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The Concept of Human Rights: The History and Meaning of its Politicization

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ARTICLES

THE CONCEPT OF HUMAN RIGHTS: THE HISTORY AND MEANING OF ITS POLITICIZATION

*Joy Gordon**

Table of Contents

Introduction	691
I. The Standard Concept of Human Rights	700
II. The Oddness of the Concept	721
A. Example One	721
B. Example Two	722
C. Example Three	723
D. Example Four	725
E. Examples Analyzed	726
III. The Mixed Heritage of the Dominant Conception: The Just War Tradition ...	729
IV. The Mixed Heritage of the Dominant Conception: The Enlightenment Notion of Rights	735

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A.	The Social Contract Theorists	736
B.	The Empiricist Critique	745
V.	Two Contemporary Philosophical Theories of Rights	750
VI.	Resolving the Paradox: Marx and the Metaphysics of Rights	756
VII.	The Political Agenda of Human Rights Claims and the Suppression of Moral Discourse: The Example of Nuremberg	763
A.	The Establishment of the Tribunal	765
B.	The Structure of the Tribunal	773
C.	What We Inherit From Nuremberg	782
	Conclusion	787

THE CONCEPT OF HUMAN RIGHTS: THE HISTORY AND MEANING OF ITS POLITICIZATION

Joy Gordon

INTRODUCTION

It is sometimes said that the concept of human rights is “the only political-moral idea that has received universal acceptance.”¹ Some describe human rights as the central moral issue in international relations today—as the “currency of international moral discourse,”² or as the “modern tool of revolution” in “the struggle for . . . human dignity in our time.”³ The concept of human rights is also invoked with increasing frequency in the context of security issues and as justification of armed conflict.⁴

In one sense, the concept of human rights is as familiar to us as the nightly news. It would be hard to read a national newspaper on any given day without finding a reference to death squads, disappearances, torture, mutilation, mass rape, siege and starvation of civilian populations, or arrests of dissidents somewhere in the world.⁵ Yet in another sense, it eludes discussion altogether: our ethical intuition is that human rights violations involve acts which are so patently monstrous that there could be no rational or moral justification for them; and that only someone who is depraved or irrational could seriously take issue with either the goodness or the urgency of human rights. At the same time, there is a further debate as to how broad the notion of human rights should be.⁶

1. LOUIS HENKIN, *THE AGE OF RIGHTS* ix (1990).

2. Martin Shupack, *The Churches and Human Rights: Catholic and Protestant Human Rights Views as Reflected in Church Statements*, 6 *HARV. HUM. RTS. J.* 127, 127 (1993).

3. Irwin Cotler, *Human Rights as the Modern Tool of Revolution*, in *HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY* 7, 7 (Kathleen E. Mahoney & Paul Mahoney eds., 1993).

4. See generally Douglas Lee Donoho, *The Role of Human Rights in Global Security Issues: A Normative and Institutional Critique*, 14 *MICH. J. INT'L L.* 827 (1993). This is especially true for the United States.

5. A recent search of the NEXIS database revealed that during the last two years there were approximately 87,000 news articles in the United States which mentioned the term “human rights.”

6. For many years now it has been suggested that the label of “human

Among contemporary commentators, the standard notion of human rights is sometimes framed in terms of "generations" of rights. "First-generation" rights are, as one scholar points out, "the traditional liberties and privileges of citizenship, covered by the first twenty articles of the [Universal Declaration of Human Rights]: free speech, religious liberty, the right not to be tortured, the right to a fair trial, the right to vote, and so forth."⁷

This notion is quite familiar to us. Less familiar are socio-economic "second-generation rights"—the right to work, the right to fair pay, the right to food, shelter and clothing, the right to education, etc.⁸ In this Article, I will argue that the concept of human rights which is so familiar is in fact quite odd and inconsistent; and that underlying this oddness is a profoundly political structure and a history of political uses.

The claim that the concept of human rights has an under-

rights" is applied too broadly, with the result that the term is amorphous or overbroad. See, e.g., Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 607 (1984) (observing that there has been an expansion of "new rights" achieved in a "haphazard, almost anarchic manner."); Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1110 (1982) (noting that human rights "has been the subject of a burgeoning jurisprudential literature."); see also generally Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1 (1986) (arguing for an enlarged core of non-derogable rights, rather than tiers of rights).

7. JEREMY WALDRON, *LIBERAL RIGHTS* 5 (1993).

8. See *id.* at 4-5. Third-generation rights, which I will not address here, concern collective and communal rights involving national self-determination, cultural practices, use of native languages and so on. See, e.g., Berta Esperanza Hernández-Truyol, *Report of the Conference Rapporteur*, 44 AM. U. L. REV. 1389, 1407 (1995) (Final Report to the *Conference on the International Protection of Reproductive Rights*, referring to "first (civil and political rights), second (social and economic rights) and third (solidarity) generation human rights."); Kathleen Mahoney, *Theoretical Perspectives on Women's Human Rights and Strategies for their Implementation*, 21 BROOK. J. INT'L L. 799, 837-38 (1996) (noting that third generation "group or peoples' rights are of greatest interest to developing countries."); Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 RUTGERS L. REV. 435, 441 (1981) (observing that Karel Vasak has distinguished the third generation of human rights as being "predicated on brotherhood (*fraternité*), in the sense of solidarity" as opposed to rights predicated on *liberté* (first generation rights) or *égalité* (second generation rights)); Feisal Hussain Naqvi, *People's Rights or Victim's Rights: Reexamining the Conceptualization of Indigenous Rights in International Law*, 71 IND. L.J. 673, 713 (1996) (understanding third generation rights, such as the right to "cultural integrity" and "the right to development" as "expand[ing] the economic entitlements of individuals."); Barbara Stark, *Conceptions of International Peace and Environmental Rights: "The Remains of the Day"*, 59 TENN. L. REV. 651, 654 (1992).

lying political agenda is not new. Feminist critics have made the claim in analyzing the consequences of the dominant concept for women.⁹ In addition, both Western critics and non-Western nations have suggested that this concept, with its emphasis on political rather than economic rights, reflects a bias in favor of wealthy Western nations.¹⁰ Many have suggest-

9. See, e.g., Sarah Y. Lai & Regan E. Ralph, Recent Development, *Female Sexual Autonomy and Human Rights*, 8 HARV. HUM. RTS. J. 201, 203 (1995) (discussing the economic/political dichotomy as it impacts on protections of the rights of women); Shelley Wright, *Women and the Global Economic Order: A Feminist Perspective*, 10 AM. U. J. INT'L L. & POL'Y 861, 874 (1995) (observing the effect that the "division between political and civil rights versus economic, social and cultural rights" has had "on how economic rights and social justice are discussed."). Also relevant to this discussion are feminist arguments contending that effective political participation by women is undermined by the fact that the standard concept of human rights rests upon the public/private distinction. See Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 HARV. HUM. RTS. J. 87, 87 (1993); see also Pamela Goldberg & Nancy Kelly, *International Human Rights and Violence Against Women*, 6 HARV. HUM. RTS. J. 195, 195 (1993); Mahoney, *supra* note 8, at 800; Celina Romany, *Black Women and Gender Equality in a New South Africa: Human Rights Law and the Intersection of Race and Gender*, 21 BROOK. J. INT'L L. 857, 860 (1996); Barbara Stark, *International Human Rights Law, Feminist Jurisprudence, and Nietzsche's "Eternal Return": Turning the Wheel*, 19 HARV. WOMEN'S L.J. 169, 169-70 (1996).

10. See Sompong Sucharitkul, *A Multi-Dimensional Concept of Human Rights in International Law*, 62 NOTRE DAME L. REV. 305, 305 (1987) (observing that "the international instruments proclaiming the Rights of Man or the International Covenants of Human Rights merely incorporate the view and concepts advocated by the authors and draftsmen of those instruments, who have invariably been trained in Western or European legal traditions."). See also Ebow Bondzie-Simpson, *A Critique of the African Charter on Human and People's Rights*, 31 HOW. L.J. 643, 658 (1988) (discussing the primacy that economic development has for political leaders in Africa); Goler Teal Butcher, *The Immediacy of International Law for Howard University Students*, 31 HOW. L.J. 435, 445 (1988) (contending that the United States "stands out as the state which, while promoting the rights of individuals against the excesses of government, that is civil and political rights, is opposed to a concept of a human right not to be hungry, a right to have work, the right to education."). But see Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 523-24 (1992) (noting that welfare rights "have become a staple feature of post-war international declarations and have been accorded a place beside traditional political and civil liberties in the national constitutions of most liberal democracies."). This issue is sometimes addressed in the context of the debate over cultural relativism in human rights. See, e.g., JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 35 (1993); Abdullahi Ahmed An-Na'im, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights*, in HUMAN RIGHTS AND CROSS-CULTURAL PERSPECTIVES 19, (Abdullahi Ahmed An-Na'im ed., 1992); Christina M. Cerna, *Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts*, 16 HUM. RTS. Q. 740, 740 (1994); Jack Donnelly, *Cultural Relativism and Universal*

ed that human rights issues must be addressed in the context of the larger relations between First World and Third World, and in the context of development and modernization.¹¹

During the Cold War, there was extensive debate about the political and economic interests underlying the notion of human rights. Western governments and non-governmental organizations (NGOs) (such as Amnesty International) routinely condemned the Eastern bloc countries for human rights violations, partly on the grounds that the judicial and electoral processes were inadequate or oppressive. The Soviets would respond that in *their* view, human rights entailed health care, education, employment and economic equity. They accused their Western critics of purporting to offer a "universal" standard which in fact reflected Western First World societies,

Human Rights, 6 HUM. RTS. Q. 400, 400-19 (1984) (examining the "competing claims of cultural relativism and universal human rights" and advocating an approach to reconciling them that "preserves the tension between and the insights of, both relativism and universalism."); Rhoda E. Howard, *Cultural Relativism and the Nostalgia for Community*, 15 HUM. RTS. Q. 315, 315 (1993) (analyzing the concept of cultural relativism, as that concept is employed by traditionalists and by communitarians, and concluding that it is in fact a form of cultural absolutism); Christopher C. Joyner & John C. Dettling, *Bridging the Cultural Chasm: Cultural Relativism and the Future of International Law*, 20 CAL. W. INT'L L.J. 275, 275 (1990); Nancy Kim, *Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism*, 25 COLUM. HUM. RTS. L. REV. 49, 56-59 (1993); Fernando R. Tesón, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 869 (1985).

11. See, e.g., Arthur A. Baer, *Latino Human Rights and the Global Economic Order*, 18 CHICANO-LATINO L. REV. 80, 80-81 (1996); Susan M. Davis, *WEDO and the Public Advocacy Agenda in Creating Sustainable Human Development*, 69 ST. JOHN'S L. REV. 179, 187 n.14 (1995) (discussing the position of the Women's Environment and Development Organization); Robert F. Drinan, S.J. *Sovereignty and Human Rights*, 20 CAN.-U.S. L.J. 75, 84-85 (1994); J. Oloka-Onyango, *Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa*, 26 CAL. W. INT'L L.J. 1, 1-2 (1995) (observing that economic, social and cultural rights have been neglected and emphasizing the need to devote more attention to those rights); Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT'L L. 470 (1995) (reviewing LAW AND DEVELOPMENT (Anthony Carty ed., 1992) and LAW AND CRISIS IN THE THIRD WORLD (Sammy Adelman & Abdul Paliwala eds., 1993)). Davis, among others, contends that the extreme economic disparities between First World and Third World need to be recognized more explicitly as the context in which any discussion of human rights can take place. As Davis points out, Third World countries account for "three-fourths of the global population," while receiving "only 30% of the world's income." Davis, *supra*, at 187. She notes that "the North consumes 70% of the world[']s energy, 75% of its metal, 85% of its wood and 60% of its food." *Id.* at 188. Drinan notes that 40,000 children die each day from preventable diseases and that the United States, with 4% of the global population, consumes 40% of its food. See Drinan, *supra*, at 84-85.

which had highly developed political systems, but also great economic disparities. The Western governments and NGOs would reply that it was not *they* who were self-serving, but the Soviets, whose theory of human rights reflected the Communist view that political rights were insignificant compared to economic benefits.¹² Thus, each accused the other of claiming to set forth a universal and impartial standard of basic rights, which was in fact not impartial at all, but patently self-serving, and whose validity was therefore compromised.

I am not interested in resurrecting this particular exchange of accusations. However, what interests me about it is that in some sense both sides are right: it is impossible not to see how closely the two concepts correspond to the political and rhetorical agendas of the Cold War. If this is so, then we must

12. See Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89, 92 n.18 (1996) (commenting on Soviet and Western objections to the Universal Declaration of Human Rights and observing that "[t]he Soviets were opposed to the preponderance of Western civil liberties Western nations were persuaded to include economic, social and cultural rights in the document only after having been persuaded that it would not be legally binding" (citation omitted)). Another commentator, Aart Hendriks, notes that:

For a long time, social rights were associated with communism, seen as the justification given by socialist governments to suppress the civil and political rights of their opponents. The degree of government interference that these rights seemed to necessitate were, in addition, often perceived to be "inherently incompatible" with the rules of a free market economy.

Aart Hendriks, *Promotion and Protection of Women's Right to Sexual and Reproductive Health Under International Law: The Economic Covenant and the Women's Convention*, 44 AM. U.L. REV. 1123, 1131 (1995). Henry Steiner, in reviewing Louis Henkin's *THE AGE OF RIGHTS*, noted that:

Throughout the Cold War, it was notorious that many communist countries, particularly the Soviet Union, justified their political systems in terms of the priority given to and the asserted realizations of economic and social rights, while simultaneously mocking the significance of bourgeois civil and political rights in Western democracies.

Henry J. Steiner, *The Youth of Rights*, 104 HARV. L. REV. 917, 928 n.17 (1991) (review of HENKIN, *supra* note 1). Steiner additionally observed that, since the commencement of the Reagan Administration, the United States "has taken the position" that either "welfare claims cannot constitute rights or that the securing of civil and political rights is an essential condition to economic and social development and must be the focus of urgent attention." *Id.* (citations omitted). See also Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156, 160 (1987); Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an "Entirely New Strategy"*, 44 HASTINGS L.J. 79, 84 (1992) (discussing our need to rethink "our Cold War aversion to 'economic rights.'").

ask ourselves: Is there a notion of human rights which has no agenda, which serves no political interests and which is truly universal? If there is not—if any concept of human rights is grounded in some political or economic interest—then is there nevertheless some principled, rational justification for adopting one concept of human rights rather than another?¹³

Part I of this Article traces the emergence of the standard notion of human rights in the second half of the twentieth century, in the context of international law and diplomacy. In the Nuremberg tribunal of 1946, we see a notion of human rights as atrocities, "crimes against humanity." In the United Nations' Universal Declaration of Human Rights¹⁴ (Universal Declaration), the notion is broadened enormously such that it includes almost every dimension of life—social, economic, political, cultural and familial. In the 1960s, these rights were bifurcated into two treaties, one concerning atrocities and political and civil rights; and one concerning social and economic rights. The former contained requirements for immediate compliance by all states, as well as mechanisms for enforcement. The latter contained neither of these. The major NGOs (Amnesty International and Human Rights Watch) largely reiterate this distinction and define human rights violations in terms of atrocities and political rights; but not economic rights.

