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Recommended Citation

Scott T. Fitzgibbon. "The Ethical Bases of Human Rights." *Journal of Law in Society* 19, no.1 (2019): 19-48.

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THE ETHICAL BASES OF HUMAN RIGHTS

BY: SCOTT FITZGIBBON¹

INTRODUCTION

I. The General Project.

Human rights have become the grounding of human solidarity. They are, today, the substance of the brotherhood of man. They take the place once occupied by “our common clay,” our common ancestry, and our common relationship with the Deity.

This being the case, it is important to understand what, in turn, grounds human rights. There is nothing approaching a consensus: indeed, the impressive edifice on which much of the political order of the world now rests has been constructed based on the conscious decision by its principal authors to prescind from asking this basic question. Unsurprisingly under these circumstances, more and more rights are being proposed,² and many divergent theories are propounded as to their bases.³

1. J.D., Harvard. B.C.L., Oxford. Professor, Boston College Law School. Member of the Massachusetts bar. My thanks to James Gordley, W.R. Irby Chair in Law, Tulane University School of Law, for his comments, which extended through several drafts and were a great help, and to those scholars who attended a session relating to this paper at Trinity College, Dublin in the Autumn of 2017, especially Head of School Oran Doyle; their comments were numerous and very thoughtful.

2. Four examples among many: The International Covenant on the Elimination of All Forms of Racial Discrimination includes a “right to inherit.” International Covenant on the Elimination of All Forms of Racial Discrimination art. V(d)(iv), March 7 1966, 660 U.N.T.S. 195. The African Charter includes a right to “security.” The African Charter on Human and Peoples’ Rights art. 23.1, Oct. 21, 1986 1520 U.N.T.S. 217. The International Covenant on the Rights of the Child identifies a right for a child to be “cared for” by his parents. Convention on the Rights of the Child art. 7, Nov. 20, 1989, 1577 U.N.T.S. 3. The International Covenant on Economic, Social and Cultural Rights identifies “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” International Covenant on Economic, Social and Cultural Rights, art. 12 § 1, Dec. 16, 1966, S. Treaty Doc No. 95-19, 6 I.L.M. 360 (1967). See THANA CHRISTINA DE CAMPOS, *THE GLOBAL HEALTH CRISIS: ETHICAL RESPONSIBILITIES* 28 (2017)(hereinafter referred to as “de Campos, *Global Health*”) and works cited.

3. An extensive bibliography of works on human rights is available in the “Human Rights” entry in the Stanford encyclopedia of philosophy, <https://plato.stanford.edu/entries/rights-human/>. Many of the works cited below also set forth extensive lists of authorities.

This Essay considers four proposed bases and rejects them. It proposes an account according to which the ethical basis for human rights is the protection of fundamental human attributes.⁴

II. *Some Carve Outs.*

This Essay does not propose that all human rights be recognized by positive law. Plainly the extent of their recognition may depend on considerations special to the legal system and social order in question. Nor does this Essay aim to determine what, if anything, has been achieved by way of common understanding in international instruments and national law. (Scholars often find common understanding to be in short supply.). Doubtless a common understanding would be most helpful; agreement is central to the noble endeavor of protecting people from many horrific practices. Even muddled pseudo-agreement may be better than none at all. But discerning or promoting such an agreement is not the purpose here.

Instead, this Essay pursues the thoroughly normative project of asking what *deserves* protection as a human right, largely presiding from the question of whether governments and lawyers see things that way. One seeks to understand such objective *realia* out of love of knowledge and respect for the truth. One hopes to develop a basis for refuting “human rights nihilism.” One aspires to facilitate clarity, and thus to dispel fog and deprive violators of concealment. If the foundational goods prove to be the stuff of ordinary life, as here proposed, then human rights can be focused on them and therefore be better integrated into the moral and social orders of many countries,⁵ rather than becoming the “playthings of bureaucrats” and the vehicles for the promotion of novel and meretricious practices.

4. Thus this Article has a close affinity with “personalism,” a philosophy which is extensively discussed in THOMAS D. WILLIAMS, *WHO IS MY NEIGHBOR? PERSONALISM AND THE FOUNDATIONS OF HUMAN RIGHTS* (2005)(hereinafter referred to as “Williams, *Who Is My Neighbor?*”). Endorsing a personalist theory must lead on to an exploration of the basic characteristics and actions of the person. Regrettably, those subjects are mostly left unconsidered in Williams’ book. They are considered here.

5. See generally Paulo G. Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply*, 19 EUROPEAN J. INT’L. L. 931, 941-42 (2008), <http://www.ejil.org/pdfs/19/5/1704.pdf>. This article observes that human rights are based: “on a very thin, if any, agreement about where they come from and what they mean. * * * To compensate for this precarious state, human rights lawyers and political actors have spent decades dedicating themselves to the building up of the positive law of international human rights – multiple treaties, institutions, and processes designed to ‘translate’ the underlying principles into hard norms with widespread global acceptance. Once ‘constitutionalized’ in this way, the validity of the norms can become conceptually distanced from their social or philosophical basis, like Hart’s Rule of Recognition or Kelsen’s *Grundnorm*, thus obviating (or at least obscuring) the need (and perhaps even the possibility) to inquire into, or shore up, their originally pluralistic ethical starting points. *

This Essay does not even maintain that the answers it proposes are the entire story. Only “fundamental goods” and “indispensable goods” are here emphasized. There are others, not here much discussed. Furthermore, this Essay leaves aside many related questions, such as whether each person has the same rights to the same degree, what to do when rights conflict, and when rights can properly be waived or forfeited by misconduct or overridden owing to cost or exigency.⁶ Further still, this Essay refrains from addressing the subject of what duties a right generates: notably, the questions of when a right has the effect of immunizing the holder from interference and when a right requires others to assist.⁷ All of this permits this Essay to pursue without distraction its principal mission: crafting an account of the principal ethical bases of human rights.

III. The Two Big Questions.

There are two major issues about human rights. The first is: what goods are worthy of any sort of protection, individual, social or legal? The second issue is what characteristics make a good suitable for *human rights* protection, as opposed to protection of some other sort.

This Essay addresses the first issue in Part One. It is there proposed that the most important goods relate to the nature of the person. A general statement of the thesis is: if you could not be fully a person without something -- your life, for example, or your mind -- that thing is a part of fundamental good. If you could not be fully a person without *doing* something -- thinking, for example -- that activity would seem to be a part of fundamental good. Perhaps we could add: if you would be drastically different if deprived of something (your memory, for example) or prevented from ever again engaging in some project (remembering things, for example), you deserve protection from being permanently deprived of that thing or permanently thwarted in performing that project.

* * The law which is constructed without attentiveness to the underlying cultural context tends toward abstraction which separates it from the society that it purports to regulate. * * [T]he vacuum existing between the positive law of international human rights and the meaning-generative contexts in which people actually live their lives tends to get filled with an exaggerated role of bureaucratic institutions and political elites.”

6. Further, this Essay eschews the project of describing the motives which might lead people to respect human rights. (That topic is taken up in Michael J. Perry, *Human Rights Theory, 2: What Reason Do We Have, if Any, to Take Human Rights Seriously? Beyond “Human Dignity”* 23 (Emory U. Sch. of L. Legal Stud., Working Paper No. 15-350), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2597404 (proposing that the fundamental answer to this question is “the agapic sensibility”).

7. An exploration of the literature is set forth in de Campos *Global Health, supra* n. 2, at 67 *et seq.*

Plainly, this thesis opens out into an inquiry as to the especially important attributes and projects of a person. This paper pursues that inquiry. Reason, reasoning, and knowledge are proposed as central. This brings the discussion into close touch with the classic tradition of ethical anthropology.

The analysis in Part One is by far the most important part of this Essay, and can stand on its own merits whatever the reader may think about the more complicated material in Part Two.

The second issue is addressed in Part Two: what characteristics make a good eligible for the especially strong protections demanded by human rights? Answering this question is exigent, because any plausible good which is identified as worthy of general protection must be a big one, and a theory of human rights which introduced no limiting criteria would therefore appear to extend its umbrella over vast ranges of practices. Part Two of this Essay therefore identifies several principles which restrict the scope of human rights.

