49. Here Butler develops more extensively her views on universality in the book coauthored with Slavoj Žižek and Ernesto Laclau, *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left* (London and New York, 2000).

adopts what he calls the locus of enunciation of the subaltern. Butler has argued that it is the "who" that is excluded from a given articulation of the universal that constitutes the contingent limit of universalization."[42]

Both, in my view, are arguing that cosmopolitanism is made cosmopolitan by the diversality of the subaltern, the excluded other, the stranger, and the marginalized. For this reason, one can speak of cosmopolitanism from below, one that matches the socio-political effects of a globalization from below. Mignolo and Butler give voice to what can be called the cosmopolitanism of the subaltern. In fact, it is this cosmopolitanism of the subaltern that has been educating those in the metropolises of the West and those who claim to speak univocally and unequivocally for the universal as such. This form of cosmopolitanism is reflexive not just of its own standpoint, but also of the standpoint of the others, *vis-à-vis* oneself. If there is reflexive cosmopolitanism, then there is a cosmopolitanism of the other, of the subaltern.[43] Reflexive cosmopolitanism is a universality plus difference that reflects on its own conditioned claims. It is thus universality plus difference plus historical consciousness, or to use Mignolo's language: diversality plus reflexivity of historical contingency.

Dialogical Cosmopolitanism and the Cosmopolitanism to Come

I started this chapter by noting that we have entered the ruins of a Babelian temple of confused tongues of discourses about cosmopolitanism, but that we can make our way through and out. I sought to extract a semblance of order and meaning from the plurality of adjectives that are now associated with cosmopolitanism. I have focused on the philosophical import of the category of cosmopolitanism by showing how it is a way of relating to the world that is both epistemic and moral. I do think that cosmopolitanism is also a political and legal ideal that nonetheless presupposes some general views about humanity, and our place on the planet. I showed through a critical reading of Kant's work on physical geography and his anthropology, how his cosmopolitanism is infected by an imperial ethics that derives from the very unacknowledged and unreflected materials conditions of enunciation of his own putatively cosmopolitan view. Kant is not just a "dead white European male philosopher." He is also our major contemporary source of inspiration for a cosmopolitan ideal. I have availed myself through some immanent readings of the kind of resources we would need to develop an enlightened, dialogical cosmopolitanism that can help us rescue Kant the philosopher from Kant the imperial subject. In this conclusion I want to show how Seyla Benhabib

42 See Celina María Bragagnolo, "Deprovincializing the West: How the Rest Globalizes the West," in Gary Backhaus and John Muringi (eds), *Interfacing Globalization and Colonialism* (Newcastle: Cambridge Scholars Press, 2007), pp. 138–52.

43 See Boaventura de Sousa Santos, "Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality."

provides us with indispensable tools in this major task of philosophical rescue. In a very important essay, Pauline Kleingeld offered a typology of six different varieties of cosmopolitanism in late eighteenth-century Germany: moral; political; legal; cultural; economic; and romantic.[44] I think that some of the cosmopolitanism that I discussed here could also fall under similar rubrics, although it is evident that I have not discussed economic, political, and legal variants of cosmopolitanism.

I take it that these later forms of cosmopolitanisms are what have been called really existing cosmopolitanisms, or banal cosmopolitanisms. It could be claimed that we live in an age of cosmopolitanism, just as Kant can be said to have lived in an age of enlightenment. Yet, while I have relied on the important work of Nussbaum, Appiah, Butler, Mignolo, and Beck, I have also sought to push the discourse on cosmopolitanism into clarifying some of its own normative or ideal claims. At the core of these normative claims is what I have called the dialectic of difference and identity, otherness and sameness.

All cosmopolitanism is always rooted, as is every philosophical claim, and perhaps the best cosmopolitans are those who are most fervently patriotic cosmopolitans, as Appiah argued.[45] This grounded, placed, rooted, and patriotic cosmopolitanism acknowledges the contingency and thus fragility of the kinds of institutions that enable our enacting cosmopolitanism or cosmopolitan iterations, to appropriate Derrida via Benhabib.[46] I brought into dialogue Judith Butler and Walter Mignolo in order to disaggregate what Ulrich Beck has felicitously called vertical versus horizontal cosmopolitism, but also to complicate Beck's own notion of cosmopolitan Europe, which is that Europe that has internalized self-criticism and has submitted to a process of internal cosmopolitanization.[47] If vertical cosmopolitanism seeks to impose its version from above, à la Kant, horizontal cosmopolitanism holds in suspension some of its localized universal claims, patiently, solicitously awaiting for agreement and assent from other cosmopolitan claims, à la Derrida.[48] Unless cosmopolitanism is reflexive about its material standpoint, it will turn both arrogant and despotic, that is, what I called imperial cosmopolitanism, as oxymoronic as that may sound. If reflexive cosmopolitanism acknowledges its rootedness, its materiality in certain institutions and histories, it may become an emancipatory form of cosmopolitanism. Thus cosmopolitanism presupposes a form of suspended, delayed, on the way, universalism. This is the universalism of the other, an "other" that is neither metaphysical nor radical alterity, but an other that is always a historical and concrete "other." This immediately raises a question, which Beck has articulated succinctly:

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44 Pauline Kleingeld, "Six Varieties of Cosmopolitanism in Late Eighteenth-Century Germany," *Journal of the History of Ideas* 60, 3 (July 1999), pp. 505–24.

45 Kwame Anthony Appiah in Pheng Cheah and Bruce Robbins (eds) *Cosmopolitics*, pp. 91–114.

46 Seyla Benhabib, *Another Cosmopolitanism* (Oxford,/NewYork, 2006).

47 Ulrich Beck and Edgar Grande, *Cosmopolitan Europe* (Cambridge, 2007).

48 Ulrich Beck, *Cosmopolitan Vision*, p. 162.

> . . . how can we devise a limited, relativistic or contextual universalism that successfully squares the circle of affirming universal norms while neutralizing their imperialistic sting?[49]

Beck himself partly answered the question. Such a form of limited or contextual universalism that has neutralized or disarmed its imperialistic sting is to be produced by a dialogical imaginary that is grounded in a dialogical imagination. That is, an imaginary that opens a horizon of intelligibility that sets out from recognizing that we imagine others, just as those others imagine us in their own ways. We are always more and less than what we are imagined to be, which is why we must allow others to challenge our "images" and "imagination" of them, and conversely, to allow ourselves to correct our own self-understanding in light of those challenges. Thus, this imagination internalizes the other, alterity, in a non-imperial and non-obliterating way, in order to reconstitute itself. There is no single cosmopolitan vision, but a process of arriving at it through an engagement with a dialogical imagination that opens up the spaces of mutual transformation.