Part II considers the asymmetry of this bifurcated structure of the contemporary Western notion of human rights. The standard notion of human rights now consists roughly of two categories of acts: atrocities, such as torture, mass murder and summary executions; and deprivation of political rights, such

13. These questions, it seems to me, have to be resolved first in order to address issues related to the proliferation and conflicts among the purported rights advanced in the political, academic and legal literature—the right to life, the right to die, the right to employment, the right to subsistence in the absence of employment, the right to publish pornography, the right to live in a pornography-free society, individual rights, group rights, the right to use natural resources, the right of the environment to be protected from overuse, the right of non-discrimination, the right of free (and sometimes discriminatory) expression and so on. For general discussions of these matters see HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY, *supra* note 3; PHILOSOPHICAL ISSUES IN HUMAN RIGHTS (Patricia H. Werhane et al. eds., 1986).

14. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, 183d plen. mtg. at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

as rights of speech, press, multi-party elections and judicial process. It does not include economic rights, such as the right to employment, housing, food and medical care. Why is this so? I propose that we begin by adopting a reasonably uncontroversial definition of human rights (although I will consider other variations at a later point) and assume that "human rights" are those resources or conditions which constitute the minimal conditions for human existence. If by "human rights," we mean "those elements which constitute the minimal conditions for human existence," then freedom from torture or death would certainly be included; but food and shelter would be as well. At the same time, it is not clear that speech and press in fact occupy the same fundamental role in human survival (although they may be indirectly necessary as a means to ensuring the satisfaction of human needs which *are* direct and immediate). Thus, the standard notion on one hand classes together rights which are very different in nature (atrocities and political rights); while excluding other rights (economic rights) which seem as directly essential to human well-being (if not more so) than political rights.

Parts III and IV trace the particular content of the modern idea of human rights to two distinct sources: the doctrine of Just War starting with Augustine and the Enlightenment conception of rights. Just War theory concerns the duties owed in wartime to enemies—to those toward whom one has no legal or domestic ties at all. The Just War doctrine prohibits torture as well as the unnecessary killing of civilians, wounded soldiers and prisoners of war. Thus, it concerns the minimal level of decency owed to someone simply because he or she is a human being. The Enlightenment notion of rights, however, is very different. It envisions the assertion of the rights of liberty, equality, fraternity and happiness—in short, the conception of a good and full life—not the minimal conditions for survival and the minimal obligation of decency. The Enlightenment rights differ from Just War "rights" in nature as well as content. In the Enlightenment tradition, rights are abstract rather than concrete; political rather than personal; broadly rather than narrowly conceived; and counterfactual in form. Part V takes a brief look at the arguments of Dworkin and Gewirth regarding the "existence" of rights. It suggests that, although their arguments are quite sophisticated, the Enlightenment view of rights—which is not only problematic but paradoxical—

cal—is reiterated in their work as well.

Part VI revisits Bentham's and Marx's critiques of the Enlightenment notion of rights and their arguments that "a right to X" is not itself a thing that one can possess. The question is, "what is it that you *have*, exactly, when you have a 'right' to food, for example, but have no actual food?" If we hold to an idealist metaphysics, we would still consider that we have something of significance. If we hold to a materialist metaphysics, then the answer is "obviously nothing at all."

Finally, Part VII returns to the Nuremberg tribunals as a way of looking very concretely at the question of what has happened when "human rights" are invoked and looking also at the status of human rights as a "moral trump." Nuremberg is, after all, the first occasion on which the notion of human rights was treated as an actual law, on the basis of which trial and conviction took place. We are accustomed to thinking of the charges brought at Nuremberg as transcending political interests. We would generally think that if there are any "crimes against humanity" which would be universally recognized, they would be the acts of the Nazis in World War II. I review some of the many ways in which the trial served as a political project of the victors which explicitly rejected the rule of law at every turn, for the larger purpose of presenting a moral demonstration of the Nazis' absolute evil. We see this, for example, in the explicit exclusion of Allied war crimes; the fact that precisely the same parties served as legislators, prosecutors and judges; the tribunal's dubious claim to jurisdiction; and the tribunal's prohibition against raising the issue of jurisdiction in any forum. Because the denunciation of the Nazis in a sense consumed all the moral space, the victors could lay claim not only to relative goodness, but—implicitly and explicitly—absolute and universal goodness. The Nuremberg accusations, in the end, functioned not as an occasion for moral discourse, but as a moral diatribe which effectively excluded the possibility of moral discourse.

I suggest that we inherit these features in our current notion of human rights—both the implicit claim of absolute goodness and the suppression of moral discourse. This occurs insofar as a claim of human rights violations operates as a kind of "moral trump," alongside of which all other countervailing moral claims are dwarfed. Consequently, claims of human rights violations rhetorically work in a manner which

is not unlike a holy war: as a claim of absolute righteousness which ironically can come to operate at the expense of simple decency. We can look at the asymmetry of the standard notion of human rights and see this easily. For example, someone who is homeless and begging on the streets, but has the right to hire a lawyer for \$300 an hour or buy network television time, suffers no violation of his or her human rights. Or, for example, economic sanctions are sometimes imposed on a country in the name of the human rights of its citizens; despite the opposition of the citizens themselves and despite the fact that the sanctions cause direct hardship, hunger and sickness to the poorest and most fragile members of society.

Thus, I argue, the standard notion of human rights is in some degree actually dangerous in that it invokes ethical principles that it claims are not only universal, but absolute. At the same time, because it implicitly asserts the most extreme moral claim possible, it is not concerned merely with which acts are wrong, but rather with distinction between absolute righteousness and absolute evil. It can provide—and has on certain occasions provided—a justification for doing violence or inflicting suffering, if these take place on behalf of “human rights,” much the way that claims of righteousness have justified the bloodiest acts of holy wars.

I conclude by suggesting alternative models for human rights which would address the problem of asymmetry and would offer an account of human rights which is more coherent philosophically and more consistent with our ethical intuitions. But my central concern in this essay is not simply to propose a more coherent model for the concept. Rather, I am deeply interested in examining the relation between the concept and the political interest; and in demonstrating that no purely abstract choice is possible, only a fundamentally interested one. I suggest that we might be well served by simply looking at the conceptual and rhetorical means used in international relations by which brutality is sometimes reconciled with claims of moral righteousness. I suggest that absolute ethical claims—of which the concept of human rights is an exemplar—are double-edged and that absolute righteousness is not possible in the face of political situations which are always and necessarily characterized by moral ambiguity.

I should mention that my interest in the concept of human rights derives from my experiences in 1991 and 1992, when I

spent a good deal of time living and traveling in Guatemala, Nicaragua and Cuba. Although I had a strong academic background in both political philosophy and Latin America, I nevertheless found myself both deeply moved and deeply shaken. It was not so much that I learned new "facts"—I had always known, for example, that the infant mortality rate is a measure of development and that it is much higher in poor countries than wealthy countries. But I had never before been woken at 3:00 AM by a neighbor building a coffin for his baby who had died in the night for lack of \$2 worth of medicine (which happened in Nicaragua). Nor had I ever been to a public garbage dump which contained an entire village made of garbage, as I saw in Guatemala City—an entire shanty town made of garbage, with women cutting their children's hair with broken scissors picked from the garbage, old men sitting on mounds of garbage and reading newspapers they had picked out of the heaps, and teenage boys playing soccer on a field of garbage with a torn soccer ball someone had thrown away.

I also got a bit of a sense of what it is like to live in a place marked by state terrorism, also in Guatemala, when a language teacher showed me the cigarette burns on his chest; and when I saw soldiers armed with Uzis and M-16s guarding not only the banks, but grocery stores, museums, bookstores and libraries; and when I visited an academic research institute surrounded by 12-foot-high cement walls, inset with broken glass, topped with barbed wire running horizontally and circled by razor wire.

As a result, at this point I have very strong views about what some people describe as "merely" economic harm. Likewise, I have very strong views about the nature and kinds of state violence and political intrusion, when it makes sense to equate them, and when it does not. It is because of my experiences and my views that I will now argue for a certain analysis of human rights, which I hope will stand up to the scrutiny of an academic community which does not necessarily share either my views or my memories.

I. THE STANDARD CONCEPT OF HUMAN RIGHTS

The notion of human rights in general—as moral principles by which we can judge the legal acts of state—has its roots in the Greek notion that there is a transcendental stan-

dard of justice by which we measure the justness of particular laws and states.¹⁵ This view is articulated in the distinction between universal law and particular laws; and the related distinction between natural or divine law (that which is inherently and absolutely just) and positive law (that which is articulated in the form of actual laws).

Particular law is that which each community lays down and applies to its own members: this is partly written and partly unwritten. Universal law is the law of nature. For there really is, as every one to some extent divines, a natural justice and injustice that is binding on all men, even on those who have no association or covenant with each other.¹⁶

There are unwritten laws of justice which are not enforced, but exist permanently and without change.¹⁷ Written laws change often; universal laws—"the law of nature"—do not. One may break a particular law and not act unjustly, if it is an unjust law which does not fulfill its true purpose, which is to do justice.¹⁸ Aristotle refers to Sophocles' *Antigone*, who describes natural law as follows:

Not of to-day or yesterday it is,
But lives eternal: none can date its birth.¹⁹

The distinction between law (the acts of state) and justice (the ideal by which we judge the goodness of the state), or between particular laws and universal law, is the foundation of the notion of human rights. It is the basis for the moral claim by which we can justify passing judgment on a state's actions—given that the state is the source of law, the state by definition determines what is legal and what is not. The only moral justification by which those who are outside a state can pass judgment on the validity of its acts lies in the claim of a higher standard, or a universal law, or a conception of justice, against which the acts and laws of a particular state can be

15. See, e.g., PLATO, *REPUBLIC* bk 1; Plato, *Gorgias*, in 1 PLATO, *THE DIALOGUES OF PLATO* 505 (Benjamin Jowett trans., 1937) (1892).

16. ARISTOTLE, *RHETORIC* bk 1, ch. 13 (W. Rhys Roberts trans., 1954).

17. *Id.*

18. *Id.*

19. *Id.* See also Sophocles *Antigone*, in I SOPHOCLES 187 (David Grene trans. & ed., 2d ed. 1991).

measured. Thus, "human rights" by definition are not concerned about ordinary crimes, which are offenses against the state. Rather, the conception of human rights necessarily concerns acts (or failures to act) of the state; and necessarily makes the claim that an act or policy which may be legal is nevertheless unjust. This moral claim in turn provides a standard by which to judge the acts of a sovereign government to be "criminal" in some sense and justifies the "punishment" of other states, as well as interference in their internal policies.

The concept of human rights which is currently the standard or dominant concept is one which has been articulated in approximately the same form in international law and diplomacy, by NGOs and in philosophical and theoretical literature. The dominant concept of human rights entails: (1) the right to be free from what are often called "atrocities," such as torture and genocide; and (2) political and civil rights, including elections and judicial process and freedom of thought, speech and press. The dominant concept of human rights does not include economic rights, such as the rights to food, shelter and employment.

If by "human rights" we refer to those elements which constitute the minimal conditions for human life, then we have a problem: not being tortured or killed is essential for human life, but running for political office is not. Thus, it is not clear that we can justify placing civil and political rights in the same category as the right not to be subject to atrocities. On the other hand, food and shelter *are* minimal conditions for life. So how did this dominant concept of human rights come to be formulated?

In the twentieth century, the Nuremberg trials at the end of World War II were perhaps the first significant attempt to articulate and enforce (or rather penalize violations of) principles of human rights.²⁰ At Nuremberg, from 1946 to 1949, the

20. There had, of course, been rules of war for many centuries. See discussion *infra* Part III. There had even been a thin attempt to try individuals for war crimes committed during World War I. The Hague Conventions of 1899 and 1907 articulated certain guidelines regarding "war crimes," including prohibitions on the use of poisonous gas, the sinking of hospital ships, etc. At the close of World War I, there was a pro forma attempt to bring the Kaiser to trial for initiating a war of aggression and there were a few isolated trials of German soldiers, who were acquitted or sentenced to short jail terms. See TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 12-20 (1992).

Nazis were prosecuted by the Allied tribunal for war crimes, crimes against peace and crimes against humanity. "War crimes" involved the violation of the rules of war, such as blanket bombing in civilian areas, gratuitous attacks on civilian populations of other nations and mistreatment of prisoners of war.²¹ "Crimes against peace" consisted of waging a war of aggression, or waging war in violation of treaties.²² Germany's "crime against peace" was its military aggression against sovereign nations. For both "crimes against peace" and "war crimes" there was some precedent, albeit tenuous, for the notion that a tribunal could legitimately claim jurisdiction over claims brought for these two types of crimes since they involved the violation of explicit conventions and treaties.²³ However, the extermination of German Jews, gypsies, communists and other groups constituted neither a war crime nor a crime against peace. It was only under the third category, "crimes against humanity," that a cognizable claim could be made against a state for violence done to its own citizens by its officials in accordance with its own laws. "Crimes against humanity" included genocide, enslavement, torture and racial or religious persecution.²⁴

21. "War Crimes" were defined by the International Military Tribunal as violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(b), 59 Stat. 1546, 1547, 82 U.N.T.S. 284, 288 [hereinafter Nuremberg Charter], reprinted in 1 SECRETARIAT OF THE TRIBUNAL, INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 11 (1947) [hereinafter OFFICIAL DOCUMENTS OF THE TRIBUNAL].

22. "Crimes Against Peace" were defined as "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing." *Id.* art. 6(a).

23. See TAYLOR, *supra* note 20, at 12-20.

24. "Crimes Against Humanity" were defined as:

murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.

Nuremberg Charter, *supra* note 21, art. 6(c), 59 Stat. at 1547, 82 U.N.T.S. at 288.