IV. Winston and Julia.

You remember the situation portrayed in George Orwell's novel *Nineteen Eighty-Four*: an England subject to Big Brother, whose ever-watching face was posted on all walls; an England where the population was fearful of a large and all-powerful "Party," and was constantly under observation through Televisors in every corner. You remember Julia and Winston: their loathing of the regime; their secret love of one another; their rendezvous in a hidden room behind a bookstore; and their terrible vulnerability.

You remember that they were detected, captured, and separately interrogated. You remember Winston's intolerable, interminable ordeal of days or weeks, and his final capitulation:

"The circle of the mask was large enough now to shut out the vision of

anything else. The wire door was a couple of hand-spans from his face. The rats knew what was coming now. One of them was leaping up and down, the other, an old scaly grandfather of the sewers, stood up, with his pink hands against the bars, and fiercely sniffed the air. Winston could see the whiskers and the yellow teeth. Again the black panic took hold of him. He was blind, helpless, and mindless. * * *

"The mask was closing on his face. The wire brushed his cheek. And then -- no, it was not relief, only hope, a tiny fragment of hope. Too late, perhaps too late. But he had suddenly understood that in the whole world there was just ONE person to whom he could transfer his punishment --

ONE body that he could thrust between himself and the rats. And he was shouting frantically, over and over.

“Do it to Julia! Do it to Julia! Not me! Julia! I don’t care what you do to her. Tear her face off, strip her to the bones. Not me! Julia! Not me!”⁸

You probably remember the consequences for Julia’s and Winston’s love for one another:

“They sat down on two iron chairs, side by side but not too close together. He saw that she was about to speak. She moved her clumsy shoe a few centimeters and deliberately crushed a twig. Her feet seemed to have grown broader, he noticed.

“I betrayed you,” she said baldly.

“I betrayed you,” he said.

“She gave him another quick look of dislike.

“Sometimes,” she said, “they threaten you with something -- something you can’t stand up to, can’t even think about. And then you say, ‘Don’t do it to me, do it to somebody else, do it to so-and-so.’ And perhaps you might pretend, afterwards, that it was only a trick and that you just said it to make them stop and didn’t really mean it. But that isn’t true. At the time when it happens you do mean it. You think there’s no other way of saving yourself, and you’re quite ready to save yourself that way. You WANT it to happen to the other person. You don’t give a damn what they suffer. All you care about is yourself.”

“All you care about is yourself,” he echoed.

“And after that, you don’t feel the same towards the other person any longer.”

“No,” he said, “you don’t feel the same.”⁹

You certainly remember the very last sentences of the book:

“[Winston] gazed up at the enormous face. Forty years it had taken him to learn what kind of smile was hidden beneath the dark moustache. O cruel, needless misunderstanding! O stubborn, self-willed exile from the loving breast! Two gin-scented tears trickled down the sides of his nose. But it was all right, everything was all right, the struggle was finished.

He had won the victory over himself. He loved Big Brother.”¹⁰

You can see, I am sure, that Winston’s and Julia’s human rights were terribly violated. This Essay seeks to establish the theoretical basis for this conclusion.

8. GEORGE ORWELL, NINETEEN EIGHTY-FOUR 361-62 (1949) (hereinafter referred to as Orwell, 1984),.

9. *Id.* at 369.

10. *Id.* at 376. The preceding blank line does not appear in the published version.

PART ONE

Human rights protect goods. No one would assert a right to sickness or insanity. We may add: *important* goods; not mere desiderata. No one thinks there is a human right to pleasant elevator music.

What then, are the important goods? This Part One aims to answer that question.¹¹ This Part is interspersed with indented paragraphs which reflect on what the analysis, as it unfolds, may imply for human rights.

I set aside ethical skepticism. Surely there is some point to the things we do and the situations we aim to establish, or why would we do them or aim to bring them about. (Why else would you be reading this Essay?)

Surely there is some point to human rights, or why would we recognize and respect them?¹²

Some Types of Good.

Some things are good only instrumentally – in other words, for the sake of something else. But things of that sort -- “instrumental goods” -- cannot be the entire story. There must be at least one good of another sort – something which is good not (only) for the sake of something else, but is instead worth having or doing in itself. Otherwise, what would instrumental goods ultimately be good for?¹³ That other sort of good is basic, and is emphasized in this Essay under the name “fundamental

11. Some of this section of the Essay is guided by and in part tracks the brilliant and telling arguments presented in the *Nicomachean Ethics*.

12. *But cf.* JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE (3d ed., 2013)(hereinafter referred to as Donnelly, *Universal Human Rights*) at 19-21 (stating, at 21, that “[t]here are no strong foundations for human rights . . .”),

13. Thus ARISTOTLE, NICOMACHEAN ETHICS 1094a 17-22 (W.D. Ross, trans.), in II THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION 1729, 1729 (Jonathan Barnes, ed., 1984)(hereinafter referred to as Aristotle, *Nicomachean Ethics*). :

“If, then, there is some end of the things we do, which we desire for its own sake (everything else being desired for the sake of this), and if we do not choose everything for the sake of something else (for at that rate the process would go on to infinity, so that our desire would be empty and vain), clearly this must be the good and the chief good.”

Aristotle advances the same argument in ARISTOTLE, METAPHYSICS 994b 9 -15 (W.D. Ross, trans.), in II THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION 1552, 1571 (Jonathan Barnes, ed., 1984):

“[T]he *final cause* is an end, and that sort of end which is not for the sake of something else, but for whose sake everything else is, so that if there is to be a last term of this sort, the process will not be infinite; but if there is no such term there will be no final cause. But those who maintain the infinite series destroy the good without knowing it. Yet no one would try to do anything if he were not going to come to a limit. Nor would there be reason in the world: the reasonable man, at least, always acts for a purpose, and this is a limit, for the end is a limit.”

good.” Let us stipulate that fundamentality makes a good important, and therefore makes it a plausible basis for the protection of human rights.

I deploy the “dispensability criterion.” If you think something is good, but would dispense with it if nothing of any value would ensue, then you identify the dispensable thing as of instrumental value only. If you would dispense with a thing if anything worthwhile it might lead to could be more readily obtained without it, then you identify the dispensable thing as of instrumental value only. If you would be *reasonable* in dispensing with it under those circumstances, then you *reasonably* conclude that it is of instrumental value only.

Many people believe that some human rights cannot be “dispensed with”: viz. overridden or even waived; and many human rights instruments reflect this view. This suggests that some human rights are founded on fundamental good.

A further distinction might be noticed: that between things which are *realistically* dispensable and those whose dispensability can be discerned only after an imaginative leap into a world quite different from the one we inhabit. Your bicycle is obviously dispensable (you could walk or take a taxi). *Any and all* means of locomotion can be anointed as dispensable only if you take the leap, for example by supposing the availability of “beaming up.” Potatoes are obviously dispensable; *food or nourishment* is dispensable only if you imagine humans to be pure spirits. We might call the former goods “realistically dispensable” and the latter sort “only hypothetically dispensable.”¹⁴

A disinterested judge in a criminal proceeding is, for this sort of reason, not realistically dispensable. You can, by a stretch of the imagination, picture a judge who entirely disregards his own interests in all cases, but to be realistic few are so pure. The same can be said of other circumstances which tempt people to misconduct. (One might call them “occasions of wrongdoing.”) The same can be said of the right of an accused in a criminal proceeding to learn the charges and to confront witnesses: that, and many other procedural devices aimed at ensuring a fair trial, can be identified for similar reasons as not realistically dispensable. To be sure, one might imagine a legal system in which judges and prosecutors, though they refrained from informing suspects of what was afoot, nevertheless reliably arrived at just decisions. Human nature

14. Plainly the same sort of good may be realistically dispensable at one time and place but only hypothetically dispensable at another. When potatoes are the only nourishment available in a country, they are, then and there, indispensable. Plainly also, the same sort of good may be realistically dispensable for some people but only hypothetically dispensable for others: insulin, for example.

being what it is, however, consistently just results under those circumstances are unlikely.

This Essay will employ a broadened definition of “fundamental good” which makes it include instrumental goods whose dispensability is hypothetical only: goods, such as food, which could not, realistically, be dispensed with. Let us stipulate that “fundamental goods” in this extended sense are important goods, and plausible candidates for the protection of human rights.