In her Tanner lectures, Seyla Benhabib has given another account of what we have here called reflexive cosmopolitanism when she noted that the culture of human rights has made explicit the paradoxical situation in which nation-states are simultaneously affirmed and denied in the play of cosmopolitan right. Nation-states sign the kind of international agreements that delimit and call into question their own sovereignty. Under the cosmopolitan condition, sovereign nations are both universalized and effaced. They have a power that is indispensable but at the same time always already circumscribed, delimited by the very cosmopolitan legal order to which these nations subscribe. This dialectical play between sovereignty and cosmopolitan right takes on a generative and transformative character when it is unleashed within a nation-state. Individuals, bearers of cosmopolitan rights, may challenge the limits of their own nations from within catalyzing processes of self-definition and legal political transformation. Benhabib calls these two processes "democratic iterations" and "jurisgenerative politics."[50] As Benhabib puts it:

> With the concept of "democratic iterations," I wanted to signal forms of popular empowerment and political struggle through which the people themselves appropriate the universalist promise of cosmopolitan norms in order to bind forms of political and economic power that seek to escape democratic control, accountability and transparency. The interlocking of democratic iteneration struggles within a global civil society and the creation of solidarities beyond borders, including a universal right of hospitality that recognizes the other as a potential cocitizen, anticipate another cosmopolitanism—a cosmopolitanism to come.[51]

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49 Ibid., p. 59.

50 Seyla Benhabib, *Another Cosmopolitanism*, pp. 45–80

51 Ibid., p 177.

Democratic iterations open up the field of the political, ceaselessly renewing and expanding what constitutes the political itself. These struggles, which may be internal and national, actually have a global character. Where one group of citizens democratically iterates their claims on citizenship, these claims have global reverberation. This is the dialectical play that is the *modus vivendi* of the cosmopolitan age. But as Benhabib rightly notes, these democratic iterations also include the production of solidarities beyond borders. In this way, we should not just talk about a jurisgenerative politics, but also an affect-generative, or somatological cosmopolitan politics, in which solidarities and empathies are generated that allow us to fully engage the dialogical imagination. The dialogical is always irreversibly transformative and irrevocably suspended. It is the routinization of expectancy. Dialogue as waiting to hear the response of the other, is the expectancy of either rebuttal or acceptance that imposes on us the commandment to respond responsibly. Dialogue is thus patience, but it is, however, not pure receptivity or passivity. To open up to the other is deliberate, active, and willful action. If enlightened, reflexive, and rooted cosmopolitanism is in fact dialogical cosmopolitanism, it is an expectant cosmopolitanism that expands both vertically and horizontally, through local cosmopolitan iterations that defer it making it into a normative ideal that is guided by contextual universalism. We do not live in an age of cosmopolitanism, but in an age of cosmopolitization—the age of the cosmopolitanism to come, that is, the age of the cosmopolitanism of the other.

Chapter 7
Two Traditions of Human Rights

James Tully

Introduction

There are innumerable ways of disclosing and reflecting on the academic and practical fields of human rights. Today I will approach rights *as* tools or equipment for getting things done by individuals and groups in the multiplicity of relationships in which they find themselves. If we approach human rights from this perspective, then, I suggest, we can see at least two distinctive traditions of human rights: That is, two *ways* of thinking and acting *with* human rights in fields of relationships. These two traditions overlap and criss-cross in complex ways historically and in the present; in the academic literature and in practice. Nevertheless, I believe it is worthwhile to try to explicate their dissimilarities and the differences that these make in practice. This exercise helps us to understand more clearly the struggles both with and over human rights today.

Here is a very brief summary of the dissimilar features of the two traditions of human rights. Although these two ways of thinking about and practicing human rights are worldwide and have long histories, a familiar way to begin is from the European Enlightenment. In this period at least some of the main features of both traditions were articulated by theorists and practitioners.

The first tradition claims that human rights are something that can be unilaterally declared by an authority because they are self-evident or universal truths that are beyond debate. These universal human rights presuppose and are exercised in a universal set of modern legal, political, and economic institutions. These institutions have to be coercively imposed prior to the exercise of human rights since they are the pre-condition of the effective exercise of human rights. Among these necessary institutions is the modern state. It establishes the basis for human rights and remedies their violations. To declare, project, and then spread these institutions around the world; to be socialized into them; and to exercise human rights within them is to be on the universal path of development to a universal endpoint, which is called the modern enlightenment. This tradition became dominant in the nineteenth century and it remains paramount today. It is the view of human rights from the perspective of a legislator who has the power to

project rights and institutions over the world. I call it the Enlightenment project or the *high Enlightenment tradition* of human rights.[1]

The second tradition claims that human rights are *proposals*. They need to be *proposed* to fellow humans by fellow humans, rather than declared by an authority. The reason for this is that human rights are not self-evident: They are always open to question and critical examination by the humans who are subject to them. They gain their normative force by being reflexively tested, interpreted and negotiated *en passant*. Moreover, there is not one universal set of institutions in which human rights can be exercised. There is a *plurality* of political, economic, and legal institutions in which human rights can be realized; and these too gain their legitimacy from being open to the contestation of self-determining persons and peoples who are subject to them.

Thus, human rights and their institutions are not prior to democratic participation. Rather, human rights and democracy go together, hand in hand. It follows that human rights and their institutions cannot be coercively imposed. They must be spread by democratic and non-violent means. Finally, enlightenment does not consist in a developmental and institutional endpoint. Enlightenment consists in the continuous deepening of the co-articulation of human rights and democratic participation in exercising and improving them, world without end.[2]

I call this *the democratic* or *co-articulation human rights tradition.* Its European branch derives from the eighteenth century; yet it has been subordinate to the high Enlightenment tradition of human rights down to today.

The High Enlightenment Tradition

Introduction: Enlightenment Human Rights, Institutions, and Processes

The high Enlightenment project of human rights consists of *five main features*. First, a person is recognized as having the status of a human being with dignity in virtue of a universal set of rights and correlative duties. Second, the possession, exercise, and security of these fundamental rights presuppose an underlying universal set of legal, political, economic, and military *institutions* of the modern state. Third, these universal rights and institutions are the product of historical

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1 One of the most influential presentations of this view of human rights is given by Immanuel Kant in two complementary essays: Immanuel Kant, "Idea for a Universal History with a Cosmopolitan Purpose" (1784) and "Perpetual Peace: a philosophical sketch" (1795), in Hans Reiss (ed), trans. H.B. Nisbet, *Kant: Political Writings*, Second Edition (Cambridge, 1991), pp. 41–53, 93–130.