Shortly after the Allied tribunal tried Nazi leaders on charges of crimes against humanity, the notion of human rights was incorporated in the charter of the newly-formed United Nations (UN). The UN Charter, which entered into force in 1945, provided that all signatory governments would promote "universal respect for, and observance of, human rights and fundamental freedoms."²⁵ The Universal Declaration, adopted in 1948,²⁶ enumerated these rights, giving them far broader meaning than the standards employed at Nuremberg. Insofar as the Nuremberg notion of "crimes against humanity" contains a conception of human rights, it is a minimalist one: it primarily describes those acts which are inconsistent with the minimum conditions for human life. By contrast, the Universal Declaration is extremely broad. It provides that "[e]veryone has the right to life, liberty, and security of person;"²⁷ that "[n]o one shall be held in slavery;"²⁸ that "[a]ll are equal before the law;"²⁹ that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."³⁰ It states that "[e]veryone is entitled . . . to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him;"³¹ that everyone has the "right to own property;"³² that everyone has the "right to a nationality;"³³ and that men and women have the "right to marry and to found a family."³⁴ It provides that everyone has the right to work,³⁵ that everyone has the right "to free choice of employment,"³⁶ and to "just and favourable conditions of work;"³⁷ and that everyone has the right to "freedom of opin-

25. U.N. CHARTER art. 55(c).

26. See Universal Declaration, *supra* note 14.

27. *Id.* art. 3, at 72.

28. *Id.* art. 4, at 73.

29. *Id.* art. 7, at 73.

30. *Id.* art. 5, at 73.

31. *Id.* art. 10, at 73.

32. *Id.* art. 17(1), at 74.

33. *Id.* art. 15(1), at 74.

34. *Id.* art. 16(1), at 74.

35. See *id.* art. 23, at 75.

36. *Id.*

37. *Id.*

ion and expression,"³⁸ "freedom of thought,"³⁹ freedom of "conscience,"⁴⁰ and freedom of "religion."⁴¹ Finally, it guarantees that everyone has the "right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care;"⁴² that everyone has the "right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay;"⁴³ that everyone has the right to education;⁴⁴ that everyone has the right to free elementary education⁴⁵ and to higher education accessible to all on the basis of merit;⁴⁶ and that everyone has the right "to enjoy the arts and to share in scientific advancement."⁴⁷

The concept of human rights contained in the Universal Declaration stands in marked contrast to the notion of human rights contained in the Nuremberg notion of "crimes against humanity." The notion of "crimes against humanity" was very limited, in that it addressed one's right not to be subject to behavior which was in some sense beyond the pale of civilization. The concept of human rights in the Universal Declaration is not a minimal standard of civilized decency, but rather an extremely robust conception of the good. It seeks to identify every dimension of human life and every type of human need which must be met for an individual to have a rich and fulfilling life—socially, politically, economically and culturally.

The Universal Declaration does not contain an enforcement mechanism, or any specific binding obligations on the signatory governments. According to the Preamble, the Universal Declaration is "a common standard of achievement," which every individual and every organ of society shall "keep[] . . . constantly in mind."⁴⁸ Nations shall strive to achieve this standard, according to the Preamble, by "teaching and educa-

38. *Id.* art. 19, at 74.

39. *Id.* art. 18, at 74.

40. *Id.*

41. *Id.*

42. *Id.* art. 25(1), at 76.

43. *Id.* art. 24, at 75.

44. *See id.* art. 26(1), at 76.

45. *See id.*

46. *See id.*

47. *Id.* art. 27, at 76.

48. *Id.* preamble.

tion" to promote respect for these rights and freedoms and by "progressive measures" to secure their recognition.⁴⁹

In the late 1940s and in the 1950s, other treaties were generated which specifically concerned matters such as torture and genocide.⁵⁰ In the 1960s, the UN set about producing legally binding documents and enforcement mechanisms addressing the rights enumerated in the Universal Declaration.⁵¹ The elements of the Universal Declaration were reformulated in two separate covenants: the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵² and the International Covenant on Civil and Political Rights (ICCPR).⁵³

49. *Id.*

50. Other major human rights documents include the following: Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277; International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195; International Convention on the Suppression and Punishment of the Crime of Apartheid, *adopted* Nov. 30, 1973, 1015 U.N.T.S. 245; Convention on the Elimination of All Forms of Discrimination against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, S. TREATY DOC. NO. 100-20 (1988), 23 I.L.M. 1027. However, what is known as "the International Bill of Human Rights" consists of the Universal Declaration, *supra* note 14; International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, SEN. EXEC. DOC. E, 95-2, at 23 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; Optional Protocol to the International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 302 [hereinafter Optional Protocol]; Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, *adopted* Dec. 15, 1989, G.A. Res. 44/128, U.N. GAOR Supp. No. 49 at 206, U.N. Doc A/44/824 (1989).

51. For a discussion of the formulation of these covenants see Ashbjorn Eide, *Strategies for the Realization of the Right to Food*, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY, *supra* note 3, at 460.

52. ICESCR, *supra* note 50.

53. ICCPR, *supra* note 50. Note that the European analogue has the same structure. The European System for the Protection of Human Rights, established by the Council of Europe, is based upon two treaties: the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights] (including the right to life, the right not to be subjected to torture, freedom of thought and expression and political and judicial rights); European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89 (including the right to work, the right to medical care, the right to safe and healthy working conditions and the right to social welfare). Thus, the European human rights system has the same bifurcated structure as the two United Nations (UN) covenants.

The mechanisms of enforcement for the European system likewise reiterate

The ICCPR basically concerns two types of rights: those pertaining to the physical integrity of the person, such as execution, torture and enslavement, and those pertaining to legal proceedings, to the legal status of persons and to "intellectual" rights, such as the right to hold and communicate one's ideas and beliefs.⁵⁴ The first category is concrete and substantive:

the same priorities as those contained in the UN covenants. Article 19 of the European Convention on Human Rights provides for enforcement by two institutions, the European Commission of Human Rights and the European Court of Human Rights. *See* European Convention on Human Rights, *supra*, art. 19. Under Article 25, complaints of human rights violations under the Convention can be brought by either individuals (where the state party recognizes the right of private petition) or other states. *See id.* art. 25. Under Article 54, the Committee of Ministers is then charged with enforcing the judgments of the European Court of Human Rights. *See id.* art. 54.

The European Social Charter, on the other hand, establishes a set of aspirations rather than explicit obligations. Part I of the Charter provides that the state parties "accept as the aim of their policy, to be pursued by appropriate means . . . the attainment of conditions in which [these] rights and principles may be effectively realised." European Social Charter, *supra*, preamble, 529 U.N.T.S. at 92. The Charter has no mechanisms of enforcement analogous to those contained in the Convention. The Charter only provides for a reporting system to monitor the parties' progress toward these goals. The reports are reviewed by a set of committees, which pass on their views to the Committee of Ministers, which in turn may make "recommendations" to the parties. *See id.* arts. 25-27, 29, 529 U.N.T.S. at 116, 118.

54. The ICCPR provides, among other things, that the states which are parties "undertake to ensure" the equal rights of men and women to the enjoyment of all civil and political rights set forth in the ICCPR. ICCPR, *supra* note 50, art. 3, 999 U.N.T.S. at 174. The ICCPR provides that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." *Id.* art. 6(1), 999 U.N.T.S. at 174. The ICCPR provides that the death penalty may be imposed only for the most serious crimes and only pursuant to a final judgment rendered by a competent court. *See id.* art. 6(2), 999 U.N.T.S. at 174. The ICCPR provides that no one shall be subjected to torture, or to cruel, inhuman, or degrading treatment or punishment. *See id.* art. 7, 999 U.N.T.S. at 175. The ICCPR provides that no one shall be held in slavery or in servitude and that "[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." *Id.* arts. 8-9, 999 U.N.T.S. at 175.

The ICCPR further provides that anyone who is arrested shall be informed at the time of arrest of the reasons for his arrest and that anyone arrested or detained on a criminal charge shall be brought promptly before a judge. *See id.* The ICCPR provides that all persons shall be equal before the courts; and that all persons shall be entitled to be tried without undue delay. It provides that every person has the right to defend himself in person or through legal assistance; and to have legal assistance assigned to him without payment by him, when justice requires. *See id.* art. 14, 999 U.N.T.S. at 176-77. The ICCPR provides that everyone shall have the right to freedom of thought, conscience and religion; and to

when these rights are violated, individuals suffer concrete, physical harm; and there are no formal procedures which can legitimize these acts. The second category is quite different. For those rights concerned with the form of judicial and political proceedings, as long as there is due process and free elections, the outcome by definition cannot constitute a violation of one's rights. Those rights concerning speech, press and religious expression involve abstract entities—ideas, beliefs, information and the exchange or dissemination of these.

There is also an Optional Protocol to the ICCPR (Optional Protocol), adopted at the same time as the two covenants,⁵⁵ which concerns enforcement. Under the Optional Protocol, individuals claiming a violation of rights under the ICCPR, who have exhausted all available domestic remedies, may submit a statement to the Human Rights Committee.⁵⁶ Under the Optional Protocol, the Human Rights Committee shall then bring such claims to the attention of the state party alleged to be violating the covenant and the state party must within six

manifest his religion and belief in practice and teaching. *See id.* art. 18, 999 U.N.T.S. at 178. The ICCPR provides that everyone shall have the right to hold opinions without interference; and that everyone shall have the right to freedom of expression. *See id.* art. 19, 999 U.N.T.S. at 178. It provides that the freedom of expression shall include "freedom to seek, receive and impart information . . . , either orally, in writing or in print, in the form of art, or through any other media of his choice." *Id.* The ICCPR provides that every citizen shall have the right to take part in the conduct of public affairs and to vote and to be elected at elections. *See id.* art. 25, 999 U.N.T.S. at 179. It provides that these elections shall be based on universal and equal suffrage; and shall be held by secret ballot, "guaranteeing the free expression of the will of the electors." *Id.* The ICCPR provides that all persons are entitled to the equal protection of the law, without discrimination; and that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." *Id.* art. 26, 999 U.N.T.S. at 179.

Part IV of the ICCPR provides for the establishment of a Human Rights Committee, whose members are nominated and elected by the state parties. *See id.* arts. 28-30, 999 U.N.T.S. at 179-80. A state party may recognize the competence of the Human Rights Committee to hear claims of violations and may then present a claim that another state party is not fulfilling its obligations under the ICCPR. *See id.* art. 41, 999 U.N.T.S. at 182. The Human Rights Committee is then empowered to investigate and issue findings as to the claims made, if the matter cannot be amicably resolved to the satisfaction of the parties concerned. *See id.* arts. 41, 42, 999 U.N.T.S. at 182-83. The ICCPR states that the Secretary-General of the UN shall provide the necessary staff and facilities for the Committee to perform these functions. *See id.* art. 36, 999 U.N.T.S. at 181.

55. *See* Optional Protocol, *supra* note 50.

56. *See id.* art. 2, 999 U.N.T.S. at 302.

months provide a written explanation or statement regarding the remedial action taken by that state.⁵⁷

The ICESCR, by contrast, addresses issues of food, shelter, employment, health care and education.⁵⁸ The degree of the obligation varies to some extent with the different rights. For example, the parties pledge to "undertake to ensure" the right to form and participate in trade unions;⁵⁹ whereas they merely "recognize that . . . [t]he widest possible protection and assistance should be accorded to the family."⁶⁰ Unlike the ICCPR, the ICESCR contains no mechanism to receive and investigate claimed violations, originating either from states or from individuals. The only form of enforcement consists of the agreement of the state parties to submit reports "on the measures which they have adopted and the progress made in achieving the observance of the rights recognized" by the covenant.⁶¹ Unlike the ICCPR, the terms of the ICESCR contain

57. *See id.* art. 4, 999 U.N.T.S. at 303.

58. The ICESCR provides that the signatory states recognize the right to work, including the right of everyone to engage in work which he freely chooses or accepts and that the parties "will take appropriate steps to safeguard this right." ICESCR, *supra* note 50, art. 6(1), 993 U.N.T.S. at 6. The ICESCR provides that the parties "recognize the right of everyone" to fair wages, a decent living for themselves and their families, safe and healthy working conditions, rest, leisure and periodic holidays with pay. *Id.* art. 7, 993 U.N.T.S. at 6. The ICESCR provides that the parties "undertake to ensure" the right of everyone to form and join trade unions and the right to strike, in conformity with the laws of the state. *Id.* art. 8, 993 U.N.T.S. at 6. The ICESCR provides that the parties recognize the right of families to assistance for the care and education of children and paid maternity leave. *Id.* art. 10, 993 U.N.T.S. at 7. The ICESCR provides that the parties recognize the right of everyone to adequate food, clothing and housing and to the continuous improvement of living conditions. *Id.* art. 11, 993 U.N.T.S. at 7. Under the ICESCR, the parties "shall take . . . measures . . . which are needed" to improve methods of food production and distribution, including agrarian reform; and "to ensure an equitable distribution of world food supplies in relation to need." *Id.* The ICESCR provides that the states which are parties shall take those steps necessary for the reduction of infant mortality, improvement of the environment and creation of conditions which would assure medical service to all in the event of sickness. *Id.* art. 12, 993 U.N.T.S. at 8. The parties to the ICESCR "recognize the right of everyone" to take part in cultural life, to enjoy the benefits of scientific progress and to the protection of any benefits to be derived from their literary, scientific, or artistic production. *Id.* art. 15, 993 U.N.T.S. at 9.

59. *Id.* art. 8(1), 993 U.N.T.S. at 6.

60. *Id.* art. 10(1), 993 U.N.T.S. at 7.

61. *Id.* arts. 16(1), 17(1), 993 U.N.T.S. at 9. Parties may indicate in these reports the factors and difficulties affecting the fulfillment of the obligations of the covenant. *See id.* art. 17(2), 993 U.N.T.S. at 9. These reports are to be submitted to the Secretary-General of the UN, who then transmits them to the Economic

no agreement to immediately implement the rights identified in the covenant, but rather to work toward their "progressive implementation."⁶²

Thus, the contents of the Universal Declaration were reformulated in 1966 in the form of two instruments, one concerned with overt state violence, civil and political rights, and rights of belief and expression; the other concerned with social, economic and cultural rights. The ICCPR contains a procedure for addressing complaints of violations, while the ICESCR has no comparable procedure. The ICCPR provides that the parties shall conform fully to its provisions immediately; the ICESCR provides that parties shall take steps to achieve these rights "to the maximum of its available resources, with a view to achieving *progressively* the full realization" of social and economic rights.⁶³ Thus, there is a significant difference between the two covenants as to the expectations of compliance and the mechanisms for enforcement. The ICCPR "has teeth" in ways that the ICESCR does not. The ICCPR has explicit requirements, explicit prohibitions and a procedure for responding to acts of a state party that violate these requirements and prohibitions. The ICESCR, on the other hand, may be immediately binding, but what is binding is an aspirational standard: the ICESCR provides an ideal goal which the parties must work toward, but not necessarily achieve. How hard they work toward this goal is a matter they determine for themselves, in accordance with their resources and their national priorities. Thus, under the ICESCR there is no standard, even in principle, by which another nation or outside organization can judge the validity of a nation's economic priorities. In short, under the ICCPR it is both possible and expected that parties shall comply; while the ICESCR anticipates that state parties will de facto determine for themselves what constitutes compliance and that noncompliance will not be challenged or penalized.⁶⁴

and Social Council. The Economic and Social Council in turn may respond with comments or recommendations. See *id.* arts. 16-22, 993 U.N.T.S. at 9-10. The Economic and Social Council may transmit these reports to the Commission on Human Rights "for study and general recommendations" or "for information." *Id.* art. 19, 993 U.N.T.S. at 10.