If human rights are to be focused on things we humans do and understand, as will be proposed in Part Two, then it seems that realistically fundamental goods are more worthy of their protection than are goods whose dispensability is only hypothetical.

Another key to the distinction between instrumental and fundamental goods might be called the “dependency criterion.” Instrumental goods would cease to be good at all were final good to be removed. Instrumental goods take their appropriate shape or character from the final goods towards which they aim. (What time you leave for work and how fast you walk depends on what your object is.).

II. Fundamental Good: Some Approaches Not Here Endorsed.

A. Pleasure.

Pleasure and the absence of pain has been one recurrent answer to the question “what is final good?”¹⁵ Such an account is convincingly rebutted by a famous “thought experiment” advanced by Robert Nozick in *Anarchy, State and Utopia*:

“Suppose there were an experience machine that would give you any experience you desired. Super-duper neuropsychologists could stimulate your brain so that you would think and feel you were writing a great novel, or making a friend, or reading an interesting book. All the time you would be floating in a tank, with electrodes attached to your brain. Should you plug into this machine for life, preprogramming your life’s experiences? . . . Of course, while in the tank you won’t know that you’re there; you’ll

15. Thus John Stuart Mill in Chapter II of UTILITARIANISM explicated “[t]he creed which accepts as the foundation of morals ‘utility’ or the ‘greatest happiness principle’ . . . [It] holds that actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure and the absence of pain; by unhappiness, pain and the privation of pleasure.” JOHN STUART MILL, UTILITARIANISM 9-10 (1861).

Pleasure-based theories have for the most part been varieties of utilitarianism. Utilitarianism as one basis for rights among others is cautiously endorsed in JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS 58-61 (2d ed. 2007).

think it's all actually happening. Others can also plug in to have the experiences they want, so there's no need to stay unplugged to serve them. . . . Would you plug in? *What else can matter to us, other than how our lives feel. . . .?*¹⁶

If you conclude, as most people do, that you would stay out of the machine, that almost certainly is because you identify something other than pleasure (or any other experience) as a dimension or kind of final good. (A similar line of thought is taken by Aristotle when he observes that "no one would choose to live with the intellect of a child throughout his life, however much he were to be pleased at the things that children are pleased at . . .").¹⁷

Another telling argument, to similar effect, is provided by Socrates, as reported by Plato in the *Philebus*:¹⁸

"Soc. Would you choose, Protarchus, to live all your life long in the enjoyment of the greatest pleasures?"

Pro. [Protarchus] Certainly I should.

Soc. Would you consider that there was still anything wanting to you if you had perfect pleasure?"

Pro. Certainly not.

Soc. Reflect; would you not want wisdom and intelligence and forethought,

and similar qualities? would you not at any rate want sight?"

Pro. Why should I? Having pleasure I should have all things.

Soc. Living thus, you would always throughout your life enjoy the greatest pleasures?"

Pro. I should.

Soc. But if you had neither mind, nor memory, nor knowledge, nor true

opinion, you would in the first place be utterly ignorant of whether you were pleased or not, because you would be entirely devoid of intelligence.

Pro. Certainly.

Soc. And similarly, if you had no memory you would not recollect that you had ever been pleased, nor would the slightest recollection of the pleasure which you feel at any moment remain with you; and if you had no true opinion you would not think that you were pleased

16. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 42-43 (1974) (emphasis in the original)(hereinafter referred to as Nozick, *Anarchy, State, state and Utopia*.

17. Aristotle, *Nicomachean Ethics*, *supra* note 13, at 1174a 1-3 (elision in the text as quoted; note omitted).

18. PLATO, PHILEBUS (Benjamin Jowett, trans.), <http://classics.mit.edu/Plato/philebus.1b.txt>.

when you were; and if you had no power of calculation you would not be able to calculate on future pleasure, and your life would be the life, not of a man, but of an oyster or pulmo marinus. Could this be otherwise?

Pro. No.

Soc. But is such a life eligible?

Pro. I cannot answer you, Socrates; the argument has taken away from me the power of speech.”

These passages establish that there is more to fundamental good than pleasure.

There really can be no such thing as “pleasure alone.” Neither pleasure nor any other experience can exist without a being to experience it. Indeed, pleasure and such-like experiences require, not any sort of being, but one with the power to think, at least to the extent of receiving and grasping experience. For Nozick’s experience machine to work, the person in it has to have a mind (“you will *think* it’s all actually happening.”¹⁹). This dimension is prior. Pleasure depends on it, would not arise without it, and would disappear if it ceased to exist.

We may even reasonably surmise that pleasure takes its shape and color from this other dimension of things, and is directed by it. You won’t greatly enjoy a child’s pleasures once you grow up. Few of us continue to watch Mr. Rogers or to play with toys.

All of this leads to the conclusion that pleasure, though it may be a part of non-instrumental good, is at most a secondary part of it.

And similarly human rights ought not to find their foundation solely in the protection of pleasure or the avoidance of pain.

Having conceded that, we are left looking for some other basis upon which to condemn O’Brien for violating Winston’s rights, as obviously he did. We are also left looking for an explanation of why causing Winston intense pain constituted a part of this offense. An explanation is set forth in note 44, *infra*.

B. *Respect; Honor; “Concern.”*

Another possibility is that the good for people consists in being respected, or treated with respect, or regarded or treated with concern to some substantial degree. This is suggested by many of the writings of Ronald Dworkin, who made “equal concern and respect” central.²⁰ Is respect or concern the non-instrumental good, or a major part of it?

19. Nozick, *Anarchy, State, and Utopia*, *supra* note 16, at 43 (emphasis added).

20. Dworkin wrote:

Respect, honor, and concern are odd candidates because, unlike pleasure, they are not attributes or conditions inhering in the person whose good is at issue, but instead reside in the thoughts and doings of other people. They are not, so to speak, *inside* the respected person. We apprehend that whether or not a person's life or doings are basically good depends mainly on what he himself is or does, and expect outside parties to enter into the matter only insofar as they contribute or detract. Such is not the case with respect, honor or concern.²¹ Evidently there is something *relational* about respect, honor, and concern, since they implicate the connection between the person whose well-being is at issue and others – perhaps even between him and his entire society.

A similar point might be made about human rights: their foundation seems likely to lie within the person whose rights are in question, rather than outside of him. (The orthodox approach view has been persuasively characterized as holding human rights are things that people have “in virtue of their humanity.”²²).

Respect, honor, and concern are instrumental goods. This is shown by the fact that when we consider *whose* respect, honor, and concern to seek, we prefer people who know a lot about us, and people of good judgment. (No one, as Aristotle observes, attributes importance to the admiration of his dog.). This suggests that our desire for respect, honor, and concern is shaped by some further purpose and that, as Aristotle observes, this further aim is a sort of knowledge. We seek concern and respect in order to assure ourselves that we have the virtues which elicit it.²³

“No government is legitimate which does not show equal concern for the fate of all those citizens over whom it claims dominion. Equal concern is the sovereign virtue of political community – without it government is only tyranny . . .”.

RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY I (2000). Further:

“Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting upon intelligent conceptions of how their lives should be lived. Governments must not only treat people with concern and respect, but with equal concern and respect.”

RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 272-73 (1977).

21. Unless we take these terms to refer to self-respect and concern for oneself. Such is certainly not Dworkin's intention, and will not be the subject of the present discussion.

22. John Tasioulas, *On the Foundations of Human Rights*, in PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 45 (Rowan Cruft, S. Matthew Liao & Massimo Renzo, eds., 2015).

23. An additional motive is suggested by the fact that we care more about the opinions of those who can help or hurt us, less about the opinions of those who cannot. We would dispense with caring much about the concern and respect which Joe displayed or possessed if he ceased to be our boss.

Consequently, we do not care much about the high opinion of someone who hardly knows us; nor do we value respect, honor or concern of someone with low or distorted standards. For example, we would not value them if bestowed by a person who awarded them without regard to merit: for example someone who bestows them “equally” upon everyone, as Ronald Dworkin suggested: bestowed them regardless what a person is or what he does. Still less would we value the respect, honor, and concern bestowed by an exponent of a distorted or evil set of values. (In a society which had descended into a condition of malice and degradation, a person might, like Dietrich Bonhoeffer or Cardinal Stepinak, choose a way of life which incurred *disrespect*.)