2 The lecture draws on the more extensive and detailed research and references in James Tully, "On Local and Global Citizenship: an apprenticeship manual," in *Imperialism and Civic Freedom*, Volume II of *Public Philosophy in a New Key* (Cambridge, 2008), pp. 243–310.

processes of civilization or modernization. Fourth, this Enlightenment module of rights, institutions, and processes develops first in Europe. It is then spread to non-European peoples, who are at lower levels of world-historical development, by means of European imperialism: First by colonization and indirect rule, and then, after decolonization in the twentieth century, by means of informal imperialism of the modernization and democratization projects of the great powers, the institutions of global governance, and the dependent elites in the former colonies.

This project makes sense only if we take into account a fifth feature. This is the Hobbesian premise that the state institutions of modern rights are prior to, and the condition of civilized relationships of cooperation and socialization. Subjection to and participation in the modern institutions of western law and private property, commerce, representative government, and the public sphere pacify and socialize pre-modern or pre-civil human beings.

Three Types of Human Rights and Underlying Institutions

Okay, let's look at three main types of Enlightenment human rights; their underlying institutions, and the processes that spread them around the world. These types of human rights are not exhaustive and I will not mention every specific right within each of the categories. Rather, I will focus on the core rights in each. Other rights in each category are normally subordinated to these core human rights, as we will see.[3]

The *first* and most important category of rights comprises civil rights. These are the negative liberties of modern subjects. These rights consist of: the liberty of the individual or of the corporate person, of free speech, thought, conscience and faith, of formal equality before the law, and of the economic liberty to own property and enter into contracts. At the core of civil rights is the modern civil liberty to enter into the private economic sphere, to engage in commerce or market freedoms and free trade, and to be protected from interference. This first core right of modern liberty is *primary* within the first category and relative to other types of rights; it is literally *the liberty of the moderns.*

We can see that this core first type of human rights presupposes not only the rule of modern law that underpins it and the modern state that enforces it, but also a set of legal and economic institutions in terms of which it makes sense. That is, for us to be able to exercise our market freedoms in the private sphere there must be capitalist markets, the dispossession of the people from other relationships to their land and resources by the spread of private property, labor markets and corporations, and the corresponding systems of legal rights.

Given the powerful private corporations that have gained recognition under this category of rights, these market freedoms tend to be paramount over other types of rights. They comprise the right not to be interfered with in these activities

3 Background arguments and references for this section are in Tully, *Imperialism and Civic Freedom*, Part 2, pp. 125–310.

by the *demos*. And, they provide the major justification for the global spread of these legal and economic preconditions and for opening societies to free trade.

The *second* type of modern rights comprises the political rights. These are rights to participate in representative elections, the public sphere, and civil society. Like the first tier of rights, participatory rights also presuppose underlying institutions in which they can be exercised: That is, representative governments, political parties, elections, the public sphere and civil society, and the differentiation between private and public spheres.

The imposition of these modern, centralized *institutions* presupposes the *processes* that remove the multiplicity of other forms of citizen-participation in other forms of government; and the socialization of citizens into this modern mode of representative participation. Citizens do not exercise powers of self-government. They are said to "delegate" these to representatives. Citizens exercise communicative powers in elections and public spheres, through official channels, and with the hope of influencing voting behavior and public policy.

The political rights of modern participation in politics are subordinate to the first tier of civil rights of market freedoms in the private sphere in *two main ways*.

First, historically, rights of participation in modern representative institutions are said to come along after processes of modernization set the underlying economic institutions of modern commercial freedom in place. The processes of economic modernization are said to require more dictatorial or authoritarian forms of rule initially, such as colonization, slavery, labor discipline, military rule, structural adjustment, military intervention and reconstruction, and so on. Once the discipline of labor market competition is established, people can begin to exercise their modern participatory rights; yet under the tutelage of colonial powers, and, after decolonization, the tutelage of modern advisors, non-governmental organizations, and the policies of the World Bank and International Monetary Fund.

Second, the rights of political participation are restricted to the public sphere: They cannot be exercised in the economic sphere, as in, say, economic democracy, since the economic sphere is protected from this kind of "interference."

The third type of modern rights comprises *social and economic rights*. These are rights that were won in response to the horrendous inequalities and exploitation of unregulated market freedoms of tier one civil rights and by means of political rights, strikes and revolutions. Again, these rights are not seen as rights of citizens to exercise their social and economic powers themselves in their social and economic activities. They are standardly interpreted as rights that provide basic social assistance and help to integrate the unemployed back into the market.

Now, this particular *module* of civil, political, economic, and social rights, with their underlying institutions of the modern state, was codified in the nineteenth century in the *standard of civilization* in modern international law. The modern state-form was recognized as the highest form of political organization. Although only European states approximated this norm of human organization, it was said to be the ideal form for all peoples and societies. All other, non-civilized societies were ranked historically, normatively, and cognitively in accordance with universal

stages of historical development, from hunting-gathering societies at the bottom to modern European states at the top.

The Enlightenment Project of human rights was not only a project for Europe, but for the world. The European powers gave themselves a *fourth right and duty*: *ius commercium* or cosmopolitan right.[4] This is the right of European traders and missionaries to enter into non-Europe societies and to try to enter into commercial relationships with them. This involved opening their resources and labor to commodification and exploitation by the private and public companies of the competing European state empires. Furthermore, the European powers were said to have *a duty or mission of civilization* not only to exploit the resources and labor of non-European countries, but also to guide them up the stages of economic and political development to the *standard of civilization*.

These *processes of modernization* require the military force sufficient to overcome resistance, to override previous forms of economic organization, to eliminate those who refused to submit, to impose slavery and severe labor discipline, to protect the whole system of market rights from resistance and expropriation, and to establish colonial rule or support local compliant rule. This enforcement mechanism took various forms over the centuries of European imperial expansion: gunboat diplomacy, formal colonies, indirect rule, spheres of influence, and, most successful of all, free trade imperialism. As the uncivilized non-European peoples are gradually moved up through the stages of development by authoritarian governance, they are gradually introduced to degrees of self-government, and this will lead eventually to the acquisition of and self-government within of the same *underlying institutions and human rights* as the civilized states already possess.