62. *Id.* art. 22, 993 U.N.T.S. at 5.

63. *Id.* art. 2(1), 993 U.N.T.S. at 5 (emphasis added).

64. However, as Jack Donnelly notes, both sets of rights are essential and interrelated. Donnelly notes that "[a] long string of resolutions proclaim this [that

Why were the provisions of the Universal Declaration reformulated in this manner? Why is there such a dramatic difference between the enforcement provisions of the two covenants?

At the time the covenants were being drafted, several arguments were put forth justifying the disparity. First, it was maintained that political rights could be implemented immediately, while economic rights could be implemented only gradually. The argument was made that respecting political rights requires no substantial state expenditures, whereas meeting the economic needs of a population requires substantial economic outlays.⁶⁵ However, this argument is not persuasive. There are substantial costs involved in operating a judiciary system that protects the due process rights of defendants, particularly since under such a system they may be entitled to have counsel provided by the state. At the same time, there are social and economic rights the implementation of which does not require that the state provide subsidies out of pocket. This would include minimum wage standards, parental leave requirements, the right to form trade unions, child labor laws, agrarian reform, environmental protection and anti-trust regu-

is, that all human rights are interdependent and indivisible], most notably UN General Assembly [R]esolution 32/130, as well as an agenda item at the 41st General Assembly." JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 28, n.1 (1989). Many commentators have held that the two sets of rights are both necessary—or are interdependent, or complementary—without resolving the conflicts that arise, or the relative priority that should be given particular rights or sets of rights. See, e.g., HENKIN, *supra* note 1; Steiner, *supra* note 12, at 928; see also generally Melanie Beth Oliviero, *Human Needs and Human Rights: Which are More Fundamental?*, 40 *EMORY L.J.* 911, 915-16 (1991); Connie de la Vega, *Protecting Economic, Social and Cultural Rights*, 15 *WHITTIER L. REV.* 471, 471-72 (1994).

65. See Asbjorn Eide, *Strategies for the Realization of the Right to Food*, in *HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY*, *supra* note 3, at 460.

For example, Hugo Bedau makes this argument in his discussion of Section 502B of the Foreign Assistance Act of 1961, 22 U.S.C. § 2304 (1994), which makes foreign assistance conditional upon the recipient country's human rights practices:

A government may in fact be unable to do anything about the starvation of a good portion of its population; but a government is never unable to prohibit (and to that extent, end) the practice of torturing suspects

The government's responsibility to undertake to feed its own people remains less central than its responsibility not to torture.

Hugo Adam Bedau, *Human Rights and Foreign Assistance Programs*, in *HUMAN RIGHTS AND U.S. FOREIGN POLICY* 37 (Peter G. Brown & Douglas MacLean eds., 1979).

lation.⁶⁶

It was also argued that because civil and political rights only entail that the state abstain from action, it is reasonable to expect complete and immediate compliance; while such an expectation would not be reasonable regarding social and economic rights, which require the state to affirmatively undertake certain actions.⁶⁷ However, under the Nuremberg principles, state officials can be guilty of human rights violations for their acquiescence or failures to act.⁶⁸ A state which consents or acquiesces to acts of genocide or torture by paramilitary death squads, for example, may be deemed to be in violation of human rights for its failure to intervene. Thus, the human right of freedom from torture in fact requires not only that the state abstain from torturing individuals, but that it act affirmatively to prohibit and prevent non-state actors from engaging in these practices. Civil and political rights are neither self-generating nor free of costs; they "need legislation, promotion and protection and this requires resources."⁶⁹

66. One scholar, Jeremy Waldron, notes that civil and political rights entail positive duties to act, as well as duties of omission. Waldron further points out that these duties stem from economic rights as well:

The right not to be tortured generates a duty not to torture people, but it also generates a duty to investigate complaints of torture, a duty to pay one's share for the political and administrative setups that might be necessary to prevent torture and so on. As far as second-generation rights are concerned, they too may be correlated with duties that are positive or negative, depending on the context. If people are actually starving, their rights make a call on our active assistance, but if they are living satisfactorily in a traditional subsistence economy, the right may require we simply refrain from any action that could disturb that state of affairs. We talk sometimes as though it only happens by misfortune that people are starving and that the only issue rights raise in the matter is whether we should put ourselves out and come to their aid. But people often starve as a result of what we do as well as what we don't do.

WALDRON, *supra* note 7, at 25. Also relevant is Aart Hendriks discussion of negative and positive rights and the distinction between "obligation of conduct" and "obligation of result." Hendriks, *supra* note 12, at 1132-33 (1995). The distinction between positive and negative rights has been applied in numerous areas. See, e.g., Dorothy Q. Thomas & Michele E. Beasley, *Domestic Violence as a Human Rights Issue*, 58 ALB. L. REV. 1119, 1143 (1995) (applying the negative and positive rights distinction to issues concerning domestic violence).

67. See discussion *infra* Part VII.

68. See discussion *infra* Part VII.

69. Dilys M. Hill, *Human Rights and Foreign Policy: Theoretical Foundations*, in HUMAN RIGHTS AND FOREIGN POLICY 6 (Dilys M. Hill ed., 1989). As one commentator points out:

The bifurcation of the rights articulated in the Universal Declaration was also justified by a pragmatic argument: that a covenant of civil and political rights, which only requires abstention from certain acts rather than the affirmative implementation of policies, would be more easily ratified than a document which required affirmative commitment of resources from state parties.⁷⁰ However, this has not proven to be the case.⁷¹ As of January 1998, there were 137 parties to the

[I]t was widely believed that compliance with civil and political rights was cost-free, whereas the realization of social rights posed an economic burden on the State. This argument also turned out to be unfounded. The organization of presidential or parliamentary elections, for example, may in fact be extremely expensive, while there are many preventive health measures that can be implemented at low or no cost.

Hendriks, *supra* note 12, at 1133.

70. These arguments continue to be made by commentators in the field of human rights. Marc Bossuyt, for instance, writes that:

Civil rights require from the State essentially—but not exclusively—an abstention. Consequently, they must be observed immediately, totally and universally. On the contrary, social rights require an active intervention from the State. As a result, they may be implemented progressively, partially and selectively. It is precisely because observance of civil rights merely requires abstention that States have no excuse for not respecting human rights of everyone within its jurisdiction. On the other hand, because the implementation of social rights requires an active intervention by the State to the extent of its available resources—a State can be allowed to set priorities in the realization of social rights.

Marc Bossuyt, *International Human Rights Systems: Strengths and Weaknesses, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY*, *supra* note 3, at 52. Bossuyt contends that this distinction—between a requisite state abstention necessary to secure civil rights and the need for active state intervention to implement social rights—is reflected in the allocation of responsibilities for rights among the judiciary on the one hand and the administrative and political departments on the other. As Bossuyt writes:

This is also the reason why the control of the observance of civil rights can be entrusted to judicial bodies, while the control of the implementation of social rights is left to administrative or political bodies. Indeed, in spite of the often very general and vague formulations of civil rights, a judge—national or international—is able to decide whether or not civil rights have been observed in a specific case On the other hand, without further elaboration by national or regional legislation, no judge is in a position to rule whether in a specific case a State has fulfilled its obligations in the field of social rights, because—depending on the available resources—it is up to each State to decide which social rights should be implemented first and which citizens should be first entitled to the benefits of those rights.

Id.

71. According to one commentator, Asbjorn Eide:

Following the adoption of the Universal Declaration in 1948, the United Nations set about adopting legally binding instruments, and decided in

ICESCR and 140 parties to the ICCPR.⁷²

International banking institutions, such as the World Bank and the European Bank for Reconstruction and Development, adopt the same distinction.⁷³ The most prominent human rights NGOs structure their institutional priorities in the same way.⁷⁴ Amnesty International's mandate is to "contrib-

the process to make a distinction between two sets of rights: the civil and political which were incorporated into [I]CCPR, and the economic, social and cultural rights which were incorporated into [I]CESCR

Two major reasons were used in favour of their separation. One was the claim that the two sets of rights needed different kinds of implementation approaches at the national level. It has frequently been argued that the civil and political rights can be implemented immediately and without cost, whereas the economic and social rights can be implemented only gradually, and with cost

The second claim, relating more to political considerations, was that many States might be willing to ratify the [I]CCPR but not the [I]CESCR. By separating them into two documents, States which had problems in implementing economic and social rights could nevertheless undertake binding obligations in regard to civil and political rights by ratifying the [I]CCPR. Empirical reality has shown this to be wrong. In practically all cases, States have ratified both Covenants. In those very few cases where States have ratified only one covenant, it has been the [I]CESCR, not the [I]CCPR. As of March 1990, there is no case in which a state has ratified the [I]CCPR but not the [I]CESCR.

The only candidate likely to ratify the [I]CCPR but not the [I]CESCR would be the United States, which stands out as a very special case.

Eide, *supra* note 65, at 460-61 (referring to the AVOR and the ICESCR).

Indeed, as of 1997, only one country, the United States, has ratified only the VER. The United States did not ratify the CR until 1992 and has not yet ratified the ICESCR. See United Nations High Commissioner for Human Rights Website (visited Jan. 19, 1998) <<http://www.unhchr.ch>>.

72. See United Nations Treaty Collection (visited Jan. 19, 1998) <<<http://www.un.org/depts/treaty>>>.

73. See John Linarelli *The European Bank for Reconstruction and Development and the Post-Cold War Era*, 16 U. PA. J. INT'L BUS. L. 373, 400 (1995) (discussing the notion of "rights" and "the taxonomy of human rights" employed in international banking institutions).

74. See Makau wa Mutua, *The Politics of Human Rights: Beyond the Abolitionist Paradigm in Africa*, 17 MICH. J. INT'L L. 591, 605 (1996) (review of CLAUDE E. WELCH, *PROTECTING HUMAN RIGHTS IN AFRICA: STRATEGIES AND ROLES OF NON-GOVERNMENTAL ORGANIZATIONS* (1995)). Mutua discusses the civil liberties origins of the international non-governmental organizations (INGOs), as opposed to the domestic non-governmental organizations (NGOs) in Third World countries whose primary commitment is often economic rights or self-determination rather than civil rights.

INGOs are based almost exclusively in the West even though the bulk of their work is directed at the South . . . INGOs are the ideological offspring of Western domestic NGOs such as the ACLU and the . . .

ute to the observance throughout the world of human rights as set out in the Universal Declaration of Human Rights," by seeking the release of those who are imprisoned because of their beliefs or because of their race, ethnicity, or gender; by opposing the detention of prisoners of conscience or political prisoners whose trial did not conform to certain norms for judicial procedure; and by opposing the death penalty, torture and other cruel and degrading punishments.⁷⁵ Thus, despite

NAACP Legal Defense and Education fund Although the NAACP has also focused on questions of social and economic justice, both organizations rest their moral authority on a narrow range of civil and political rights. None challenge or question the fundamental character of economic and social structures and their underlying philosophies and assumptions; they seek fair and equal treatment within the framework of the American liberal market economic arrangements. Leading INGOs, such as HRW, Amnesty International and ICJ promote similar ideals abroad.

Id. (citations omitted). Mutua notes that the individuals connected to the ACLU, including a former executive director, were prominent in the formation of American and British INGOs, including Human Rights Watch, International League for Human Rights and Amnesty International. *Id.* at 606. Furthermore, the Western-based INGOs have considerably more access to resources and public recognition than the domestic human rights NGOs in Third World countries. "INGOs," Mutua observes,

derive financial, social, and moral support from [Western] philanthropists, foundations, and citizens; they enjoy access to "world" political centers, such as New York, London, Washington, Paris, and Geneva; they utilize the resources and ability of United Nations and regional human rights systems; they have access to the all-powerful Western media; and they have access to and, quite often, cooperation from the arms of government concerned with foreign affairs. In contrast, even the most visible human rights NGOs in the South operate at the bare margins of these structures.

Id. at 606. See also HENRY J. STEINER, *DIVERSE PARTNERS: NON-GOVERNMENTAL ORGANIZATIONS IN THE HUMAN RIGHTS MOVEMENT* 19 (1991) (observing that the term "First World NGOs" are "those committed to traditional Western liberal values associated with the origins of the human rights movement.").

75. Article 1 of the Statute of Amnesty International provides that the organization "adopts as its mandate:"

To promote awareness of and adherence to the Universal Declaration of Human Rights and other internationally recognized human rights instruments, the values enshrined in them, and the indivisibility and interdependence of all human rights and freedoms;

To oppose grave violations of the rights of every person freely to hold and to express his or her convictions and to be free from discrimination by reason of ethnic origin, sex, colour or language, and of the right of every person to physical and mental integrity, and, in particular, to oppose by all appropriate means irrespective of political considerations:

- a) the imprisonment, detention or other physical restrictions im-

Amnesty International's claimed commitment to "the observance of the provisions of the Universal Declaration of Human Rights," in fact its substantive commitment is to some of those provisions: those relating to the physical integrity of individuals (such as torture and execution); those relating to civil and political rights (such as judicial process, elections and freedom of belief and expression). While Amnesty International does not explicitly reject the notion of economic rights,⁷⁶ it does not identify, investigate, or address in any manner those actions or failures to act which would constitute violations of economic rights.

Amnesty International does not "take a stand on the legitimacy of military, economic, and cultural relations maintained with countries where human rights are violated, or on punitive measures such as sanctions or boycotts." Nor does it "address

posed on any person by reason of his or her political, religious or other conscientiously held beliefs or by reason of his or her ethnic origin, sex, colour or language, provided that he or she has not used or advocated violence (hereinafter referred to as "prisoners of conscience"); Amnesty International shall work towards the release of and shall provide assistance to prisoners of conscience;

b) the detention of any political prisoner without fair trial within a reasonable time or any trial procedures relating to such prisoners that do not conform to internationally recognized norms;

c) the death penalty, and the torture or other cruel, inhuman or degrading treatment or punishment of prisoners or other detained or restricted persons, whether or not the persons affected have used or advocated violence;

Statute of Amnesty International, art. 1, in AMNESTY INTERNATIONAL REPORT 1995 327 (1995).