For these reasons, we must set aside respect, honor, and concern as fundamental goods grounding human rights. (Doubtless the perennial emphasis on them in writings on this subject reflects the likelihood that a government which disrespects its subject, or some category of them, will proceed to damage them in ways which *do* implicate fundamental good.)

C. *Choices; Preference Satisfaction.*

Another cluster of theories identifies the fundamental good as constituted by choice; the exercise of choice; obtaining what has been chosen; the satisfaction of preferences.²⁴ Here is a central passage along these lines in an important book by James Griffin:

“Human rights can . . . be seen as protections of our human standing or, as I shall put it, our personhood. And one can break down the notion of personhood into clearer components by breaking down the notion of agency. To be an agent, in the fullest sense of which we are capable, one must (first) choose one’s path through life – that is, not be dominated or controlled by someone or something else (call it ‘autonomy’). And (second), one’s choice must be real; one must have a certain minimum education and information. And having chosen, one must then be able to act; that is, one must have at least the minimum provision of resources and capabilities that it takes (call all of this the ‘minimum provision’). And none of this is any good if someone then blocks one; so (third) others must not forcibly stop one from pursuing what one sees as a worthwhile life (call this ‘liberty’).”²⁵

24. Thus John Harsanyi proposed that we “follow the economists in defining social utility in terms of the *preferences* . . . of the individual members of society. * * * [W]e should help [other people] to obtain pleasure or to avoid pain . . . or to achieve any other objective, only *as far as* they want to achieve it.” John Harsanyi, *Rule Utilitarianism and Decision Theory*, 11 ERKENNTNIS 27-28 (1977).

25. ON HUMAN RIGHTS 33 (2008). The elision reflects the omission of the word “then.” See generally GRIFFIN ON HUMAN RIGHTS (Roger Crisp, ed., 2014).

Any theory in this cluster soon reaches out to encompass the deliberations of the chooser: that is, the reasoning behind the choice. No one, I suppose, would assert that the hasty, irrational, ignorant choice is good, nor its unpleasant and unexpected consequences. No one can reasonably insist that an ignorant choice to drive onto a collapsing bridge is a part of the final good.²⁶ Griffin implicitly rejects such possibilities and introduces the element of informed, capable deliberation by insisting on “education and information” and by his reference to “capabilities” in the above-quoted passage.²⁷ Any reasonable theory along these lines must insist that the subject possess and exercise the capacity to deliberate.

Furthermore, any such theory will require that the subject possess a full complement of the character traits that conduce to the successful exercise of choice and, further still, that he deploy those traits. A plausible theory will require his successfully applying reason to the formulation and to the implementation of the choice, rather than allowing his reasoned conclusions to be overridden, for example by timidity or distraction or anger. Thus, such a theory must stipulate that the person possess some modicum, at least, of courage, and in addition a sufficient level of temperance to overcome the suasions of appetite and passion.

For these reasons, a defensible choice-based theory must reach far beyond choice, narrowly defined: it must recognize the good of many important character traits as well, and of their exercise. A theory of this sort is credible only as a component of a larger theory which comprises all the attributes of character which support reasonable decision.²⁸

26. The objection which is developed in the text is one of several well recognized objections to preference utilitarianism. Here is another objection: the theory leaves us ignorant about how to treat people who lack reasonableness or the ability to exercise it. What about babies and the mentally incapacitated? Were preference utilitarianism the entire story of ethics, and were it to be modified to refer only to choices or preferences rationally developed, such people would be located in an ethical void; and were this ethic the only basis for human rights, they would have none.

27. See also his reference to knowledge and information as important elements, at page 47, and his statement at page 150 that his account is based in major part on “autonomy,” a term which he defines to mean “self-decision [A] decision that results from one’s exercising one’s capacity to distinguish true values from false, good reasons from bad” ON HUMAN RIGHTS at 47 & 150 (2008).

28. Might those character traits be identified as of instrumental importance only, by a theorist determined to exclude them from fundamental good? No: for two reasons. First, the dispensability criterion reveals that those character traits are not mere instruments for the formulation of a persons’ reasonable choices: blind luck will only occasionally result in a good result, and if you gave yourself over to the control of some genie your choices would be his not yours. Second, note that reason and other such capacities are not “realistically dispensable” in the formulation of choice, and therefore would be part of fundamental good even if they were merely instrumental.

Another criticism is that an exclusively choice-based theory, implausibly, can recognize no value in conditions which have not been chosen, and none in activities which are not the product of the will. Such a theory may attribute only a diminished value to a person to the extent he accepts the guidance of culture and tradition, as many do in non-liberal societies,²⁹ and perhaps still less if he defers to the will of another. If, like St. Paul, it is no longer I who live “but Christ who lives in me,”³⁰ my value seems to be the less as appraised according to the choice theory.

*D. Needs Satisfaction.*³¹

Another prominent theory found human rights on needs. Thus, David Miller states: “[W]e prove that something is a human right by showing that having that right fulfils the [basic] needs of the right-holder.”³²

A need is a requisite. A carpenter needs a hammer. An unemployed person needs work. The term “need” relates to instrumental goods. (We seldom say we “need” our reason or our reasonableness.) Therefore, an exclusively needs-based theory recognizes value only in those things which protect or satisfy instrumentalities. This suggests two lines of criticism.

First: note that instrumental goods take their value entirely from the final goods which they serve. A theory which accords value only to needs omits to accord value to final ends. But surely if instruments are accorded value, their final ends must be accorded value as well. Protecting or satisfying needs cannot be the whole story.³³

Furthermore, within the area of instrumental goods, the strength of a needs-based theory depends on the merits of the list of instrumental goods to which it refers. (No credible theory will recognize a value in *any* instrument; none in heroin, for example; none in racial epithets.) If the list

29. See David Miller, *Personhood versus Human Needs as a Basis for Human Rights*, in GRIFFIN ON HUMAN RIGHTS 152, 157 (Roger Crisp, ed., 2014) (2007)(Griffin’s account “appears to deny that human beings can live perfectly good lives according to some inherited pattern that they have not chosen for themselves, but simply take for granted.”).

30. GALATIANS 2:20 (King James Version).

31. Further criticisms of theories based on needs are contained in ON HUMAN RIGHTS 88-90 (Roger Crisp, ed., 2014). t 88-90.

32. DAVID MILLER, NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE 179 (2007). See David Miller, *Grounding Human Rights*, 15 CRITICAL REVIEW OF INTERNATIONAL SOCIAL AND POLITICAL PHILOSOPHY 207 (2012).

33. It can, however, be part of the story: that is to say, a specific kind of right can be founded on its satisfaction of a need for something instrumental to a final good of the sort identified further on in this Article. A right to health and health care can, in major part, be established on this basis, as is achieved in de Campos, *Global Health*, *supra* n. 2.

is to be limited, as it must be, the strength of a needs-based theory depends on the merits of the criteria by which it compiles the list.

Here are passages from David Miller's writings which address these questions:

"[E]ach candidate list of human rights is assessed by how effectively it will protect the conditions for a minimally decent life."³⁴

"[T]here are certain key elements that are reiterated throughout [human societies] There is no society in which human beings do not, for example, participate in productive labor, raise families, play games, sing and dance, engage in religious rituals, and so forth – or to be more precise, no society in which they do not engage in these activities unless prevented from doing so by coercion, by material deprivation or some such cause. That allows us to speak of a human form of life [W]e can understand the idea of human needs, as conditions that must be fulfilled if people are to be able to live a human life at a minimally decent level. Where their needs are met, they will have the opportunity to engage in each of these core activities without having to forgo any of the others."³⁵

General practice cannot be a satisfactory criterion, however. Philosophy is not widely practiced. Bullying is.

E. Dignity.

Numerous international instruments found human rights on dignity, as do a great many national and international judicial decisions.³⁶ These references gesture in a promising direction, because to appeal to human dignity is to appeal to that which makes humans valuable. (Such is the etymology of the term, which can be traced to "*dignus*," which means

34. David Miller, *Personhood versus Human Needs as a Basis for Human Rights*, in GRIFFIN ON HUMAN RIGHTS 152, 161 (Roger Crisp ed., 2014).

35. *Id.* at 160.