As Tony Anghie argues, the coercive projection of these institutions and rights throughout the world by imperial means was put into practice in nineteenth-century international law, the Mandate System of the League of Nations, the trustee system of the United Nations, the foreign policy of the Great Powers during and after Decolonization and the Cold War—and the policies of economic and political globalization of the institutions of global governance today.[5]

Human Rights at the United Nations and Decolonization

The development of international human rights at the United Nations by the Commission on Human Rights is arguably the most important event in the history of human rights since the eighteenth century. Human rights became part of international law and the United Nations became a forum to discuss, formulate, enact, promote, and monitor human rights. From the Commission on Human Rights, beginning in 1947, to today, a very large catalogue of international human

4 Mommsen, *Theories of Imperialism*, (Chicago, 1977), pp. 86–99.

5 See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, 2004) and Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford, 2008).

rights has been developed: the *Universal Declaration of Human Rights* (1948), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), the Declaration on the Right to Development (1986), and the Declaration on the Rights of Indigenous Peoples (2007). These have been complemented by the Universal Declaration of the Rights of Peoples (Algeria 1976), the African Charter on Human and Peoples' Rights (1977), the expansion of minority rights, the rights of the child, the right to participate in development, and much more. This remarkable achievement has changed the way that the whole world thinks about politics and it has given rise to a global cultural of human rights and human rights organizations of various kinds.[6]

Yet, if we examine the history of human rights at the United Nations, as Roger Normand and Sarah Zaidi have done in their official history, *Human Rights at the UN*, we can see a certain amount of continuity with the earlier period of the spread of the Enlightenment human rights module. The three main types of human rights, their uniform institutional bases, and the processes of imposition and monitoring by the powerful states have remained at the center of the human rights project since 1948.[7]

The delegations of Britain, The United States, and Canada dominated the Commission and crafted the main documents in accordance with their shared foreign policy in the Cold War. The modern sovereign state remains the enforcer of human rights and the ultimate decision-maker of which human rights are to be protected and violations remedied. As Hirsch Lauterpacht famously complained, the lack of individual petitioning power and the devolution of the enforcement of human rights to domestic jurisdiction effectively increased the power of states.[8] Against the wishes of the socialist states, economic and social rights were separated from the civil and political rights and subordinated to them. Yet, the socialist states accepted the general Enlightenment Project, its underlying institutions and processes of rapid development and centralization, and the sovereign state as the ultimate authority over human rights. Thus, the three tiers of rights of the enlightenment module were reproduced in the covenants. The right to private property and the fourth right of corporations to trade freely in any country in the world were also written into the *Universal Declaration of Human Rights* and almost every international trade law and agreement of GATT, the WTO, and the rapidly proliferating *lex mercatoria*.[9]

Representatives from the Third World of decolonizing peoples came into the Commission on Human Rights once it was underway. They received recognition

6 The United Nations documents are available at http://www.un.org.en/documents/

7 Roger Normand and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice*, United Nations Intellectual History Project Series (Bloomington: Indiana University Press, 2008). This section is indebted to this fine study.

8 Ibid., pp. 157–9.

9 Ibid., pp. 139–242.

of their right of self-determination in Resolution 1514 in 1960.[10] The Non-Aligned Movement of former colonies attempted to free the majority of the world's population in the Third World not only from colonial imperialism, but also from the new form of neo-colonial or post-colonial imperialism after decolonization, exercised by both the capitalist West and the socialist East. They based their case on the new, universal *right of self-determination* of peoples to determine their own interpretation of human rights, their appropriate institutions, and the best processes of development. That is, they argued for political, legal, and economic pluralism in opposition to the imperial imposition of one form of institutionalization and development of human rights.

Next, the former colonies argued that the right of self-determination and development gave them the *right to renegotiate* the deeply unequal power relations between the global north and south by means of negotiation between free and equal peoples. That is, they used the human right of self-determination to try to bring the great powers to address and transform the greatest injustice on the planet: The persistent relationships of massive inequality, exploitation, subordination, environmental destruction, indebtedness, dependency, and forced centralization and militarization. This was put forward in the *New International Economic Order* (1974). It was defeated by the great powers.[11]

During the Cold War, the Great Powers were able to continue what centuries of formal imperialism had begun, but now by informal means: The integration and subordination of the Third World into the global economy and the opening of their resources, labor and markets to free trade dominated by multinational corporations. The great powers and the dependent elites in the Third World imposed rapid centralization, dependent development, indebtedness, and militarization, destroying or marginalizing local forms of political, legal, and economic organization. Free trade prevailed over fair trade; comparative advantage over self-reliance; centralization over pluralism; armament over non-violence; dependent elite rule over broad-based democracy from below; private corporations and government agencies over democratically run cooperatives. In a word, as Gallagher and Robinson put it in the 1960s, *the end of empire and the continuity of imperialism*.[12]

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10 Declaration on the granting of independence to colonial countries and peoples: United Nations, Official Records of the General Assembly, Fifteenth Session, 958th Plenary meeting, 20 December 1960, 1514 (XV)

11 Declaration for the Establishment of a New International Economic Order (http://www.un-documents.net/s6r3201.htm): United Nations General Assembly document A/RES/S-6/3201 of 1 May 1974. See Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge, 2004), pp. 73–134.

12 Wolfgang J. Mommsen, "The End of Empire and the Continuity of Imperialism," in Mommsen, (ed.), *Imperialism and After* (London, 1976), pp. 332–58, and Mommsen, *Theories of Imperialism* (Chicago,1977) for the first survey of first and third world theories of the continuity of imperialism during and after decolonization.

There has always been a lively debate and healthy dissensus over human rights and institutions at the United Nations. Yet, a dominant interpretation emerged early and continues today. The right of self-determination, which initially seemed so promising, is interpreted as the right of a people to determine themselves into a modern western state form based on the three hierarchically ranked rights and their underlying institutions, and open to free trade under international law. This is now argued to be the only universally valid form of self-determination.[13] If a people fail to follow this model, they are subject to the covert or overt intervention and reconstruction along familiar lines.

In the 1980s and 1990s, economic and social rights were interpreted as rights to participate in capitalist markets. As the Non-Aligned Movement disintegrated in the 1980s, the right to development was *read down* as the right to be included in global processes of rapid neo-liberal economic development or face intervention and reconstruction. The right of participation of the early 2000s, which looked so promising in the 1980s, has come to mean the right to have a say within, and to be socialized into, the institutions and forms of subjectivity of type one and type two rights and their underlying institutions. The new "right to democracy" of international law is the duty to accept the basic institutions of the Enlightenment module; often delivered by the combined military power of the advanced states, as in Iraq and Afghanistan.

The right to constitutional assistance appears to be heading in the same assimilative direction. The *security resolutions* of the Security Council after 9/11/2001 have reinforced these trends and criminalized the widespread popular opposition to them.[14] The recognition of the right of Indigenous Peoples to internal self-determination in 2007 may serve to complete these processes of global modernization by integrating 350 million Indigenous peoples into the modern states constructed over their traditional territories without their consent.[15]

We are told by leading intellectuals today, as Europeans were told in the eighteenth and nineteenth centuries, that once these violent and anti-democratic processes are complete, some future generation will have a just world order of human rights and peace.

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13 For example, see Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge MA: 1996 [1992]), pp. 286–7.