76. Thomas Hammarberg, a chairman of the International Executive Committee of Amnesty International, noted that Amnesty International is deeply committed to political prisoners and it is also

deeply involved in combatting torture and the death penalty, and in working for fair trials and improved prison conditions. This focus certainly does not mean that Amnesty International downgrades other basic rights, such as the social and economic ones. These are often related to the political and civil rights. Neither would Amnesty International attempt to create a conflict between civil and political rights on the one hand and socio-economic rights on the other. That approach would be false. The *Universal Declaration* is quite clear in stating that both are needed. Often they complement one another: when those deprived of their socio-economic rights cannot make their voices heard, they are even less likely to have their needs met.

Thomas Hammarberg, *Preface to Chapter 5, Non-Governmental Organisations*, in 3 JAMES AVERY JOYCE, HUMAN RIGHTS: INTERNATIONAL DOCUMENTS 1559-60 (1978).

itself to the general economic or political system in any country, only to that country's observance of human rights within Amnesty International's mandate."⁷⁷

Human Rights Watch and its offshoots⁷⁸ likewise have a mandate which addresses state violations of the physical integrity of individuals (torture, kidnapping and execution) and political and civil rights (judicial process, free elections, freedom of belief and expression). Human Rights Watch "defends freedom of thought and expression, due process of law and equal protection of the law; it documents and denounces murders, disappearances, torture, arbitrary imprisonment, exile, censorship and other abuses of internationally recognized human rights."⁷⁹

The same two-tier notion of human rights has also been adopted by various individual governments, perhaps in its most extreme form by the United States. The United States has followed a curious path in its espousal of human rights principles. On one hand, Franklin Delano Roosevelt's "Four Freedoms" included "freedom from want" as well as political freedom.⁸⁰ The United States then had a leading role in both the Nuremberg tribunals⁸¹ and the drafting of the Universal Declaration.⁸² Since the Carter Administration, it has been commonplace to hear references to human rights in foreign policy discussions in the United States.⁸³ Since the end of the

77. THE AMNESTY INTERNATIONAL HANDBOOK 129 (Marie Staunton et al. eds., 1991).

78. Human Rights Watch began with the founding of Helsinki Watch in 1978 and now includes Africa Watch, Americas Watch, Asia Watch, Middle East Watch and other human rights projects. See HUMAN RIGHTS WATCH, THE LOST AGENDA: HUMAN RIGHTS AND UN FIELD OPERATIONS i (1993).

79. *Id.*

80. See Frank C. Newman, *United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures*, 42 DEPAUL L. REV. 1241, 1242 n.7 (1993).

81. See discussion *infra* Part VII.

82. See HENKIN, *supra* note 1, at 68 (discussing the U.S. role in the postwar formulation of international legal instruments and treaties).

83. Although the Carter Administration is most widely recognized for making human rights a centerpiece of foreign policy, human rights have at least formally been a foreign policy priority since the early 1960s. The U.S. concern with human rights was reflected in the passage of the Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (1961) (codified as amended in scattered sections of 7, 16, 22 and 42 U.S.C.). Section 502B of the Foreign Assistance Act, as amended, provides that the United States shall "promote and encourage increased respect for human rights and fundamental freedoms throughout the world without distinction

Cold War and the collapse of the Soviet Union, "human rights" has become one of the central principles invoked in the justification of U.S. foreign policy.⁸⁴ However, the United States has been one of the slowest nations in the world to ratify the major human rights instruments.⁸⁵ It has not yet ratified and does not abide by the ICESCR.⁸⁶

as to race, sex, language, or religion. Accordingly, a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries." 22 U.S.C. § 2304(a)(1) (1994).

84. Since 1990, human rights have been invoked to justify U.S. interventions in Haiti and Somalia and U.S. support of United Nations intervention in Bosnia; human rights violations were one of the justifications given for the Persian Gulf War; human rights claims have justified the U.S. economic embargo of Cuba; and human rights violations have been raised to criticize U.S. military and financial support of Guatemala. See, e.g., *The President's News Conference*, 27 WEEKLY COMP. PRES. DOC. 39 (Jan. 12, 1991) (press conference of President George H.W. Bush, contending that, throughout United States history, "we've been resolute in our support of justice, freedom, and human dignity. The current situation in the Persian Gulf demands no less of us and of the international community."); *Message to Congress on Haiti*, 31 WEEKLY COMP. PRES. DOC. 185 (Feb. 3, 1995) (message of President William J. Clinton, citing the expulsion of human rights observers as among the factors which precipitated the international intervention in Haiti); Luisette Gierbolini, *The Helms-Burton Act: Inconsistency with International Law and Irrationality at Their Maximum*, 6 J. TRANSNAT'L L. & POL'Y 289, 305 (1997).

85. See Glendon, *supra* note 10, at 521 (observing that the United States is notable for its "conspicuous unwillingness . . . to ratify several important international human rights instruments to which all other liberal democracies have acceded."). Similarly, Vega notes that the U.S. position "contradict[s] the vast authority in the international community which maintains that the enjoyment of both sets of rights is indivisible and interdependent." Vega, *supra* note 64, at 471-72.

86. See Stark, *supra* note 12, at 81-82. Stark identifies two justifications for the nonadherence of the United States to the ICESCR:

First, it has been suggested that the rights set forth in the Covenant are "foreign" to our notion of rights. It has been argued that the Covenant represents aspirations, as distinguished from "real," enforceable, civil or political rights. During the Cold War, the U.S. Department of State viewed ICESCR as a socialist manifesto thinly veiled in the language of rights. It is settled that such rights are not protected under the U.S. Constitution.

Second, political leaders have maintained that the concerns addressed by ICESCR are within the exclusive authority of the states, and national adoption would infringe on state sovereignty.

Id. See also Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365, 366-67 (1990) (examining barriers to U.S. ratification of the ICESCR). Another commentator, Feisal Naqvi notes that the United States "partially justified its withdrawal from [UNESCO] on the basis [of] UNESCO's emphasis on economic rights." Feisal Hussain Naqvi, *People's Rights or Victim's Rights: Reexamining the Conceptualization of Indigenous Rights in International Law*, 71 IND. L.J. 673, 713 (1996).

Thus, the bifurcated notion of human rights—which treats both atrocities and political rights as essential, while treating economic rights as irrelevant or relatively trivial—is at present the only notion of human rights which is explicitly adopted and enforced in any fashion at all in the domains of international law, international diplomacy and NGOs. It is also a notion which has been widely maintained and defended among commentators on human rights as well, although there is considerably more diversity among the academic treatments of human rights than there is to be found in law, diplomacy and activist organizations.

Among political philosophers, one of the early defenders of the dominant notion of human rights is Maurice Cranston. In his influential critique of the Universal Declaration, Cranston argued that the criteria for determining what constitutes human rights are “practicability” and “paramount importance.”⁸⁷ It is more practical to assert the existence of political rights than economic rights, he suggests: political rights “can be readily secured by legislation,” whereas economic and social rights can rarely, if ever, be secured by legislation alone. Cranston points out that the legislation by which political rights are secured is more straightforward than that needed for economic rights. Often political rights can be achieved by restraining governmental conduct.⁸⁸

Thus, Cranston argues, it is practical to articulate and enforce political rights and impractical to articulate and enforce socioeconomic rights. Cranston ridicules the notion of economic rights by focusing on one right included in the Universal Declaration which seems relatively frivolous: the right to holidays with pay.⁸⁹ “At present,” Cranston writes, “it is utterly impossible, and will be for a long time yet, to provide ‘holidays with pay’ for everybody in the world. For millions of people who live in those parts of Asia, Africa, and South America, where industrialisation has hardly begun, such claims are vain and idle.”⁹⁰

87. MAURICE CRANSTON, WHAT ARE HUMAN RIGHTS? 66, 67 (1973).

88. See *id.* at 66.

89. See Universal Declaration, *supra* note 14, art. 24 (providing that “[e]veryone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.”).

90. CRANSTON, *supra* note 87, at 66.

The second test "of a human right, or universal moral right," Cranston writes, "is the test of *paramount importance*." As Cranston explains, "[i]t is a paramount duty to relieve great distress, as it is not a paramount duty to give pleasure,"

Common sense knows that fire engines and ambulances are essential services, whereas fun fairs and holiday camps are not. Liberality and kindness are reckoned moral virtues; but they are not moral duties in the sense that the obligation to rescue a drowning child is a moral duty.⁹¹

Although in recent years, some models have been proffered by philosophers and political theorists which do not fully reiterate this dichotomy,⁹² this is still the most commonly held contemporary notion of human rights as it has emerged in the second half of the twentieth century.

Thus, the conception of human rights, as it has been formulated in the international and diplomatic arena in the twentieth century, has undergone a series of radical transformations. In the Nuremberg trials, the concept of "crimes against humanity" was defined in terms of the failure to meet minimal ethical obligations to human beings, by engaging in "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during war."⁹³ Three years later, the 1948 Universal Declaration defined human rights not only in terms of extermination and torture, but as an entitlement to all that which is necessary for a full and complete life in every dimension of human existence—economically, socially, politically and culturally. However, the Universal Declaration had no mechanism for enforcement. Twenty years later, the 1966 covenants then divided the "human rights" of the Universal Declaration into two categories, with a clear hierarchy. Civil and political rights consisted of entitlements to judicial and political processes, belief and

91. *Id.* at 67.

92. Donnelly discusses some of the other models which, to some extent, identify other sets of basic rights. Fouad Ajami's core rights would be survival, protection against torture and apartheid and food; Henry Shue's would be security, subsistence and liberty. See DONNELLY, *supra* note 64, at 38-41; see also generally WALDRON, *supra* note 7 (setting forth several essays reformulating the problem from a liberal perspective).

93. Nuremberg Charter, *supra* note 21, art. 6(c), 59 Stat. at 1547, 82 U.N.T.S. at 288.

expression, as well as freedom from torture, enslavement and execution—and the covenant regarding civil and political rights contained mechanisms for both investigation and enforcement. The covenant regarding social and economic rights to work, health care, food, shelter and education contained no comparable mechanism for investigation or enforcement. This two-tier formulation of human rights, which is now the dominant one in diplomacy and international law, was adopted in turn by the most prominent non-governmental organizations, including Human Rights Watch and Amnesty International, and has been defended by philosophers and political theorists.

II. THE ODDNESS OF THE CONCEPT

Let us look at four sets of implications of this formulation of the concept of human rights.

A. *Example One*

Imagine two scenarios. In the first, military personnel go to the home of a woodcutter. He is not home, but his mother, wife and four young children are. When the woodcutter returns, he finds the women and children decapitated. The torsos have been seated around the table, with the head of each placed on the table in front of the torso. The arms of each torso are extended forward, the hands resting on top of the head. The arms of the youngest child are too short to rest on top of his head; his hands are nailed to the head, to hold them in place. The executions committed by the soldiers constitute a human rights violation.

In the second scenario, a political activist lives in a country with a single political party, which is center-right. The activist is strongly committed to principles of economic equality and social justice and believes that capitalism is both morally wrong and historically doomed. The single political party and all of its candidates are committed to a free-market economic ideology, the privatization of education and health care, and the elimination of all government subsidies for the poor. In the upcoming election, there is only one presidential candidate. In local elections, there are multiple candidates, but all are from the same party. The activist is furious and frustrated at the lack of choice. Although he has the right to vote, he feels disenfranchised because there are no parties representing his views.

This is a violation of his human rights.

Under the dominant conception, one's rights as a citizen have the same standing as one's right not to be subject to cruel and extremely violent acts. Thus, under the dominant conception, the right not to have one's children hacked to death has the same status as the right to choose between Republicans and Democrats.

B. *Example Two*

Your human rights have been violated if:

- you can only vote for a candidate from the Republican Party;
- the law does not allow you an unlimited right to buy all the television time you can afford;
- the government requires you to wait your turn to go to Aruba for vacation.

No human rights have been violated if:

- your neighbor freezes to death for lack of heat;
- your infant daughter dies because you could not afford a doctor;
- your teenage children are illiterate;
- begging on the street is the most lucrative form of employment you can find.

The dominant conception of human rights ensures that individuals can express political views and pursue certain personal interests—activities which may be satisfying or important, but are not essential for human life. However, the dominant conception does not include any rights that are economic in nature, even if these concern actual physical survival, physical hunger, pain, helplessness and humiliation.⁹⁴

94. This is a point that has been made by numerous commentators. See, e.g., Butcher, *supra* note 10, at 445 (contending that "civil and political human rights, such as the right of free speech, only make sense to the person with basic economic rights."). Butcher observes that "[a] mother whose baby is dying of disease which he succumbed to because of debilitating diarrhea caused by massive malnutrition—and half the babies in AFRICA die before they are one for just this reason—would have little comprehension of our insistence on free speech as the

Thus, the dominant conception has a curious structure: it gives the same status to political and civil rights—including those which enhance one's life, but are not necessary for survival—as it does to the rights relating to extreme acts of physical brutality. At the same time, it excludes economic rights, even those which have implications for life and death, or the necessities required for basic health and physical safety.⁹⁵

C. *Example Three*

Let us assume, with the dominant conception, that our human rights include the right to vote in free elections, the right to hold public office, the right to due process of law and the right to equal treatment and equal protection of the law.

Given this assumption, there are no violations of our human rights where:

- the law permits everyone—rich and poor alike—to spend the \$12 million necessary to run for Congress;
- the law forbids everyone—rich and poor alike—to beg on the streets.⁹⁶

fundamental right." *Id.* at 446. See also Bondzie-Simpson, *supra* note 10, at 658. Bondzie-Simpson refers to the following quote from an unnamed African political leader:

Imperialists talk about human rights, drinking tea or sipping champagne. They can afford to—after all, they have made it. If we had slaves for two hundred (200) years to build our roads, build our homesteads, sow our fields; if we had multinationals for three hundred (300) years looting wealth from other people's lands; if we had literate, healthy, well-fed citizens—if we had a diversified economy and people had jobs—we too could talk human rights from our air conditioned offices and houses.

Id.

95. This issue can also be framed in terms of the dual nature of property rights. R. Andrew Painter offers the insight that:

the right to property can be viewed from two perspectives: that of the landed and that of the landless. From the perspective of the landed, the right to property is a civil right, one intended to ensure protection against arbitrary State interference. From the perspective of the landless, the right to property is an economic and social right, a prerequisite to the fulfillment of other guaranteed human rights, such as the right to life and an adequate standard of living. Under the latter perspective, there is a positive State duty to ensure that sufficient lands are available to all.