36. In addition, the term is widely used in recent statements from the Catholic magisterium. See, e.g., THE CATECHISM OF THE CATHOLIC CHURCH, SECTION 1930 (note omitted) http://www.vatican.va/archive/ccc_css/archive/catechism/p3s1c2a3.htm :

"Respect for the human person entails respect for the rights that flow from his dignity as a creature. These rights are prior to society and must be recognized by it. They are the basis of the moral legitimacy of every authority: by flouting them, or refusing to recognize them in its positive legislation, a society undermines its own moral legitimacy. If it does not respect them, authority can rely only on force or violence to obtain obedience from its subjects. It is the Church's role to remind men of good will of these rights and to distinguish them from unwarranted or false claims."

“worth.”). To identify “dignity” as a fundamental good is to appeal to human worth.³⁷

But what is that? Almost all non-skeptical theories appeal to one or another account of human value; their divergences can almost always be traced to disparities in their opinion of this subject.³⁸

Some authorities seem to give “dignity” a limited meaning which makes that good conflatable into one or another of the goods criticized above: freedom from pain, for example, or choice and its exercise.³⁹ Theories of that sort can be rejected on two grounds. First, they mischaracterize “dignity,” which plainly may be enhanced rather than diminished by pain, contempt, and many conditions (such as imprisonment) which deprive the victim of liberty of choice. (Consider the impressive set of narratives, recurrent throughout many cultures, which extol the dignity of the suffering hero.) Second, they make dignity-based ethics vulnerable to the same criticisms as those deployed against the underlying good. If dignity means pleasure and freedom from pain, for example, it cannot be the full final good for the reasons, set forth above, which establish that pleasure and pain cannot ground final good. If dignity means respect, it is vulnerable to the criticisms deployed above as to respect-based theories.

Schopenhauer pungently stated:

“[The] expression ‘Human Dignity’, once it was uttered by Kant, became the shibboleth of all perplexed and empty-headed moralists. For,

37. See generally JEREMY WALDRON, *DIGNITY, RANK & RIGHTS* (Meri Dan-Cohen, ed., 2012); MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* (2012). Cf. Kant’s statement in *METAPHYSICS OF MORALS* that a person’s dignity is his “absolute inner worth”:

“[M]an regarded as a person, that is, as the subject of a morally practical reason, is exalted above any price; for as a person (*homo noumenon*) he is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in himself, that is, he possesses a dignity (an absolute inner worth) by which he exacts *respect* for himself from all other rational beings in the world.”

IMMANUEL KANT, *op. cit.*, *Metaphysical First Principles of the Doctrine of Virtue*, I, Part I, Book I, Chapter II (1797)(Mary Gregor trans., 1991, at 230)(a volume in Cambridge University Press’ “Texts in German Philosophy” series, Raymond Gues, General Editor). Compare *id.*, Part Two, Chapter I (page 255 in the Gregor translation):

“Humanity itself is a dignity; for a man cannot be used merely as a means by any man (either by others or even by himself) but must always be used at the same time as an end. It is just in this that his dignity (personality) consists”

A more extensive discussion of dignity is present in Kant’s earlier work, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (1785).

38. See generally *HUMAN DIGNITY IN CONTEXT* (Dieter Grimm, Alexandra Kemmerer & Christoph Mollers, eds., 2018).

39. See Thana de Campos, *MAiD in Canada and the Homo Economicus View of Dignity: Inclusive Enough?*, 22 *JOURNAL OF DISABILITY & RELIGION* 246 (2018), <https://www.tandfonline.com/doi/full/10.1080/23312521.2018.1486775>.

behind that imposing formula they concealed their lack, not to say, of any real ethical basis, but of any basis at all which was possessed of an intelligible meaning”⁴⁰

This is an exaggeration: “human dignity” *does* have an intelligible meaning; as stated, it refers to human worth. The problem is that we are left to inquire what it may be that is of value in humans and appeals to human dignity do not imply even a sketchy answer.⁴¹ That accounts for the unsatisfactory character of the term as a guide to human-rights ethics.

As a leading expert, Christopher McCrudden, writes:

“[T]he use of ‘dignity’, beyond a basic minimum core, does not provide a universalistic, principled basis for judicial decision-making in the human rights context, in the sense that there is little common understanding of what dignity requires substantively within or across jurisdictions. The meaning of dignity is therefore context-specific, varying significantly from jurisdiction to jurisdiction and (often) over time within particular jurisdictions. Indeed, instead of providing a basis for principled decision-making, dignity seems open to significant judicial manipulation, increasing rather than decreasing judicial discretion. That is one of its significant attractions to both judges and litigators alike. Dignity provides a convenient language for the adoption of substantive interpretations of human rights guarantees which appear to be intentionally, not just coincidentally, highly contingent on local circumstances.”⁴²

40. ARTHUR SCHOPENHAUER, *THE BASIS OF MORALITY* 100 (1840; Arthur Brodrick Bullock, trans., 1905).

Another telling recital of the confusions and contradictions arising based on appeals to dignity is set forth in Paulo G. Carozza, “Human Rights, Human Dignity, and Human Experience,” in *UNDERSTANDING HUMAN DIGNITY* 614, 619 (McCrudden, ed., 2013) (hereinafter referred to as *Understanding Human Dignity*) (maintaining that although there is a core meaning to the term, its “ambiguity . . . [makes] the principal of human dignity vulnerable to charges of inconsistency and even incoherence, and even to ideological manipulation.”).

41. *But see* Williams, *Who Is My Neighbor?*, *supra* note 4, especially at 146-64, where the author proposes an account of human dignity which emphasizes the person’s capacity for choice and self-realization. It may be objected that an account of dignity based entire on choice and the capacity to choose is vulnerable to the criticisms of choice-based theories set forth above. It may further be objected that “self-realization” cannot be understood without an account of what traits realize, rather than undermine, a person.

42. Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 *EUROPEAN J. INT’L. L.* 655 (2008). This passage appears almost *verbatim* in McCrudden’s “Acknowledgements” contribution to *Understanding Human Dignity*, *supra* note 40 (at page xi): *verbatim* except that the passage is there preceded by the words “I argued that” and except that some of the tenses have been changed from present to past and the phrase “I suggested” has been interpolated. McCrudden does not, however, there repudiate this conclusion.

None of this requires, of course, that references to dignity be expunged from basic documents or eschewed by judges and legislators. As Michael Rosen writes: “Dignity is surprisingly deeply entrenched in our moral discourse: it is not going anywhere any time soon.”⁴³ As Paulo Carozza writes:

“The ontological claim of human dignity helps sustain the very possibility of human rights as global principles that can and should help us condition sovereignty and hold accountable those who abuse power, especially the power of the state. Human dignity represents the ideal that there is a certain unity to the human person in which conflicting claims of rights need to be balanced and reconciled. . . . [W]ithout a commitment to the idea of human dignity, human rights law as it has been painstakingly constructed over the last seventy years would not exist.”⁴⁴

To recognize the dignity of each person is to acknowledge that there are some universal human attributes or conditions which make a person worthy of protection.⁴⁵ The trouble is that the term “dignity” takes us almost nowhere in understanding what those attributes or conditions are. Worse, the term may suggest arrogance: a puffed-up quality which leads its possessors to disdain as “beneath their dignity” much that is basic to the human condition. “Birth and breeding and death” are undignified. (Therefore, science ought to find ways to replace them, according to the recommendations of a villain in C.S. Lewis’ novel *That Hideous Strength*.⁴⁶)

Owing to the term’s indeterminacy, those who hear and rely on propositions about dignity are easily misled into believing that they have firmer bases for their conclusions than they actually possess.

III. Fundamental Good: The Approach Here Commended.

The best approach, as here maintained, identifies fundamental good as the possession of a certain sort of character and the effective exercise of

43. Michael Rosen, *Dignity: The Case Against*, in *Understanding Human Dignity*, *supra*, note 40, at 143, 153 (2013),

44. Paulo G. Carozza, *Human Rights, Human Dignity, and Human Experience*, in *Understanding Human Dignity*, *supra* note 40, at 614, 620.

45. A valuable discussion of dignity as a basis for human rights is set forth in Donnelly, *Universal Human Rights*, *supra* note 12, at 130-32 (noting at page 131 that “human dignity is an intermediate concept that links human rights to ‘comprehensive doctrines.’”).