14 Normand and Zaidi, *Human Rights*, pp. 243–342, Rajagopal, *International Law*, pp. 135–232, Kim Lane Scheppele, "The International State of Emergency: Challenges to Constitutionalism after September 11" (Unpublished manuscript: Princeton University, 2007).

15 Declaration on the Rights of Indigenous Peoples (www.un-documents.net/): United Nations General Assembly document of 13 September 2007, Doc.A/61/L.67. See James (Sa'ke'j) Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN recognition* (Saskatoon, 2007) for the struggle to gain these rights and the possibilities that it opens up.

The Asocial Sociability Premise and its Consequences

Now, the coercive spread and enforcement of the universal institutions that are said to underlie universal human rights have always been met with various forms of resistance. And, resistance has been met by counter-insurgency. I do not think we can understand this complex *contrapuntal history* unless we understand the premise that underlies it.

As we have seen, one of the basic assumptions of the high Enlightenment is that human rights rest on and presuppose a specific set of modern western institutions in which the rights are exercised. Humans must have these institutions and be socialized into them before they can participate in the free activities of cooperation and contestation that human rights guarantee. The reason for this coercive and anti-democratic basis of human rights is that humans are basically asocial and antagonistic, and thus untrustworthy. As a result, it is irrational to try to reason with another person or people prior to imposing over them a secure structure of law. Only once their asocial dispositions have been socialized, pacified, civilized or modernized by subjection to a coercive structure of cooperation of some kind is it reasonable to approach and engage with them as persons and peoples with the dignity of rights-bearing and self-determining agents. *Thus*, violence, wars, and despotic rule are the necessary *means* to a rights-based just world order.

Unfortunately, the human beings over whom the institutions of cooperation are imposed do not usually submit. They understandably distrust the intruders, reason in exactly the reciprocal way in response, purchase arms, and resist violence with violence. This familiar outcome is then said by the proponents of violence on both sides to prove their premise (humans are naturally antagonistic) and their conclusion (more coercive imposition of the institutional preconditions of socialization is needed, or more resistance to their imposition is needed).[16] Unremitting wars of imposition and resistance continue apace, as Kant predicted in *Universal History.*[17] However, the unremitting wars do not appear to be leading to world peace by means of a hidden hand or positive dialectic, as the Enlightenment theorists and their followers speculated. Rather, the resulting "security dilemma" tends to perpetuate violence, war, war-preparation, and power politics. In short, the current outcome appears closer to the negative predictions in Rousseau's *Discourse on Inequality*.

16 For example, Frantz Fanon, *The Wretched of the Earth* [1961] (New York, 1963) is the mirror image of the necessity of violence in the high Enlightenment theories.

17 Kant argued that the unremitting wars and European expansion were the unjust, yet necessary and irresistible "pathological" means by which providence spreads the institutional conditions for an eventual global "moral whole" based on his scheme of human rights. See, *Idea for a Universal History*, pp. 45, 47, and *Perpetual Peace*, pp. 108–14.

Resulting Global Problems

The global power-politics of the spread and policing of this module of the institutions that are said to be the necessary condition of the realization of the three types of human rights is, I believe, a major cause of the global problems we face today.

The global spread of privatization and commodification that is said to be the necessary pre-condition of type-one rights has led to the inequality, exploitation and systemic poverty of the global south. As Irene Khan, Secretary General of Amnesty International sums up the consequences:

> 963 million people go to bed hungry every night. One billion people live in slums. One woman dies every minute in childbirth. 2.5 billion people have no access to adequate sanitation services. Twenty thousand children die every day as a result. [18]

Furthermore, the protection of private corporations from democratic control by type-one rights of non-interference has led to the current financial crisis and the deepening inequalities in the Global North. These processes and institutions are also the major cause of environmental damage and global warming. The expansion of the Great Powers' global military network to protect them has led to arms races, wars, the militarization of politics and dispute resolution, and indebtedness, which in turn leads to deeper impoverishment and inequality.

When concerned citizens try *to exercise their human rights* in response to these global problems they find that the dominant institutions of political human rights are not very effective. Their political rights and the institutions in which they can be exercised are limited and subordinated to type-one rights and their institutions. The limits on democratic rights and social and economic rights shield the very processes and institutions that cause the global problems from public engagement, since they are said to be prior to and the condition of democratic participation. These limitations lead to a further *global problem*. This is the global crisis of *restricted* or "low intensity" democracy, and hence the global protests by concerned yet constrained human rights activists.[19] According to Rajagopal in *International Law from Below,* these trends lead to the criticism and rejection of human rights in the Global South.[20] In the Global North it has led to the *indignation* movements and popular assemblies in Europe and the Occupy Wall Street movements in Canada and the United States.

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18 Kahn, *The Unheard Truth: Poverty and Human Rights* (New York/London, 2009)

19 Boaventura de Sousa Santos, *The Rise of the Global Left: The world social forum and beyond* (London, 2006).

20 Rajagopal, *International Law*.

The Democratic Tradition

Introduction

I think that many of the criticisms of human rights in both theory and practice are criticisms of aspects of the tradition of human rights that I have just summarized. I would now like to turn around and examine another tradition of human rights: the democratic tradition. It is my suggestion that this tradition can be seen as a response to the problems generated by the High Enlightenment tradition. This tradition is constructed from various features drawn from different sources: the Quakers in England and America, Rousseau, Mary Wollstonecraft, Toussaint L'Ouverture in Haiti, Thoreau, William Lloyd Garrison, Robert Owen, and the great cooperative, suffragette, nonviolent, and anti-imperial movements of the last two centuries; to Gandhi, the Fellowship of Reconciliation, Martin Luther King, Amnesty International, Oxfam, the World Social Forum, and Fair Trade.[21] I sometimes call this the Gandhian tradition of human rights and responsibilities, because it is Gandhi more than anyone else who has enabled me to see this as a distinctive approach to human rights.

This tradition rejects the premise that a set of declarative human rights and their institutions and processes of socialization all precede democratic participation. Its members hold that human rights and their institutions must always be co-articulated by the humans who are subject to them. I will now set out six main features of this way of thinking and acting with human rights.

Human Rights as Proposals to and by Free and Equal Human Beings and Peoples

First, human rights are not norms that can be unilaterally declared by some authority to be self-evident and binding on subjects. Rather, human rights are proposals made by and to free and equal persons and peoples. They are proposed as tools for cooperating together and for contesting and changing unjust forms and means of cooperation.