R. Andrew Painter, *Property Rights of Returning Displaced Persons: The Guatemalan Experience*, 9 HARV. HUM. RTS. J. 145, 167 (1996).

96. I am of course appropriating the famous dictum of Anatole France, that

Under the dominant conception, political equality is a human right. Yet political equality is purely formal: the fact that all citizens of a certain age have the right to hold public office does not mean that substantively they have the means to do so. Political equality—the formal equality of all citizens in relation to government and to law—does not entail economic equality—substantively having the means to exercise one's political rights.

The dominant conception of human rights attributes great value to rights which are formal and abstract, or which are not self-standing, and for that reason are quite worthless to many. What is it that we have when we have the right to run for office, to start a newspaper, to buy television time—without the money necessary for each of these things? If I do not have \$12 million and I do not receive \$12 million in campaign contributions—what exactly is it that I have, then, if I have the right to run for Congress? What do I *have* when I have a right which is purely formal? What I have is either a promise of a very limited sort, or it is simply and entirely an abstraction.

If it is a promise, then it is the promise regarding the concrete and direct activities of the state. The promise is: if I have the inclination—and the funds—to run for public office, the state will not intervene to prevent me from doing so. If I want to buy television time—and can afford to—the state will not prevent me from doing so. If I am arrested, the state will not prevent me from hiring a competent and thorough lawyer—if I can afford to pay for her. If I and my organization contribute \$100,000 to the Democratic National Committee and my Democratic senator is then willing to spend two hours meeting with me, the state will not prevent me from lobbying for laws that will serve my interests. If a political right is a promise, then it is a promise regarding the limitations on the state's intervention in how people make use of their resources. Thus, it is the *equal* right of all to make use of resources, where those resources are distributed *unequally*.

Yet if we want to consider political rights to be human rights, we must maintain that there is something which all persons have—not just the wealthy—when they have these

“The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.” ANATOLE FRANCE, *THE RED LILY* 87 (1894).

rights. What is it that I have, exactly, when I have the right to start a newspaper but not the means? What is it that I have when I, who earn \$5 an hour, have the right to lobby my senator who will not spend more than five minutes with someone who has not contributed \$1000 to his campaign? When I cannot afford to buy television time, ad space, or the time and attention of my governmental representatives, what exactly does it mean to say that I have "the same" political rights as someone who contributes \$50,000 to the Democratic Party, or a corporation which loans one of its jets to a presidential candidate to use during his campaign? In exactly what sense are my rights "equal" or "the same?"

What *exactly* does it mean to say that I "have" a right—which cannot be exercised? Let's say that I have a coupon for 10% off on any mink coat I buy for a retail price of \$10,000 or more. But perhaps I earn only \$5 per hour working at a fast food restaurant. What is the "right" that I "have" when I have an entitlement I cannot possibly actualize? What would I be missing if someone took away my coupon for the mink coat? Would my life be less rich? Would I live in more pain or fear? In fact, my life would be no different. I would not be any happier or less happy. I would not be in more pain or less pain. I would not be doing anything different in my life with possession of the coupon than I would without it. Is this so different from the right to buy television air time? Or to start a newspaper in competition with the New York Times? Or the right to travel to foreign countries? How can one have "essential rights" which are of no use to someone who does not have the necessary resources to exercise them? How can something be absolutely essential for every human being—and also quite worthless to those who are not wealthy?

D. Example Four

Since 1960, the United States has maintained an economic embargo against Cuba, actively interfering in Cuba's commercial relations with third-party nations. This embargo has prevented Cuban purchases of medicine, medical equipment, water purification chemicals, bicycles, soap, rice and milk. The justification that the United States gives for this policy is that the Cuban government violates the human rights of the Cuban people. The human rights of the Cuban people are violated, it

is held, in that they do not have freedom of speech and press; that there is not a multi-party electoral system; that there has only been one candidate for president since the revolution; and that there are not certain rights of due process. Partly as a result of the economic embargo, malnutrition has increased; there have been severe shortages of electricity, public transportation and school supplies; the water is no longer consistently potable; and there has been a measurable increase in preventable deaths.

United States interference with Cuban trade has been justified as an ethical measure, intended to destabilize Fidel Castro's leadership and replace socialism with a "less repressive" government that will not violate the human rights of the Cuban people.⁹⁷ In this case, the purported human rights violations include no "atrocities"—death squads, torture, genocide, or enslavement. The claimed human rights violations involve press, speech, religious expression, electoral practices and judicial process.⁹⁸ Because civil and political rights are deemed to be "human rights," and economic rights are not, we see the ethically problematic situation in which "human rights" are invoked to justify the infliction of concrete, immediate physical suffering, by economic means, upon those members of society who are the most vulnerable and the least responsible for governmental policies—the elderly, the ill and the very young.

E. Examples Analyzed

I use these examples to raise four conceptual issues regarding human rights: (1) the inclusion of civil and political rights as human rights; (2) the exclusion of economic rights

97. See, e.g., the Cuban Democracy Act of 1992, 22 U.S.C. § 6001 (1994) (finding, *inter alia*, that "[t]here is no sign that the Castro regime is prepared to make any significant concessions to democracy," and that "it is appropriate for" the United States and its allies "to cooperate . . . to promote a peaceful [political] transition in Cuba."); Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C.A. § 6021 (West Supp. 1997) (finding, *inter alia*, that "the repression of the Cuban people . . . [has] isolated the Cuban regime as the only completely nondemocratic government in the Western Hemisphere," and that the "Cuban people deserve to be assisted in a decisive manner to end the tyranny that has oppressed them for 36 years, and the continued failure to do so constitutes ethically improper conduct by the international community.").

98. See, e.g., 1996 AMNESTY INTERNATIONAL REPORT (1996).

from the conception of human rights; (3) the circumstances in which "human rights" are abstractions without concrete value; and (4) the consequences of this structure, whereby human suffering may actually be increased in the name of human rights.

If by the term "human rights" we want to somehow capture those elements essential to human life, then there is a problem; some are essential to human life, while others concern enrichment or happiness, but are by no means essential. Death squads and genocide, both of them human rights violations, deprive people of life. State control of television, on the other hand, which is a human rights violation under the dominant conception, does not. It is probably an understatement to say that to be physically tortured shatters the texture of one's daily life and replaces it with a single consuming focus of surviving extreme pain. State control of television does nothing of this sort. There is state control of television in dozens of countries, including, for example, the Netherlands. Would we really want to claim that the quality of human life in the Netherlands for a middle-class businessman is equivalent to being a victim of torture?

The question here is not whether state control of television is good or bad. The question is: is it comparable to torture? Is it indisputably wrong in the way that torture is? Is it devastating to human life in the way that torture is? Would we really say that it is "beyond the pale of civilization" and "inconsistent with the most basic precepts of human decency" in the way that we say torture is? Free access to the press may be a good thing; it may be a very good thing. It may be necessary for a full and happy life. It may be indirectly necessary as a tool to expose and address such things as torture and genocide. But is free access to the press, in itself, a prerequisite for human life or human well-being in the same way that not being tortured or enslaved is necessary for human well-being?

Recall also that, under the dominant conception, literacy is not a human right. Now, to what degree is a free press valuable (not to say essential) for the well-being of those who are illiterate? How is it that the dominant conception does not see any human rights violations if people are illiterate—but does see a human rights violation if an illiterate population does not have the right to publish and distribute newspapers? I suggest that our actual physical experiences in the world indicate that

the genocide and torture—because they are physically concrete, direct, immediate experiences—are fundamentally dissimilar to formal political rights—which are indirect, less than essential and in some circumstances worthless.

Conversely, there are certain economic resources which *are* essential for human life, but are not included in the dominant conception: shelter, food, medical care, clothing. Without shelter and warm clothing, people who live in cold climates will simply, literally freeze to death. Without the safety that shelter provides, people who live on the streets are robbed, beaten and raped. Without medical care, people suffer literal, physical pain from illness and injury and may die or be crippled from lack of treatment. Without potable water, illness and an early death are more probable; the major cause of infant mortality in developing countries is amoebic dysentery from untreated drinking water.⁹⁹ Is the physical experience of starving to death from poverty different in any way from, say, being starved to death intentionally as a form of execution? Is the loss one feels for a child who has died for lack of a \$2 medicine so different from the loss one feels for a child killed by the state?

Thus, if by “human rights” we refer to those things which are “essential for human life,” then the dominant conception of human rights makes no sense: it includes things which may be highly desirable, but are not essential to life; and it excludes things which, in fact, *are* essential to human life. If by “human rights” we are concerned with acts or situations which “shock the conscience,” which we “cannot imagine that human beings could endure,” the dominant concept includes those; but it also includes acts or situations which are not only endurable, but quite ordinary. If by “human rights” we mean “those principles whose violation constitutes immediate and concrete harm,” then the dominant conception includes some aspects of human experience, such as enslavement or torture, which are so concrete that they dominate and pervade every moment of one’s conscious life. But it also includes formal and abstract rights which people may never exercise, may never want to exercise, may never have the means to exercise and whose absence would have no concrete consequences for their lives.

99. See Butcher, *supra* note 10, at 446.

Thus, I would argue, the dominant conception of human rights is not only disputable, but is indeed quite odd. It is an odd mixture of the very concrete and the purely abstract; of what is essential to everyone and what is worthless to many; of goods and protections which are immediately and directly effective and those which are only contingent, indirect, or hypothetical. Yet it is a concept which lays claim to being an absolute ethical standard, with universal validity. How is it that this came to be? In the first section, I gave a brief overview of the diplomatic and institutional processes in which this conception of human rights was formulated. Now I would like to look at the conceptual roots of the dominant conception, in order to explain its oddness and asymmetry, as well as its claim to absolute validity and universal applicability.

III. THE MIXED HERITAGE OF THE DOMINANT CONCEPTION: THE JUST WAR TRADITION

The dominant conception of human rights, I would maintain, has an asymmetrical structure because it derives from two very different sources: the Just War tradition, which dates back to Augustine; and the Enlightenment notion of rights, articulated in liberal political theory. The first essentially concerns the distinction between civilization and barbarity: what are the acts which are not only criminal or violent, but in some sense "go beyond the pale of civilized conduct?" What are the minimal ethical obligations owed to a person simply in virtue of his or her humanity? The second, in contrast, concerns a conception of the good: what is necessary for human beings to be happy? What is necessary for a good and full life? There is another fundamental distinction as well. The Just War tradition concerns acts and duties regarding those to whom one has no juridical or political relation—the obligations of a warrior toward those who are enemies of his nation, who are legally entitled to nothing from him; they are simply, merely, human beings. The Enlightenment tradition of rights, on the other hand, concerns the obligations of the state to its citizens and the limitations on the power of the state to intervene in the decisions and acts of its citizens.

There is a long tradition of reflection by both ethical thinkers and military theorists on the question of what constitutes a Just War. However, the prior question is: do ethics even apply

to war in the first place? If an individual, acting on his own behalf, sets off a bomb in someone's home or workplace in his own country, he would be called a criminal (or terrorist or deviant). He would be tried and imprisoned or put to death for violation of the law. A soldier, acting on behalf of the state, against foreign nationals, is not bound by those laws. We do not consider that killing the enemy in battle is criminal or deviant; indeed, killing in these circumstances is rewarded and praised. The soldier is not restricted by the laws governing domestic order; but is he restricted by anything other than his obligation to his sovereign? Stated differently: once you are engaged in war—which is outside the lawful social order—are there any rules of civility by which you are bound, or are you simply outside the bounds of civilization altogether? Given that war takes place outside the rules of law, is war a rule-governed activity at all?¹⁰⁰

In *JUST AND UNJUST WARS*,¹⁰¹ Michael Walzer describes the cold-blooded realism of the Melian dialogue in Thucydides' *HISTORY OF THE PELOPONNESIAN WAR*,¹⁰² in positions such as Sherman's "War is hell;" and in von Clausewitz' view that war in its pure form has no boundaries to its destruction. Walzer's concern is to reject that "realist" view that there is no distinction between war and atrocity. For realists, he says, "war strips away our civilized adornments and reveals our nakedness."¹⁰³ The realists would simply maintain: "yes, our soldiers committed atrocities in the course of the battle, but that's

100. See IAN CLARK, *WAGING WAR* 24-27 (1988) (discussing rules of military efficiency, rules of political instrumentality and proportionality, rules of utility, rules of positive law and rules of morality). Clearly war can be or is in fact "rule-governed" in some of these senses. Our concern in this discussion of Just War is the role of ethical rules. See, e.g., James F. Childress, *Just-War Theories: The Bases, Interrelations, Priorities, and Functions of Their Criteria*, in *WAR, MORALITY, AND THE MILITARY PROFESSION* 256, 262-63 (Malham M. Wakin ed., 1986) (exploring the distinction between a model of war as a rule-governed activity and the model of "war as hell."). Although, as Terry Nardin writes, "it does not follow from the fact that in war the normal order of society is disrupted that the state of war is one without order. The alternative to life according to one set of rules is not necessarily life without any rules at all, but rather life according to different rules." TERRY NARDIN, *LAW, MORALITY AND THE RELATIONS OF STATES* 288 (1983).

101. MICHAEL WALZER, *JUST AND UNJUST WARS* 4 (1977).

102. See THUCYDIDES, *HISTORY OF THE PELOPONNESIAN WAR* 400-08 (Rex Warner trans., Penguin Books 1954).

103. WALZER, *supra* note 101, at 4.

what war does to people, that's what war is like."¹⁰⁴

There is, however, an equally weighty tradition dating back to Augustine which specifically asserts the relevance of considerations of justice and articulates principles by which Just Wars are distinguished from unjust ones. The principle of *jus ad bellum* concerns the justice of the cause for which the war is fought; *jus in bello* concerns the means by which the war is conducted. In *THE CITY OF GOD*,¹⁰⁵ Augustine is using the principle of *jus ad bellum* when he suggests that the unity of the empire has been achieved only at the cost of just and necessary wars and that the very extent of the empire has also produced social and civil wars. However, the wise man is willing to wage Just Wars and is compelled to do so by the wrongdoing of the other party.¹⁰⁶

Jus in bello concerns two general principles: proportionality and discrimination. The principle of proportionality requires that the harm done by the military action should be less than the harm it seeks to prevent or rectify.¹⁰⁷ The principle of discrimination concerns those who will be targeted or subject to attack in wartime and what types of weapons will be used. This principle involves making a moral distinction in wartime between combatants and noncombatants; wounded and non-wounded combatants; combatants who are fighting and combatants who have surrendered and handed over their arms. The principle of discrimination would prohibit blanket bombing in civilian areas; directly targeting civilian residential areas;

104. *Id.*

105. SAINT AUGUSTINE, *THE CITY OF GOD* (Marcus Dods trans., 1950).

106. See *id.* at 683. See also Paul Ramsey, *The Just War According to St Augustine*, in JEAN BETHKE ELSHTAIN, *JUST WAR THEORY* 8, 15-16 (Jean Bethke Elshtain ed., 1992). One commentator suggests that, in the twentieth century, the principle of *jus ad bellum* can principally be seen in the area of aggressive war and proscription (or condemnation) of wars of aggression in the Hague conferences, the Covenant of the League of Nations, the Kellogg-Briand Pact of 1928 and the Nuremberg tribunal. CLARK, *supra* note 100, at 78. But it is certainly the case that the notion of *jus ad bellum* can also be seen in the types of justifications given for military actions since World War II. The United States, for example, has variously invoked "making the world safe for democracy," human rights and "the drug war" as the moral justifications for military actions.