46. C.S. LEWIS, *THAT HIDEOUS STRENGTH: A MODERN FAIRY-TALE FOR GROWN-UPS* 174 (Macmillan Paperback ed., 1967) (1945) (“What are the things that most offend the dignity of man? Birth and breeding and death.”).

that character's abilities.⁴⁷ (If that sounds too constricted – if “certain kind of character” seems to imply a single model only – do not let that deter you from reading on. The theory allows for *variora*, as will emerge.) It is for the sake of these elements that we would stay out of the experience machine. We would not choose to forfeit our minds -- our ability to apprehend consider, grasp, and remember; nor to forfeit the use of our minds in considering and contemplating and in reaching conclusions; nor to lose the ability to conform our actions to our conclusions nor use of that ability so as actually to act reasonably.

Character traits, or some of them, well survive application of the dispensability criterion. To be sure, having a good character is instrumentally helpful (it helps your career, for example). But we would not dispense with it, though we had all the other goods. The same can be said of the *exercise* of character traits and the achievement of their ends.

This, then, leads on to the question of what attributes are best, basic, and central to being human.

A. Reason.

Let us take first, as a basic trait, reason: the abilities and qualities of the mind which enable a person to think clearly and to arrive at the attainment of knowledge.⁴⁸

That reason is a fundamental good can be established using the dispensability test. A clear, reason-pursuing, conclusion-grasping quality of mind is something we would not dispense with. Such is the lesson of the Nozick experience-machine narrative, the lesson of Aristotle's reference to the “intellect of a child,” and the lesson of Plato's reference to the oyster or *pulmo marinus* (all quoted above). Losing one's mind, one loses a significant part of oneself.

47. Compare S. Matthew Liao, *Human Rights as Fundamental Conditions for a Good Life*, in *PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS* 79 (Rowan Cruft, S. Matthew Liao & Massimo Renzo, eds., 2015) (proposing at page 81 that human rights protect the “fundamental conditions” to a good life, and that a good life “is one spent in pursuing certain valuable, basic activities.” The present Essay is to similar effect as regards activities, but identifies certain character traits as part of basic good – a more fundamental part than activities, in fact. Matthew Liao makes character traits *conditions* to basic good, since they are needed in order to pursue basic activities. So indeed they are; but many character traits, notably those of the mind depicted below, are not only good as necessary for something else – not only instrumentally good - but part of final good as well.)

48. See Rowan Cruft, *Human Rights, Human Agency, and Respect: Extending Griffin's View*, in *GRIFFIN ON HUMAN RIGHTS* 114, 115 (Roger Crisp, ed., 2014) (why not focus on “our capacity for theoretical reason?”). (Cruft thanks Tom Pink for this suggestion.) Cruft proceeds to set aside this suggestion on the apparent grounds that “rights language . . . is most at home in characterizing the protection of agency.” *Id.* at 116.

That reason is basic may also be suggested by its involvement in the other plausible goods described above. Respecting others involves knowing them. Forming a preference requires the exercise of reason.

As promised, this Essay endorses the insight that reason, like other qualities of character, has many dimensions and shows forth in different ways in different cultures and among different individuals. Lincoln was reasonable. Newton was reasonable. Samuel Johnson was reasonable. Shelley was reasonable.

Human rights are violated when a person is deprived of reason. If O'Brien and the Party drove Winston mad, as they probably did, they in that way violated his human rights.⁴⁹

B. Reasoning.

Reason naturally leads on to reasoning; this Essay now proposes that as a second fundamental good. Actually, to deploy reason for its obvious purpose: to gaze insightfully, to think clearly, to grasp propositions, to weigh evidence, to endorse conclusions, to draw inferences and apply them -- these are projects fundamental to human life. Since speech and the interior discourses are basic to reasoning, a component of this fundamental good is the deployment of vocabulary and the formulation of coherent and telling propositions.

Human rights are, therefore, violated by interventions which lastingly and greatly impede clarity of thought. Such would be the effect, for example, of a project which crippled a person's grasp or deployment of language and speech.

The Party violated human rights by the imposition of Newspeak (as described in the appendix to this Essay).

C. Knowing.

Reasoning naturally leads on to the acquisition of knowledge, which is proposed here as a third fundamental good. Actually, to know: to endorse insights, to sustain an understanding of things both particular and general -- is good, as it is to retain knowledge and to employ it and reenact it on what has been called the "stage of consciousness."

Knowing is not only an instrumental but also a fundamental good. One could not reasonably dispense with knowledge, even under the unlikely circumstance that all other goods could be achieved without it. To be sure, many kinds of knowledge are instrumental to action and its achievements,

49. Pain intense and lasting enough to drive a person mad therefore violates his human rights, as may pain which lastingly impairs his ability to exercise concentrated reason.

but we would hold onto our knowledge even were this not the case. We prize speculative insights, even those which have no practical application.⁵⁰

D. Benevolence and Love; Beneficence; Friendship and Loving.

A fourth cluster of fundamental goods enables a person to care about others, to be benevolent towards them, and to love them.⁵¹ Again, the indispensability of these characteristics is evident. We would choose to be kind and loving, “though he had all the other goods”:⁵² quite apart, in other words, from what further benefits might accrue to us.

Thus it would violate a person’s human rights to deprive him of the capacity to love, as perhaps the Party did to Winston and Julia.

Indeed, through its Hate Sessions, the Party may have sought the comprehensive eradication of love. To have achieved this would have violated everyone’s human rights.

As with reason, so with beneficence and love: it is not enough to possess the traits; one wishes actually to exercise them, to exercise them effectively and to see them take effect. Like other good traits, these do not come into their own so long as they remain bottled up.

50. An important objection might be that this analysis grounds no human rights for the mentally handicapped, the senile or the demented, or for babies and very young children. Of course, such persons may have human rights on other bases: they can love, for example. But even as to the basis discussed in this text we can make ample ground human rights by offering broadened definition of “reason” and “reasoning” according to which those terms encompass experiential cognitivites: the acquisition of sensory data and their emotional and aesthetic appreciation, for example.

51. Compare Williams, *Who Is My Neighbor?*, *supra* note 4, which frequently identifies love as central: e.g. at 182 (“[L]ove – to be treated as an acting subject with a transcendental purpose and never as a mere means – constitutes the content of the regard due to human dignity. The fundamental right – the *Ur*-right, -- of the human person is the right to be loved.”) and at 302 (“The personalist approach affirms that every person . . . has a right to be loved.”). These passages emphasize the right to *receive* love, or to be treated as love requires; the present Article, in the text *supra*, instead identifies, as an ethical basis, the good of the capacity to love and to act accordingly.

Perhaps Williams is right that love underlies all the ethical bases of rights. Certainly an actor motivated by love for those affected will be guided by concern for their well-being. As Williams says at page 320, “love of the person as such demands the affirmation of those particular goods that contribute to and comprise the person’s integral good.” The great question must then be what attributes and projects *do* comprise a person’s integral good. The present Article aims to supply answers to this question.

52. The phrase is from Aristotle, *Nicomachean Ethics* 1174a 1-3, *supra* n. 13.

“A bell is no bell ‘til you ring it,
 A song is no song ‘til you sing it,
 And love in your heart
 Wasn’t put there to stay -
 Love isn’t love
 ‘Til you give it away.”⁵³

Thus, it would violate a person’s human rights to prevent him from being friendly or loving.

E. The Ability to Conform One’s Conduct to the Requirements of Reason and Love.

A further fundamental good consists in the ability to conform one’s actions to the directives of reason and to pursue the goods commended by benevolence and love. Intemperance, cowardice, and rage harm the sufferer, not only by thwarting his success in the pursuit of instrumental goods, but also by preventing his reason and benevolence and love from fully taking effect. A man’s actions are not fully his own when he is in the grip of some such disorder. His deeper self is overwhelmed. He has been broken.

Winston was broken. His final capitulation – his acknowledgement that he loved Big Brother – reflects the Party’s success in destroying Winston’s capacity to bring his reason to bear on the matter of whom to love. In this respect also the Party violated his human rights.