No human rights are self-evident. As proposals, they are always questioned by those to whom they are proposed and the proposer has the responsibility to give reasons for them.[22] Dialogue, negotiation, interpretation, contestation, and revision emerge around human rights and continue forever. Human rights exist

21 I do not mean to suggest that each of these members endorsed every feature I use to define this tradition. Almost every one of them endorsed features that define the high Enlightenment tradition. This is the overlap. Rather, I mean that each member on the list advanced at least one feature that makes up the democratic tradition. I have retrospectively put these features, and so these members, together to compose a distinct tradition. I doubt that it could have been seen as a distinctive tradition prior to Gandhi.

22 For this feature, see Rainer Forst, "The Justification of Human Rights and the Basic Right to Justification," *Ethics*, 120 (2010).

and have their meaning and normative force, not in striking us as self-evident, but, rather, in being proposed and used, and simultaneously, being open to continuous questioning and negotiation. Human rights gain their authority from being open to the reflective critical enquiry and testing of the persons and peoples who hold them. I take Rainer Forst and Anthony Laden to be two of the leading theorists of this democratic premise today; that every human right requires a justification. [23]

This ideal of the co-articulation of human rights and democracy is *manifest* in practice. The human rights of the European Enlightenment have not gained their authority from being declared and imposed. They have gained it from being questioned, interpreted, expanded, transformed, and fought over since their inception. And, as we have seen, this questioning, testing and improving has continued at the United Nations and on the ground in the great post-colonial struggles over human rights today.

The Democratic Dignity of the Holder of Human Rights and Being the Change.

This democratic element is not just a basic feature of human rights. It is also a basic feature of the *dignity* of the person or the people that rights of individual and collective self-determination are designed to recognize and affirm. On the high Enlightenment view, the dignity that human rights embody is that of a person being the subject of three types of universal rights and their universal institutions and processes of enlightened modernization that socialize them into modern forms of subjectivity.

On the democratic view, the dignity that human rights recognize is the dignity of self-determining persons and peoples who have the capacities to work up and revise forms of self-government themselves: To be both subjects and authors of the norms of action coordination. To declare human rights as universal and to impose a rights regime unilaterally violates and undermines the dignity of human agency that human rights are supposed to recognize and enable. It literally *robs* human rights of their democratic authority.[24]

The democratic approach treats the other to whom rights are proposed as always already a free and equal, democratic and sociable agent, capable of agreeing to or dissenting from any human right from the first step. That is, humans acquire the abilities to treat each other as free and equal human beings with rights *by being treated as such* and being drawn into democratic relationships of dialogue and interaction. It follows from this Gandhian premise that human rights can never be spread coercively, by war and despotic rule, but only by

23 Ibid. and Anthony Simon Laden, *Proposals for Rational Creatures: A Social Picture of Reasoning* (Oxford, forthcoming).

24 This is the classic argument of Mary Wollstonecraft, *The Vindication of the Rights of Woman,* [1795] Nina Power (ed.) (London, 2010). For the argument that the imposition of the high Enlightenment rights and institutions (primarily tier one economic rights) has had similar effects on colonized and post-colonial peoples and their governments, see Vijay Prashad, *The Darker Nations: A People's History of the Third World* (New York, 2007).

means of respecting the dignity of persons and peoples that human rights are designed to affirm, empower and protect.

This discovery of the peace and non-violence movements means that human rights promoters and activists *have to be the change* that they wish to bring about. As difficult as it is, they must always act as if the *other* is already a person or people with democratic dignity. The human rights activist brings a human rights *ethos* into being by interacting with others in this free and equal democratic manner. Local and global cultures of human rights are *not* brought about by means that violate human rights: That is, by declarations, coercion, and authoritarian forms of government. The effective and lasting way to *actualize* human rights is by acting and interacting in accordance with democratic human rights. Means and ends are one and the same. The intersubjective practice of human rights **is** the socializing *ground* of human rights.[25]

This is the invaluable lesson that Amnesty International has taught us by the way they conduct themselves. And, their non-violent and democratic promotion of human rights has not only transformed the conduct of rights violators. It has also brought into being and sustained an exemplary culture of human rights cooperation and contestation that has served as a role model with normative force for millions of others.

The Plurality of Ways of Institutionalizing Human Rights

Next, there is no single, universal and uniquely modern or civilized module of institutions that underlie human rights. Rather, there are *countless* practices, customs, institutions, and relationships in which human rights can be exercised as tools for cooperating together and for contesting unjust forms of cooperation. The democratic approach to human rights that I have just laid out entails the recognition and fostering of pluralism in the corresponding legal, political and economic institutions both locally and globally.[26]

Human beings take up human rights in the social relationships in which they find themselves here and now; social relationships that are often thousands of years older than the artificial legal, economic and political institutions of the high Enlightenment module. Persons and peoples do not require a global project that destroys or marginalizes their existing social relationships by military intervention or revolution and implants allegedly universal ones in their place. Rather, human

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25 Although this idea and practice were articulated in the nineteenth-century nonviolent suffragette and peace movements, they were brought together in a comprehensive anti-imperial and democratic philosophy by Mahatma Gandhi in *Hind Swaraj* in 1909 and developed throughout his later life. See M.K. Gandhi, *Hind Swaraj and other Writings*, Anthony Parel (ed.) (Cambridge, 2007).

26 See James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, 1995) and Julia Paley, "Towards an Anthropology of Democracy," *Annual Review of Anthropology*, 31 (2002), pp. 469–96.

rights are practices that can begin anywhere within everyday relationships, and they are path dependent in their free and democratic evolution. (Following the expressivist tradition of Goethe, Herder, and Franz Boas, we might call this the *unity* of the ideal of human rights and the *diversity* of its manifestations.)

Almost all the human rights documents proposed by the Third and Fourth Worlds call for this kind of human rights pluralism. They ground it in the human right to individual and collective self-determination. This democratic ethos of human rights is also manifest in the organization and proposals of the World Social Forum. The global North is also beginning to rediscover the diversity of political, legal and economic life and the roles of human rights within them, and thus to awake from the imperious presumption that one size fits all.[27]

Three dogmas of the high Enlightenment Project: the First Two

The acknowledgement of political, legal and economic pluralism of the institutions of human rights involves more than recognizing that western institutions are not universal, but simply one set among many. This is of course true and it is captured in the post-colonial critique of "provincialising" European institutions and their links to imperial power.[28] Yet, we have to go one step further to see the distinctiveness of the democratic approach to human rights and its challenge to the dominant approach. This step involves criticizing *three false dogmas* of the high Enlightenment.

The first criticism is of the assumption that the human right to private property in the productive capacities of labor is a commodity that can be treated just like any other commodity in market relations. The commodification of productive capacities is not like other commodities. It is, as Karl Polanyi put it, a fictitious commodity.[29] Human productive capacities cannot be disembedded from their background social relationships and inserted into the imposed competitive relationships of the global labor market without damaging or destroying the background cooperative social relationships in which laboring persons and peoples exist, and on which competitive market relationships ultimately depend.