107. For a summary of this notion, see U.S. Catholic Bishops, *The Just War and Non-Violence Positions*, in *WAR, MORALITY, AND THE MILITARY PROFESSION* 239, 249-51 (Malham M. Wakin ed., 1986) (excerpting the pastoral letter of May 1983); CLARK, *supra* note 100, at 35; WALZER, *supra* note 101, at 129-30 (discussing the difficulty and the desirability of applying the proportionality principle).

intentionally and directly killing children, the elderly, hospital patients, farmers and workers not involved in war production, villagers not involved in combat, etc. The principle of discrimination would also prohibit the use of weapons which by their nature will kill or injure civilian populations, such as nuclear, biological, or chemical warfare.¹⁰⁸ The "laws of war" regarding such matters as the treatment of prisoners and civilians have changed as forms of war and their conventions have undergone transformation. In the twentieth century, they were codified in a series of treaties. The Fourth Hague Convention provided that enemy soldiers who surrendered should be taken prisoner rather than killed; captured cities could not be pillaged; civilian areas could not be bombed; poisoned weapons and arms "calculated to cause unnecessary suffering" could not be employed. The Geneva conventions required humane treatment of prisoners and protection of the sick and wounded.¹⁰⁹

108. See U.S. Catholic Bishops, *supra* note 107, at 250-51; CLARK, *supra* note 100, at 35, 87-97. See also WALZER, *supra* note 101, at 138-59 (discussing the doctrine of necessity); JAMES TURNER JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR xxiii (1981). See also Richard Wasserstrom, *The Laws of War, in WAR, MORALITY, AND THE MILITARY PROFESSION* 393 (summarizing *jus in bello* principles and observing that "[f]or the most part the laws of war deal with two sorts of things: how classes of persons are to be treated in war, e.g., prisoners of war, and what sorts of weapons and methods of attack are permissible, e.g., the use of poison gas.").

Johnson notes that this distinction can be traced in part to the Middle Ages. De Treuga et Pace ("Of Truces and Peace"), part of the canon law of the 13th century, "lists eight classes of persons who should have full security against the ravages of war: clerics, monks, friars, other religious, pilgrims, travelers, merchants, and peasants cultivating the soil." JOHNSON, *supra*, at 127. There were two other canonical limitations as well: the Truce of God prohibited combat on certain days; and, in 1139, the Second Lateran Council banned the use of certain weapons in combat among Christians (the crossbow, bows and arrows and siege engines). However, Johnson notes, "[n]o mention was made of the use of these weapons in warfare against infidels and heretics, and they remained acceptable there." *Id.* at 128. The second source of the distinction among classes of persons from the Middle Ages was the chivalric code, which excluded from combat both women and peasants. The code also established conventions of courtesy, by which it was deemed a virtue for a conquering knight to offer quarter to the vanquished knight. *Id.* at 133-39.

109. See Telford Taylor, *War Crimes, in NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 29-30 (1970). See also generally the Hague Conventions of 1907, the Geneva Conventions of 1949 and the 1977 protocols amplifying the Geneva conventions. Articles 48 and 51 of the 1977 Protocols provide that:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civil-

The conventions articulated in these “rules of war” underscore what an extraordinary situation war is; it is tempting to use the word “abnormal,” or “deviant,” or Durkheim’s term “anomic.” Within “normal” societal life, killing someone is murder, burning down their house is arson, taking their crops is theft and going into someone’s home without permission is burglary. All of these are crimes and those who commit them are deemed to be deviant and anti-social in some sense, deserving of punishment, in need of rehabilitation and segregated from the trustworthy and law-abiding sector of society. Yet in wartime, these acts are normal and committed by one’s own soldiers, who are in fact required to do these acts and lauded as heroes if they do them successfully. Given that all the obligations one would owe to other citizens under the laws of the nation are inapplicable—indeed, given that the instructions from one’s own nation are to kill, maim, burn and destroy—what does it even mean to speak of “good” and “bad” acts? Within a society, obligations are owed to other members of the society, under the laws of the state; as members of this moral community, their lives and property have moral significance. War, however, involves interactions with those who are not members of one’s own moral community; to whom one has no obligations under the laws of one’s own state; to whom one has no relation except a relation of enmity. Under these circumstances, then, how are we obliged to act? The principle of discrimination explicitly creates a code of conduct and implicitly creates minimum moral obligations toward those who are not members of our moral community. Thus, it is ethical to kill an enemy soldier; but it is unethical to massacre unarmed women and children. It is ethical to kill a soldier in combat; but it is unethical to bomb an infirmary for the wounded. It is ethical to kill an enemy soldier who is armed; but it is unethical to shoot an enemy soldier in the back after he has surrendered and handed over his weapon. It is ethical to capture a soldier and hold him prisoner; but it is not ethical to torture him.¹¹⁰

ian objects and military objectives and accordingly shall direct their operations only against military objectives . . . The civilian population as such, as well as individual citizens, shall not be the object of attack . . .

See also Jane Olson et al., *Bosnia, War Crimes and Humanitarian Intervention*, 15 WHITTIER L. REV. 445, 451 (1994).

110. I will not address here the issues of military necessity—that these acts

In the "rules of war," the appeal is not to explicit laws generated by a supra-national legislative body; there is no such body, although there are treaties among equal and sovereign state parties. The appeal (within the treaties and conventions, as well as in the face of actual war crimes) is rather to conscience and to an intuitive understanding of what acts, in themselves, "shock the conscience."¹¹¹ The appeal cannot be to the legal entitlements of, and obligations to, enemy soldiers and civilians, since they are not entitled to the protections claimed by citizens or residents of one's own country. Thus, rules of war constitute restrictions on the harm that may be done to persons—not because they are citizens, with formal legal entitlements, but simply and solely because they are human beings. Fundamentally, they speak to the question: what do I owe those with whom I have no social contract? What do I owe those to whom I have no explicit duties, no legal obligations? What do I owe those who are my enemies—who have tried to kill me, or who are the kin and protectors of those who are trying to kill me? What is the minimum standard of conduct that applies to a human being as such, even a human being who is my enemy?

The principles of proportionality and discrimination imply I am obliged to recognize, in some small degree, the humanity of my enemy. I am obliged to recognize that his death and pain are something of moral significance; that burning a village of people is not akin to burning a field of dry grass; that taking a human life, or causing human pain, is not akin to destroying or damaging an inanimate object. Thus, I am not entitled to indulge myself in conduct that is gratuitous and unbounded bloodthirstiness, even when that conduct is directed at someone who wishes me dead. Thus, the rules of war implicitly draw a distinction between civilization and barbarism: the rules of war hold that even in the absence of law, even in the absence of contract, even in the absence of relationship, even in circumstances of enmity—there are still some acts whose brutality makes them indecent—inherently and directly inde-

are permitted when they are militarily necessary. I only wish to sketch out some of the general principles that have to do with the recognition of ethical duties owed outside of society and outside of law.

111. This is exemplified by the language used by the prosecutors at the Nuremberg tribunals. See discussion *infra* Part VII.

cent—simply because they are committed by human beings, against human beings.

This notion does not articulate an affirmative conception of happiness or goodness, but rather a minimum standard for ethical conduct and for ethical entitlements. To say that one has the right not to be tortured or executed only addresses the minimum conditions for human life. It says nothing about the larger possibilities for happiness. Note also that there is nothing abstract about the nature of the entitlements implied by the rules of war; death and extreme physical pain are the most concrete human experiences there are. If the rule against torture were violated and you were the object of torture, you would be very much aware that this violation had taken place. It would alter your life and well-being, directly, immediately and physically. You would require no further resources or intermediate steps in order to experience your right. To be the beneficiary of the rules of war does not mean that you have an entitlement to happiness; it means only that you will be protected against brutality that is direct, physical and gratuitous.

IV. THE MIXED HERITAGE OF THE DOMINANT CONCEPTION: THE ENLIGHTENMENT NOTION OF RIGHTS

As we have seen, the Just War tradition contains a notion of the minimum obligation owed to someone simply by virtue of their humanity. Furthermore, the Just War tradition consists first and foremost of a code of conduct; to the extent that there are “rights,” they are inferred from the restraints on conduct, not articulated prior to it—or for that matter, not articulated at all by soldiers or military leaders, but only by historians and ethicists. The customs of war, for example, simply proscribe targeting civilians, but do not derive this proscription from an articulated underlying theory of universal rights (at least not prior to the twentieth century). However, the Enlightenment notion of rights is quite different. In one sense it is much broader, in that it entails a conception of the good—what is involved in a complete, fulfilled human life. Yet in a different sense it is narrower: it concerns only the political dimension—the relation of the individual to the state and the basis for the legitimacy of the state. And where the “rules of war” are an empirical description of customary conduct from which rights are only secondarily inferred, the revolutionary

documents and political theory of the Enlightenment, which set forth claims about rights, do not necessarily describe or even claim to describe actual conduct. Finally, and crucially, the Enlightenment gives us one of the fundamental notions of modern political thought: that there are such things as rights and that they are universal,¹¹² inherent, self-evident and inalienable.¹¹³

In a sense it is presumptuous to speak at all of "an Enlightenment conception of rights," given the tremendous diversity among the thinkers of this era. The difference between the French and German Enlightenments, for example, is quite stark. However, my interest here is not in offering an extensive discussion of the political thought of the seventeenth and eighteenth centuries, but in tracing the influences on human rights theory of the mid and late twentieth century, by indicating some of the elements we have inherited and appropriated. I will do this by quickly reviewing some of the central themes which emerge again and again in Enlightenment political thought, looking specifically at social contract theory and the proclamations of rights in the French and American revolutions. The social contract theorists assert an original condition (whether historical or mythical) in which individuals have natural rights. The revolutionary proclamations assert the present existence and nature of rights.

A. *The Social Contract Theorists*

Hobbes' political writings set out the rational grounds for obedience to authority; while maintaining that those grounds consisted in the natural rights of individuals, prior to and

112. As has been pointed out on many occasions, the "universe" for the Enlightenment thinkers was in fact limited to white males of European descent. See, e.g., CAROL PATEMAN, *THE SEXUAL CONTRACT* 221 (1988) (observing that "[t]hrough the mirror of the original contract, citizens can see themselves as members of a society constituted by free relations. The political fiction reflects our political selves back to us—but who are 'we'? Only men—who can create political life—can take part in the original pact."); see also DIANA H. COOLE, *WOMEN IN POLITICAL THEORY* 71-132 (1988) (discussing Hobbes, Locke and Rousseau). For a discussion of the implicit and explicit racism in the revolutionary thought of the Enlightenment, see RONALD T. TAKAKI, *IRON CAGES: RACE AND CULTURE IN NINETEENTH-CENTURY AMERICA* 1-15 (1979). My interest here lies in addressing the notion of universal rights as such.

113. See Louis Henkin, *Human Rights and State "Sovereignty"*, 25 GA. J. INT'L & COMP. L. 31, 40 n.34 (1995-96).

outside of the existence of the state. The state of nature was characterized by a fundamental equality: "Nature hath made men so equall, in the faculties of body, and mind . . . For as to the strength of body, the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others, that are in the same danger with himselfe."¹¹⁴

The result of this equality is an ongoing state of war, "where every man is Enemy to every man."¹¹⁵ In this state, there is "continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short."¹¹⁶ The "right of nature,"¹¹⁷ consists in "the Liberty each man hath, to use his own power . . . for the preservation of his own Nature; that is to say, of his own Life" and to anything he conceives to be useful toward that end.¹¹⁸ Hobbes defines liberty as the "absence of externall Impediments" which may "take away part of a mans power to do what he would."¹¹⁹ Hobbes distinguishes "right" from "law," concluding that right consists in liberty to do or forebear from doing, while law determines and binds. Law, for Hobbes, is obligation, while right is liberty.¹²⁰ It follows, he says, that because everyone may make use of anything which is of use to him in preserving his life against his enemies, in such a condition, "every man has a Right to every thing."¹²¹

Consequently, the sovereign does not rule by divine right or a right of tradition; rather, sovereign power is conferred by consent of individuals living in the warlike state of nature. Hobbes writes that "[a] *Common-wealth* is said to be *Instituted*, when a *Multitude* of men do Agree, and *Covenant*, every one, with every one" and when they agree "to submit to some Man, or Assembly of men, voluntarily, on confidence to be protected by him against all others."¹²² Thus, sovereignty is conferred by individuals; and it is conferred by individuals who

114. THOMAS HOBBS, *LEVIATHAN* 183 (Penguin Books, 1968) (1651).

115. *Id.* at 186.

116. *Id.*

117. Hobbes is here translating *jus Naturale*, or natural law. *Id.* at 189.

118. *Id.*

119. *Id.*

120. *See id.*

121. *Id.* at 190.

122. *Id.* at 228.

have a "right to everything."

Similarly, Locke, in replying to Filmer's defense of rule by divine right, rejects the position that "[m]en are not born free, and therefore could never have the liberty to choose either Governors, or Forms of Government."¹²³ In his *Second Treatise of Government*, Locke maintains that "[t]o understand Political Power right, and derive it from its Original, we must consider what State all Men are naturally in, and that is, a *State of Perfect Freedom* to order their Actions, and dispose of their Possessions, and Persons as they think fit . . ."¹²⁴ Locke maintains that "[t]he *State of Nature* has a Law of Nature to govern it," which is reason; and that reason "teaches all Mankind . . . that . . . no one ought to harm another in his Life, Health, Liberty, or Possessions."¹²⁵ Reason, as law of nature, likewise indicates that everyone is bound to preserve himself and to preserve the rest of mankind as well.¹²⁶ Since the "Fundamental Law of Nature" dictates that man should be preserved, he has a right to destroy anyone who threatens him with destruction or enslavement.¹²⁷ The "*Natural Liberty* of Man is to be free from any Superior Power on Earth," Locke says, "but to have only the Law of Nature for his Rule."¹²⁸ Thus, legislative power over man within the commonwealth can be established only by consent.¹²⁹

Unlike Hobbes, who spoke of equality in the state of nature as actual physical and mental equality, Locke asserts an "equal right" in the face of actual inequality:

Though I have said above, Chap. II, *That all Men by Nature are equal*, I cannot be supposed to understand all sorts of *Equality*: *Age* or *Virtue* may give Men a just *Precedency*: *Excellency of Parts and Merit* may place others above the Common Level: *Birth* may subject some, and *Alliance* or *Benefits* others, to pay an *Observance* to those to whom Nature, *Gratitude* or other *Respects* may have made it due; and yet all this consists with the *Equality*, which all Men are in,

123. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 143 (Peter Laslett ed., Student ed. 1988) (1690).