F. National Citizenship; Social Membership

Being social animals, most of us humans are deeply embedded in social orders, usually those of our nations. To live otherwise one must be, as Aristotle said, “either a beast or a god.”⁵⁴

Citizenship and participation in the affairs of one’s country is instrumental to the possession and exercise of reason, beneficence, love, and other basic goods. The civic order is a school for the development of character and a field for its exercise. Perhaps it might be proposed that

53. RODGERS & HAMMERSTEIN, *Sixteen Going on Seventeen*, in *THE SOUND OF MUSIC* (1959).

54. ARISTOTLE, *POLITICS* 1253 a 28-29 (Benjamin Jowett, trans.) in *2 THE COMPLETE WORKS OF ARISTOTLE* 1986, 2032 (Jonathan Barnes ed., 1984). (“[H]e who is unable to live in society, or who has no need because he is sufficient for himself, must be either a beast or a god . . .”).

these matters are of instrumental value, but they are not realistically dispensable. One's citizenship and participation in one's country's affairs cannot be forfeited without severe damage to the self, however meritorious might be the foreign land to which one was exiled, and however warmly one might be welcomed there.

Some of the provisions in international instruments which protect a person's relationship with his country are justifiable on this basis.

PART TWO

I. The Ethical Foundation.

Based on the above account of fundamental good, we can turn to the definition of "human right" and place it on the following foundation: *A claim is well based on a human right if to deny it would substantially interfere with a fundamental good.*

So far as this takes us, the rights to one's reason – one's sanity – and to using one's reason (thinking) and using it effectively (knowing) are grounded on the ethical basis of human rights, as are the rights to one's capacity to love and to act accordingly, and the rights to one's capacity to conform one's actions effectively to the conclusions of reason and love. An impairment of a fundamental good grounds a claim for the violation of a human right.

Similarly, starvation – since as noted above fundamental goods include not only non-instrumental goods but also those goods which cannot realistically be dispensed with – has a good pedigree to be identified as a violation of human rights.

II. Further Criteria.

Should we conclude, then, that any infringement of an important good is a violation of human rights? This might lead to the protections across a vast range. Lying to someone might, under this approach, violate his human rights, as might interrupting him while he is reading, shutting down his microphone at a meeting, and disturbing him while he was kissing his girlfriend. Such conclusions are implausible.

It might seem that the objection comes down to cost: some actions, though they infringe human rights, cannot be efficiently detected and remedied. Understood this way, the problem is instrumental: if we could "dispense with" cost we would protect these things as the human rights violations they assuredly are. This is not the objection at issue here.

This Essay takes the more fundamental position that some infringements of basic goods do not infringe human rights at all. To

reiterate: it is here proposed that human rights, although their purpose is to protect basic goods, are not ethically coextensive with the goods they protect. Some fundamental goods do not merit human rights protection; some impairments of fundamental goods do not infringe human rights.

A human right, it is here maintained, protects a fundamental good only when it is suitable for social or legal recognition. This is so because “human rights” is a social concept, and a good is eligible to be protected as a human right only when it is eligible to be supported by meritorious social practices.⁵⁵

Human rights are instantiable within a decent society. This is not to limit the field to rights that have already been agreed upon: this Essay, as stated, is about ethics not convention. There may be many rights not yet discerned. Nor is it intended to deny that any particular legal system may reasonably identify as rights and extend legal protection to goods which do not fit the bill. This *is*, however, to propose, as a necessary characteristic of something’s being ethically a human right, that it be suitable for specification and invocation as a component of a social institution and that it be such that a reasonable society might honor and respect it.⁵⁶

This suggests the following requirements:

A human right must protect goods that can be attained or lost and therefor might need protection. No one would propose a human right to be lucky, or to be divine, or to be of noble descent.

A human right must protect goods which are in some important way connected with *humanitas*. They are, after all, *human* rights. They should protect goods which are rated as important by people generally. Some of the appeal of human rights rests on the contribution they make, when they are recognized and respected, to the good of human solidarity.

A human right must be *invocable*. It must be accessible to human understanding: graspable, understandable, and communicable. Perhaps, indeed, it must be expressible in ordinary language and comprehensible to

55. As Oran Doyle has pointed out to me, a right always involves two or more people, whereas a value may involve only one.

56. *Cf.* NICKEL, MAKING SENSE OF HUMAN RIGHTS 186 (2d ed, 2007)(stating that “[j]ustifying a right . . . requires showing the availability of a feasible and morally acceptable way of imposing duties and constructing institutions that will make it possible to supply that good to all people.”) This doctrine would, implausibly, would make extraneous conditions abolish rights; bear in mind that for many centuries a majority of people (never mind “all”) could not have been supplied their basic rights by some outside power by any means, that this may still be true today, and that these deplorable circumstances could be spread yet more widely in some future age. The limitation proposed in the present Essay speaks only to the intrinsic characteristic of a proposed right, not to extrinsic conditions which might obstruct its implementation.

ordinary people or at least to lawyers and judges. Human rights are not arcane.

A human right must protect goods which are within the sphere of society's concern. Goods that are entirely extra-civil – some people might place the intimacies of friendship in that category – are unlikely subjects for human rights.

A human right, must be *stable*: not altering with every breeze. A human right, we apprehend, is *invariant*.

A human right must be determinable: clearly expressible rather than incurably vague.⁵⁷ Only if it has this character may claims based on the right be adjudicable (“justiciable”), if not in court then in some social or political forum. It must be appraisable in such a way that claims based on it can be fairly assessed. The right to be “cared for” does not qualify,⁵⁸ nor does the right to “enjoy his or her own culture.”⁵⁹ The widely asserted rights to privacy and dignity may not qualify. A human right must to the extent possible eschew matters of psychology and refer instead to external phenomena.

The principle that human rights must be instantiable within a decent society leads on to the question what makes for a decent society. All decent societies comprise a morality of personal relations, including norms pertinent to manners, civility, good taste, prudence, judgment, charity, self-sacrifice, and the implications of relationships of intimacy and trust.⁶⁰ Human rights occupy but a portion of this field; indeed, they seem often to jar with others (as within a family, for example, or a close friendship).

57. See JAMES GRIFFIN, *ON HUMAN RIGHTS* 38 (2008) (a human right's “existence must depend, to some extent, upon the concept's being determinate enough in sense to yield human rights with enough content for them to be an effective, socially manageable claim on others.”). *But cf.* De Campos, *Global Health*, *supra* n. 2, at 43-44 (maintaining, that “[a] relevant distinction cannot simply be dismissed, just because it is not always clear how it applies in practical terms. Vagueness is a pervasive feature of language, and this also applies to normative concepts. * * * [A]ny legal system has to operate with vague concepts”). Accepting de Campos' points, the present article excludes only those proposed bases for rights which are “incurably” vague: notably those which do not point in a direction with sufficient specificity or clarity to guide determination.

58. A right to be “cared for by his parents” is expressed in Article 7(1) of the **United Nations Convention on the Rights of the Child**, **United Nations Convention on the Rights of the Child**, **Sept. 2, 1990, 1577 U.N.T.S. 3** (“The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.”).

59. *See id.* at 14.

60. *See generally* KEITH THOMAS, *IN PURSUIT OF CIVILITY: MANNERS AND CIVILIZATION IN EARLY MODERN ENGLAND* (2018). We might suggest a principle of normative compatibility, which would require that the theoretical structure underlying each kind of norm be such as to generate norms which do not conflict with those of other types.

One might apprehend that a society's over-indulgence in rights occludes its liberality in endorsing other modes of social good.

This suggests a requirement of parsimony. Human rights, we apprehend, are especially strong instances of moral norms, justifying strong claims – demands -- and usually imposing strong obligations. Therefore, we may surmise, they occupy a narrow space. If a good could be thoroughly protected through principles of generosity, that circumstance would suggest that the good is not ethically eligible to be protected by a human right.⁶¹ The criterion of parsimony precludes finding human rights under every bush.

The criterion of parsimony requires that an incursion on the protected good be material before it amounts to a violation of a human right. Interrupting someone who is reading or speaking or kissing his girlfriend doubtless interferes with the exercise of a basic capacity and therefore implicates fundamental good, but it does so in a small way, and cannot reasonably be identified as a violation of human rights.⁶²

An important element in materiality might be called "replaceability." When the victim is deprived of a thing (an interval of uninterrupted time, for example) which can be adequately compensated for by some other thing (more time later), the deprivation is unlikely to be material. This requirement is closely related to that of realistic indispensability set forth above. When a thing's connection with final good is only instrumental, and when it can (like turnips or bus rides) realistically be replaced by something else (carrots or walking to work), that thing is "realistically dispensable" and not a part of final good. This requirement ought to exclude some of the elements mentioned on wish lists of human rights: for example, the "right to inherit" expressed in the International Covenant on the Elimination of All Forms of Racial Discrimination.⁶³

A further possible criterion is that human rights protect only those goods which can in general be exercised by one person without wrongful

61. For example, a society may reasonably regard the education and training of children as best protected by parents, and relegate human rights in this area to the protection of the family unit.