This deeply flawed assumption of the Enlightenment project was recognized and criticized immediately, long before Polanyi formulated it in 1944. The response of the democratic tradition has been to propose and exercise the human right to disengage from the commodification of human productive capacities and the right

27 Boaventura de Sousa Santos and Cesar A. Rodriguez-Garavito, (eds), *Law and Globalization from Below: Towards a cosmopolitan legality* (Cambridge, 2005) and Neil Walker, "The Idea of Constitutional Pluralism," *Modern Law Review*, 65/3, (2002), pp. 317–59.

28 Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton, 2000).

29 Karl Polanyi, *The Great Transformation: The political and economic origins of our time* (Boston, [1944] 2001). For an update of the Polanyi hypothesis, see Peter Evans, "Is an Alternative Globalization Possible?," *Politics and Society*, 36/2, (2008), pp. 271–305.

to exercise them in democratically organized cooperatives, community-based enterprises, peasant communes, microcredit, local and global fair trade networks, and so on. These traditions have given rise to democratically organized forms of economic activity throughout the world that run parallel to the two destructive high Enlightenment alternatives of market liberalism and state-run socialism.[30]

These democratic and *co-operative* institutions of social and economic human rights treat human productive capacities as embedded in broader local social relationships and exercised under the democratic authority of the producers, consumers and local communities. This grass-roots interpretation of social and economic rights is what Gandhi and Schumacher called *Swadeshi and Swaraj***:** economic self-reliance and economic democracy.[31] Mary Robinson, the UN High Commissioner for Human Rights 1997–2002, and Irene Kahn, Secretary General of Amnesty International, see the local and global networks of nonviolent, cooperatively exercised social and economic rights as the solution to poverty and the ground of a world culture of human rights. These nonviolent practices of human rights, rather than the military might of the great powers, is the ground, realization and guarantee of human rights.

The second criticism of the Enlightenment module is of the assumption that the human right to private property in land, in the environment, is a commodity that can be treated just like any other commodity in market relations. The privatization of the environment is not like other market commodities. It too is a fictitious commodity. The natural world cannot be transformed into commodifiable resources and its effects treated as externalities without destroying the background ecological relationships in which human beings live and breathe and have their being.

This ecological criticism of the commodification of the natural world developed at the same time as the social criticism of the commodification of productive capacities. It gave rise to the deep ecology movements that are now worldwide. The response of the democratic human rights movements to this second dogma of the Enlightenment Project is to realize that human rights are not only embedded in and exercised in broader social relationships. They are also, and even more fundamentally, embedded and exercised in cooperative ecological relationships that unite the diversity of all forms of living beings in the world.

Rights bearing persons and peoples are thus place-based or *Gaia citizens*. They are citizens of the *commonwealth of all forms of life* and thereby have duties to respect, care for, and sustain the interdependent ecological relationships that care for and sustain them. If, on the contrary, modern human rights are taken as the very

30 The classic study is George Davidovic, *Towards a Cooperative World: Economically, Socially, Politically* (Antigonish Nova Scotia, 1967). More recently, see Stefano Zamagni and Vera Zamagni, *Cooperative Enterprise* (Cheltenham, 2010).

31 Mahatma Gandhi, *The Essential Writings*, Judith M. Brown (ed.) (Oxford, 2008), pp. 67–105, 133–308, and E.F. Schumacher, *Small is Beautiful: A Study of Economics as if People Mattered* (London, 1973).

basis of legal, political, and economic relationships, their exercise destroys both social and ecological relationships, and, eventually, life on earth.[32]

Thanks to the democratic, cooperative, and ecological tradition of human rights, we are learning that the drafters of the UN *Universal Declaration of Human Rights* were correct in stating that human beings have *human rights and duties*, not as abstract persons, but as responsible *members of the human family*.[33] Following Albert Schweitzer and Rachel Carson, ecological human rights activists have extended this world community to include all forms of life, human and non-human.[34] This view, the *Gaia hypothesis*, is now endorsed by many climate scientists and the Intergovernmental Panel on Climate Change.

Cooperation is more basic than competition

The *third criticism* is of the basic Enlightenment premise that humans are anti-social and untrustworthy and thus require the coercive imposition of modern institutions before they can exercise human rights. This dogma leads, as we have seen, to the false hypothesis that the unintended consequence of unremitting wars in the name of human rights will lead to the spread and eventual affirmation of human rights. Two hundred years later, we now know what Montesquieu already predicted in 1748: That the premise leads to distrust, armament, war and rearmament.[35]

The democratic tradition challenged this premise in the nineteenth century. Classically, Kropotkin responded to Darwin that ecological and social relationships of cooperation and mutual aid are more pervasive and fundamental than relationships of antagonism and violent struggles for existence. If this were not true, if the basic condition were one of wars of all against all, then the human species, and all other species, would have perished long ago.[36]

It has taken the work of peace and non-violent activists and scientists the entire twentieth century to bring this cooperative premise to the awareness of the dominant tradition. Ecological scientists, conservation biologists, anthropologists and even political scientists have substantiated the proposal that cooperation,

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32 See Emilio F. Moran, *People and Nature: An Introduction to Human Ecological Relations* (Oxford, 2006) and Peter G. Brown and Geoffrey Garver, *Right Relationship: Building a Whole Earth Economy* (San Francisco, 2008).

33 The *Universal Declaration of Human Rights*, Preamble: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" (www.un.org/en/documents/udhr/).

34 See, for example, Vandana Shiva, *Earth Democracy: Justice, Sustainability and Peace* (Cambridge MA, 2005).

35 Charles de Secondat Montesquieu, *The Spirit of the Laws* [1748], (trans. and ed.) Anne M. Choler, Basia Carolyn Miller and Howard Samuel Stone (trans. and ed.) (Cambridge, 1989), Book 13, #17, pp. 224–5.

36 Peter Kropotkin, *Mutual Aid: A Factor of Evolution* [1902] (Kessinger Publishing, 2007). Compare Gandhi, *Hind Swaraj*, 88–90, and Ashley Montagu, *Darwin: Competition and Cooperation* (New York, 1952).

not antagonism, is the primary factor in human and ecological evolution. This cooperative hypothesis has begun, for the first time since the rise of the antagonistic model of human behavior, to make inroads into the way proponents of modernization think about human rights.[37]

Of course, this is not a self-evident truth but a contested hypothesis in the natural and human sciences. The point of the democratic tradition is that if we wish to realize a world of respect for human rights we should *act as if* other human beings are trustworthy and inclined to cooperation in order to bring this state of affairs about, as the majority of humans evidently do in everyday life.

Next, it is not only that relationships of cooperation and mutual aid are prior to competition in and over them. The democratic view is also that when disputes break out in everyday life, the normal course of action is to resolve them non-violently rather than violently. Again, if this were not the case, if the violent resolution of disputes were normal rather than abnormal and pathological in everyday life, then the human and non-human world would have perished ages ago. If follows that violence is not a necessary feature of government or of the contestation of unjust forms of government.

This is of course the most contentious claim of the grass-roots and non-violent human rights movement of the twentieth century—of William James, Tolstoy, Einstein, Aldous Huxley, Bertrand Russell, Mahatma Gandhi, Martin Luther King, Kathy Kelly, and millions of followers. The coercive apparatus of modern states and global military networks, and of violent opposition movements, *are unnecessary and counter-productive means* in the promotion and protection of human rights, and in remedying their violations. As Hannah Arendt concluded in 1969, we can no longer describe the violent processes that we have unleashed as "progress" because the means now overwhelm the ends.[38]

Human rights can be effectively proposed, adopted, used, abused, and remedied all by the plenitude of non-violent means of cooperation, noncooperation, contestation, and negotiation that the peace and non-violence movements have developed. These countless means of exercising human rights and of alternative dispute resolution techniques are now argued to be, by researchers and human rights activists, "a force more powerful" than the power politics of the modern world,[39] as we witnessed in Tunisia and Egypt this Spring.

Both Gandhi and King embodied this human rights *ethos* in their struggle for the right of self-determination in India and civil, political, and economic rights in the United States. They held on to it against all the violence mobilized against them. Yes, they were murdered. Yet, the most powerful empire in the world was defeated in India, the Indian people gained the right of self-determination, and African-Americans gained civil rights in the United States. Perhaps even more

37 Brown and Garver, *Right Relationship*.

38 Hannah Arendt, *On Violence* (New York, 1969), p. 9.

39 Peter Ackerman and Robert DuVall, *A Force More Powerful: A Century of Nonviolent Conflict* (New York, 2000).

importantly, they set an example that has been followed by millions of non-violent human rights activists ever since.[40]

The Democratic Relationship between Human Rights and Duties

The penultimate contrast I wish to draw is between the role of duties or responsibilities in the two human rights traditions. The UN *Universal Declaration of Human Rights* states that rights and duties go hand in hand. In the High Enlightenment tradition, this is taken to mean that rights correlate with duties: (1) with a duty of others to respect the right; (2) or with a duty of government to provide the underlying institutions in which rights can be exercised; or (3) or with a duty of governments coercively to remedy violations of rights.

In the democratic tradition, duties are interpreted differently. *Duties precede and enable human rights*. The persons and peoples who hold human rights are also the holders of duties to cooperate in providing the social conditions and means by which human rights can be exercised. This thesis is based on the premise of the democratic tradition: We the people, individually and collectively, have to *embody in our activities the change that* we hope to bring about in world at large. As Gandhi famously put it:

> I learnt from my illiterate but wise mother that all rights to be deserved and preserved came from duty well done. Thus the right to live accrues to us only when we do the duty of citizenship of the world. From this one fundamental statement, perhaps it is enough to define the duties of Man and Woman and correlate every right to some corresponding duty to be first performed. [41]

For example, if humans have a human right to clean water, then they have a duty to protect the commons from privatization and to participate in governing the water supply for the public good. If they a right to peace, then they have a duty to act peacefully in their activities and to refuse to cooperate with war and violence. If they have rights to health, work, shelter, and a decent diet, then they have corresponding duties to work in relationships of mutual service that make the exercise of these rights possible. If someone violates a human right, the remedy is the *duty* we all have to withdraw our cooperation; as well as to boycott, protest, strike, and negotiate until the violation is remedied and the violator is converted to non-violence and human rights.

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40 The classic manual of nonviolent politics, endorsed by Gandhi and King, is Richard B. Gregg, *The Power of Nonviolence* (New York, 1960). See also Roger Powers (ed.), *Protest, Power and Change: An Encyclopedia of Nonviolent Action from Act-Up to Women's Suffrage* (New York, 1997) and Gene Sharp (ed.) *Waging Nonviolent Struggles: Twentieth Century Practice and Twenty-first Century Potential* (Boston, 2005).

41 UNESCO, Human Rights: *Comments and Interpretations,* Intr. Jacques Maritain (New York, 1949), p. 18

Conclusion: Delegating the Duties of Human Rights to Governments

Democratic human rights movements are proponents of conditionally *delegating* some of these corresponding human duties to representatives, whether the representatives are public governments or private corporations. And, they are also proponents of the politics of engaging in public spheres or courts to try to influence representative governments and hold private corporations and international institutions of global governance accountable. Yet, they are opposed to the idea that this delegation model is the only way that human rights can be realized. The reason for this, as we have seen, is that unconditional delegation leads down the slippery and disempowering slope of the *alienation* of these responsibilities to quasi-autonomous institutions *such as states* that then claim they are the very condition of possibility of human rights.

The democratic human rights tradition has learned that these huge private and public institutions that claim to spread and protect the foundations of human rights will do so *by means of human rights if and only if they are held accountable by active and engaged democratic citizens*. If citizens sit on their hands and expect governments to provide the public goods and private corporations to provide the jobs that human rights require for their exercise, they will not do so. They will be unaccountable to the persons who *alienated* their responsibilities to them and they will be manipulated by the powers-that-be, as in the current financial crisis.

Furthermore, democratic citizens have learned that an active democratic citizenry capable of engaging in public spheres and holding governments and private corporations accountable has to be grounded in something even deeper. It has to be grounded in a *democratic human rights way of life in* which persons and peoples learn to practice their underlying human responsibilities at the same time as they learn to exercise their human rights.

For the democratic human rights tradition, the practice of these human responsibilities is *the historical foundation of the human rights that we have today*. The human rights we enjoy were not declared by the political, economic, and military powers-that-be and handed down to the people after they had built the underlying institutions for us and spread them around the world. This grand narrative has the world of human rights upside down. We have the imperfect human rights we have today because human beings, individually and collectively, took up the responsibilities of enacting their human duties and rights in every walk of life, from the lowest to the highest. *It is the manifestation and normative force of this living democratic ethos of human rights that moves governments and corporations to recognize and support human rights*.

To see this ethos is to become aware of another kind of enlightenment—democratic human rights enlightenment—that exists all around us and is the *real foundations of human rights*. It is overlooked, partly because of its familiarity and everydayness, and partly because of the captivating majesty and power of the high Enlightenment alternative. Yet, I would like to propose that this lower case human rights enlightenment is worth your attention and consideration.

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