62. Materiality in this context refers to the extent and depth of the good's involvement in the basic attributes and their exercise, rather than to direct impact on other people. Interruption of a presidential speech might be a big thing from the point of view of its effects on partisan politics but might not be important from the point of view of the president's character – his reason, for example, and its application. Contrariwise, depriving Winston of his faculties of clear thought might not have been important in the larger scheme of things – Winston was only a low-level bureaucrat, after all – but a major infringement upon his deeper self. Here is a test: if the victim can reasonably attest, "I was just not the same man or woman after that" – then the incursion was material.

63. Art.(V)(d)(vi), Jan. 4, 1969, 660 U.N.T.S. 195.

harm to others. Nobody, one hopes, would propose a human right to kill the innocent.

III. An Application of these Limitations: Love and Marriage.

What about Winston and Julia? Suppose we imagine that the Party had *not* deprived either of them of sanity, or of the capacity to love *someone*, but that it did – “only” -- destroy their relationship with one another.

The criterion of materiality leads us to inquire whether the deprivation was or was not of something that could be replaced. Relationships differ in this regard. Some, though it may not seem so when we are teenagers, amount to little more than crushes, and though their endings are painful they leave the parties no worse off. Others, such as marriages, are – aspirational and, usually, actually as well – not substitutable. Winston and Julia were not married, but neither were they teenagers with crushes on one another. What ought we to conclude? Surely we must assess their relationship as material. After its destruction, each of them would have said, “I was never quite the same.”

The requirement of determinability, however, excludes many such relationships from the protection of human rights. The determinability criterion requires that a good be clear and firm of outline (adjudicable; justiciable) before its infringement can be accepted as a violation of a human right. Romances, however intense, seldom satisfy this requirement. Marriages, when they are defined, as they usually are, by social morality and the commitments of the parties usually do qualify.

PART THREE: A FINAL WORD

The ethical basis of human rights is the protection and promotion of *humanitas*.

APPENDIX

The Principles of Newspeak⁶⁴

“* * * The purpose of Newspeak was not only to provide a medium of expression for the world-view and mental habits proper to the devotees of Ingsoc, but to make all other modes of thought impossible. It was intended that when Newspeak had been adopted once and for all and Oldspeak forgotten, a heretical thought — that is, a thought diverging from the principles of Ingsoc — should be literally unthinkable, at least so far as thought is dependent on words. Its vocabulary was so constructed as to

64. Orwell, 1984, *supra* note 8.

give exact and often very subtle expression to every meaning that a Party member could properly wish to express, while excluding all other meanings and also the possibility of arriving at them by indirect methods. This was done partly by the invention of new words, but chiefly by eliminating undesirable words and by stripping such words as remained of unorthodox meanings, and so far as possible of all secondary meanings whatever. To give a single example. The word FREE still existed in Newspeak, but it could only be used in such statements as 'This dog is free from lice' or 'This field is free from weeds'. It could not be used in its old sense of 'politically free' or 'intellectually free' since political and intellectual freedom no longer existed even as concepts, and were therefore of necessity nameless. . . . Newspeak was designed not to extend but to DIMINISH the range of thought, and this purpose was indirectly assisted by cutting the choice of words down to a minimum.

"As we have already seen in the case of the word FREE, words which had once borne a heretical meaning were sometimes retained for the sake of convenience, but only with the undesirable meanings purged out of them. Countless other words such as HONOUR, JUSTICE, MORALITY, INTERNATIONALISM, DEMOCRACY, SCIENCE, and RELIGION had simply ceased to exist. A few blanket words covered them, and, in covering them, abolished them. All words grouping themselves round the concepts of liberty and equality, for instance, were contained in the single word CRIMETHINK, while all words grouping themselves round the concepts of objectivity and rationalism were contained in the single word OLDTHINK. Greater precision would have been dangerous. . . * * *

"So far as it could be contrived, everything that had or might have political significance of any kind was fitted into the B vocabulary. The name of every organization, or body of people, or doctrine, or country, or institution, or public building, was invariably cut down into the familiar shape; that is, a single easily pronounced word with the smallest number of syllables that would preserve the original derivation. In the Ministry of Truth, for example, the Records Department, in which Winston Smith worked, was called RECDEP, the Fiction Department was called FICDEP, and the Teleprogrammes Department was called TELEDEP, and so on. This was not done solely with the object of saving time. Even in the early decades of the twentieth century, telescoped words and phrases had been one of the characteristic features of political language; and it had been noticed that the tendency to use abbreviations of this kind was most marked in totalitarian countries and totalitarian organizations. Examples were such words as NAZI, GESTAPO, COMINTERN, INPRECORR, AGITPROP. In the beginning the practice had been adopted as it were instinctively, but in Newspeak it was used with a conscious purpose. It

was perceived that in thus abbreviating a name one narrowed and subtly altered its meaning, by cutting out most of the associations that would otherwise cling to it. The words COMMUNIST INTERNATIONAL, for instance, call up a composite picture of universal human brotherhood, red flags, barricades, Karl Marx, and the Paris Commune. The word COMINTERN, on the other hand, suggests merely a tightly-knit organization and a well-defined body of doctrine. It refers to something almost as easily recognized, and as limited in purpose, as a chair or a table. COMINTERN is a word that can be uttered almost without taking thought, whereas COMMUNIST INTERNATIONAL is a phrase over which one is obliged to linger at least momentarily. In the same way, the associations called up by a word like MINITRUE are fewer and more controllable than those called up by MINISTRY OF TRUTH. This accounted not only for the habit of abbreviating whenever possible, but also for the almost exaggerated care that was taken to make every word easily pronounceable.

“In Newspeak, euphony outweighed every consideration other than exactitude of meaning. Regularity of grammar was always sacrificed to it when it seemed necessary. And rightly so, since what was required, above all for political purposes, was short clipped words of unmistakable meaning which could be uttered rapidly and which roused the minimum of echoes in the speaker’s mind. The words of the B vocabulary even gained in force from the fact that nearly all of them were very much alike. Almost invariably these words — GOODTHINK, MINIPAX, PROLEFEED, SEXCRIME, JOYCAMP, INGSOC, BELLYFEEL, THINKPOL, and countless others — were words of two or three syllables, with the stress distributed equally between the first syllable and the last. The use of them encouraged a gabbling style of speech, at once staccato and monotonous. And this was exactly what was aimed at. The intention was to make speech, and especially speech on any subject not ideologically neutral, as nearly as possible independent of consciousness. For the purposes of everyday life it was no doubt necessary, or sometimes necessary, to reflect before speaking, but a Party member called upon to make a political or ethical judgement should be able to spray forth the correct opinions as automatically as a machine gun spraying forth bullets. His training fitted him to do this, the language gave him an almost foolproof instrument, and the texture of the words, with their harsh sound and a certain willful ugliness which was in accord with the spirit of Ingsoc, assisted the process still further.

“So did the fact of having very few words to choose from. Relative to our own, the Newspeak vocabulary was tiny, and new ways of reducing it were constantly being devised. Newspeak, indeed, differed from most all other languages in that its vocabulary grew smaller instead of larger every

year. Each reduction was a gain, since the smaller the area of choice, the smaller the temptation to take thought. Ultimately it was hoped to make articulate speech issue from the larynx without involving the higher brain centers at all. This aim was frankly admitted in the Newspeak word **DUCKSPEAK**, meaning 'to quack like a duck'. Like various other words in the **B** vocabulary, **DUCKSPEAK** was ambivalent in meaning. Provided that the opinions which were quacked out were orthodox ones, it implied nothing but praise, and when 'The Times' referred to one of the orators of the Party as a **DOUBLEPLUSGOOD DUCKSPEAKER** it was paying a warm and valued compliment."