124. *Id.* at 269.

125. *Id.* at 271.

126. *See id.*

127. *See id.* at 278-79.

128. *Id.* at 283.

129. *See id.*

in respect of Jurisdiction or Dominion one over another, which was the *Equality* I there spoke of, as proper to the Business in hand, being that *equal Right* that every Man hath, *to his Natural Freedom*, without being subjected to the Will or Authority of any other Man.¹³⁰

Also unlike Hobbes, Locke distinguishes liberty from freedom. Liberty is freedom from restraint; but freedom is not the liberty for each person to do as he wishes, “[f]or who could be free, when every other Man’s Humour might domineer over him?”¹³¹ Freedom is rather the “*Liberty* to dispose, and order, as he lists, his Person, Actions, Possessions, and his whole Property, with the Allowance of those Laws under which he is”¹³² With language that seems to anticipate Kant, Locke says that “[t]he Freedom then of Man and Liberty of acting according to his own Will, is *grounded on* his having *Reason*, which is able to instruct him in that Law he is to govern himself by”¹³³ Thus, he says, “we are *born Free*, as we are born Rational; not that we have actually the Exercise of either: Age that brings one [the age of majority], brings with it the other too.”¹³⁴

All of these discussions are from the chapters on the state of nature, the state of war, slavery, property and paternal power. Yet, in a rather different vein, in the chapter entitled *Of the Beginning of Political Societies*, Locke says that “[m]en being, as has been said, by Nature, all free, equal and independent, no one can be put out of this Estate, and subjected to the Political Power of another, without his own *Consent*.”¹³⁵

This contrasts markedly with Locke’s earlier statements: that freedom is not the freedom for each to do as he wishes, but rather the freedom to act on one’s will to the extent allowed by law; that there are inequalities of age, virtue, birth, and so on; that one is dependent and subordinate to one’s parents at birth; and that in the state of nature one has obligations both to and from mankind as a whole. Thus, it is as a citizen—that is, as an individual consenting to the formation of

130. *Id.* at 304.

131. *Id.* at 306.

132. *Id.*

133. *Id.* at 309.

134. *Id.* at 308.

135. *Id.* at 330.

government—that Locke describes man as “by Nature, all free, equal, and independent.” Yet these qualities would not seem to apply to the individual in his family relations, his social relations, or his pursuit of his desires and interests.

Rousseau reiterates the conception of a state of nature as the origin of rights and consent as the basis for legitimate sovereignty. “Man is born free, and everywhere is in chains,” he writes in the beginning of *ON THE SOCIAL CONTRACT*.¹³⁶ “Since no man has a natural authority over his fellow man,” Rousseau writes, “and since force does not give rise to any right, conventions therefore remain the basis of all legitimate authority among men.”¹³⁷

The transition from the state of nature to the civil state takes place when each individual alienates his rights to the whole community, which is expressed in the general will.¹³⁸ For Rousseau, the state of nature was characterized by simplicity and an innocent goodness. Whereas individuals in civil society are competitive, deceitful and greedy, “savage man” has simple needs and is easily satisfied. “The only goods he knows in the universe,” writes Rousseau, “are nourishment, a woman, and rest; the only evils he fears are pain and hunger.”¹³⁹ In the state of nature, human beings are agile, robust and satisfied—“I see [the savage man] satisfying his hunger under an oak tree, quenching his thirst at the first stream, finding his bed at the foot of the same tree that supplied his meal; and thus his needs are satisfied.”¹⁴⁰ The state of nature is characterized by savage man’s “natural liberty and an unlimited right to everything that tempts him and that he can acquire.”¹⁴¹ “Every man by nature has a right,” Rousseau writes, “to everything he needs.”¹⁴²

In civil society, according to Rousseau, the individual alienates his rights to the community as a whole: “*Each of us places his person and all his power in common under the su-*

136. JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* 17 (Donald A. Cress trans. & ed., 1983) (1762).

137. *Id.* at 20.

138. *See id.* at 26-27.

139. JEAN-JACQUES ROUSSEAU, *DISCOURSE ON THE ORIGIN AND FOUNDATION OF INEQUALITY AMONG MEN* 126 (Donald A. Cress trans. & ed., 1983) (1755).

140. *Id.* at 120.

141. ROUSSEAU, *supra* note 136, at 27.

142. *Id.* at 27.

preme direction of the general will; and as one we receive each member as an indivisible part of the whole."¹⁴³ Sovereignty is then "merely the exercise of the general will," and the sovereign is the "collective being" that the general will represents.¹⁴⁴ The social contract, according to Rousseau, involves a transformation from inequality to equality. Rousseau writes that "the fundamental compact . . . substitutes a moral and legitimate equality [for] whatever physical inequality nature may have imposed upon men . . . however[] unequal in force or intelligence they may be, men all become equal by convention and by right."¹⁴⁵

Thus, our status as equal or unequal is characterized by duality. We continue to be unequal in fact—in strength or intelligence—while being equal in some other sense, as "moral" equals in the face of the law. According to Rousseau, in the passage from the state of nature to civil society, the individual cedes all of his rights to the community as a whole.¹⁴⁶ The community as a whole is both the source of its own law and bound by that law. The sovereign consists of the community itself: "the social compact gives the body politic an absolute power over all its members, and it is the same power which . . . is directed by the general will and bears the name sovereignty."¹⁴⁷

Since the citizen participates in the general will by virtue of his membership in the body politic, the citizen is—in some sense—the sovereign. However, the exercise of sovereign power concerns only public (civil) matters. While the sovereign power is "absolute, wholly sacred and inviolable," it does not dictate the private use and disposition of property, because when the matter becomes a private one, the sovereign's power is no longer competent.¹⁴⁸

Within the social contract tradition, the claim that individuals possess rights prior to and apart from the state is the basis for determining both the legitimacy and the limitations of the acts of the state. At the same time, the state is the only

143. *Id.* at 24.

144. *Id.* at 29.

145. *Id.*

146. *Id.* at 24.

147. *Id.* at 32.

148. *Id.* at 34.

body which enforces and protects one's rights. For the social contract theorists, the individual in the state of nature had unlimited "rights." But this did not mean that he or she would be able to exercise or act on those rights. In the state of nature, everyone had the same natural rights, which were unlimited and mutually exclusive. But, of course, "having" natural rights to everything did not mean that an individual actually had everything, or even that an individual had anything at all, since anyone else who was able to take or monopolize resources might well have done exactly that.

Thus, in the social contract tradition, to have rights in the state of nature—for example, to have the right to kill for food—clearly did not mean that an individual would in fact have anything; a given individual might kill for food, or might himself be killed by someone or something stronger. On the other hand, to have rights after the formation of society means only that there are limits on the acts of the sovereign and the individual is entitled to take certain actions against the sovereign if these limits are violated.

The French and American revolutions at the end of the eighteenth century, I will argue, both invoked the concept of rights, in roughly the same sense as this notion was formulated by the social contract theorists: first, rights inhere in individuals and precede the formation of the state. They are the basis for the legitimacy of the *state*—not claims whose legitimacy is granted by the state. Second, the original rights held by individuals pertain to their self-interest—their sustenance, their self-preservation, their freedom to pursue their own ends and desires. This freedom is a negative freedom, that is, freedom from prohibitions. Finally, these rights speak to the relation between the individual and the state: the original rights are the basis on which the individual consents to be ruled; and they are the justification for rebellion in the event of tyranny by the sovereign.

This view of rights can also be seen in the documents which were promulgated as the justifications for the American and French revolutions. The American Declaration of Independence begins by proclaiming the people's dissolution of the existing political bands, "to assume among the powers of the earth the separate and equal station to which the Laws of

Nature and of Nature's God entitle them."¹⁴⁹ According to the Declaration of Independence, it is a "self-evident" truth that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights," which include "Life, Liberty, and the pursuit of Happiness."¹⁵⁰ These rights are prior to government and legitimate government is a convention based upon consent: "to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed."¹⁵¹ The people retain the right to dissolve a government: "That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it."¹⁵²

The French Declaration of the Rights of Man and Citizen of 1789¹⁵³ (Declaration of the Rights of Man or French Declaration) echoes the language of Rousseau, the American Declaration of Independence and the social contract theorists. It holds that "ignorance, forgetfulness or contempt of the rights of man, are the sole causes of the public miseries and of the corruption of governments," and then sets forth the "natural, inalienable, and sacred rights of man," in order that "the acts of the legislative power and those of the executive power may be each moment compared with the aim of every political insti-

149. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

150. *Id.*

151. *Id.*

152. *Id.* The Virginia Declaration of Rights of June 12, 1776, is, interestingly, both more explicit and more concrete. It states:

1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

2. That all power is vested in, and consequently derived from, the People; that magistrates are their trustees and servants, and at all times amenable to them.

3. That Government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; . . . and that, whenever any Government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter or abolish it

VIRGINIA DECLARATION OF RIGHTS arts. 1-3, *reprinted in* 1 THE FOUNDERS' CONSTITUTION 6 (Philip B. Kurland & Ralph Lerner eds., 1987).

153. See DECLARATION OF THE RIGHTS OF MAN AND CITIZEN [hereinafter DECLARATION OF THE RIGHTS OF MAN], *reprinted in*, THE CONSTITUTION AND OTHER DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF FRANCE 1789-1907 15 (2d ed. 1908).

tution," which is the preservation of the rights of man.¹⁵⁴ The Declaration of the Rights of Man then states that, accordingly:

[T]he National Assembly recognizes and declares . . . the following rights of man and citizen.

1. Men are born and remain free and equal in rights. Social distinctions can be based only upon public utility.

2. The aim of every political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.

. . .

4. Liberty consists in the power to do anything that does not injure others; accordingly, the exercise of the natural rights of each man has no limits except those that secure to the other members of society the enjoyment of these same rights. These limits can be determined only by law.

. . .

6. Law is the expression of the general will; It must be the same for all, whether it protects or punishes. All citizens [are] equal in its eyes

. . .

11. The free communication of ideas and opinions is one of the most precious of the rights of man; every citizen then can speak, write, and print, subject to responsibility for the abuse of this freedom in the cases determined by law.

. . .

17. Property being a sacred and inviolable right, no one can be deprived of it, unless a legally established public necessity evidently demands it, under the condition of a

154. *Id.* preamble.

just and prior indemnity.¹⁵⁵

These proclamations of rights are thoroughly familiar to us. Yet their very familiarity obscures something quite obvious: the literal meaning of the words. This is the basis of the empiricist critique of rights and it is worth reiterating the arguments of two of the leading empiricist critics of rights from the Enlightenment, Bentham and Hume, who assert that the declarations of rights are quite simply counterfactual.

B. *The Empiricist Critique*

In his essay, *On the Original Contract*, first published in 1748, Hume summarizes the basic claims of the social contract theorists:

When we consider how nearly equal all men are in their bodily force, and even in their mental powers and faculties, till cultivated by education, we must necessarily allow, that nothing but their own consent could, at first, associate them together, and subject them to any authority. The people, if we trace government to its first origin in the woods and deserts, are the source of all power and jurisdiction . . . Nothing but their own consent, and their sense of the advantages resulting from peace and order, could have had that influence.¹⁵⁶

But, says Hume, look around us—there is no sign that there was, or is, consent by subjects or recognition by those who hold power that their legitimacy rests upon such consent.

But would these reasoners look abroad into the world, they would meet with nothing that, in the least, corresponds to their ideas, or can warrant so refined and philosophical a system. On the contrary, we find every where princes who claim their subjects as their property and assert their independent right of sovereignty, from conquest of succession. We find also every where subjects who acknowledge this right in their prince and suppose themselves born under obligations of obedience to a certain sovereign . . . Obedience or subjection becomes so familiar, that most men never make any inquiry about its origin or cause, more than about the gravi-

155. *Id.* arts. 1, 2, 4, 6, 11, 17.

156. David Hume, *On the Original Contract*, in *SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME AND ROUSSEAU* 209, 211-12 (Ernest Barker ed., 1947).

ty, resistance, or the most universal laws of nature.¹⁵⁷

Hume continues, observing that “[a]lmost all the governments which exist at present, or of which there remains any record in story, have been founded originally, either on usurpation or conquest, or both, without any pretence of a fair consent or voluntary subjection of the people.”¹⁵⁸

Hume asked where the social contract could be found in the world’s shifting political fortunes:

The face of the earth is continually changing, by the increase of small kingdoms into great empires, by the dissolution of great empires into smaller kingdoms, by the planting of colonies, by the migration of tribes. Is there anything discoverable in all these events but force and violence? Where is the mutual agreement or voluntary association so much talked of?¹⁵⁹

Hume’s point is quite obvious: in the social and political world around us, there is no sign of either the social contract or the natural rights on which it rests. If we look around us, or look at history, we see only the opposite: government based upon force or tradition and obedience based upon fear or habit.

Bentham’s criticism concerns more the logical and linguistic issues: when we claim that we “have” a “right,” what exactly is the referent? What is it exactly that we “have?” It is in this context that Bentham remarks: “*Natural rights* [are] simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts.”¹⁶⁰

The tone may be contemptuous, but his objection is a serious one. In *Anarchical Fallacies*, Bentham dissects the Declaration of the Rights of Man line by line and word by word. Bentham states that “[t]he criticism is verbal:—true, but what else can it be? Words—words without a meaning, or with a meaning too flatly false to be maintained by anybody, are the stuff it is made of. Look to the letter, you find nonsense—look

157. *Id.* at 213-14.

158. *Id.* at 215-16.

159. *Id.* at 216.

160. Jeremy Bentham, *Anarchical Fallacies; Being an Examination of the Declaration of Rights Issued During the French Revolution*, in *NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN* 53 (Jeremy Waldron ed., 1987).

beyond the letter, you find nothing."¹⁶¹

This is a serious and precise objection. On the one hand, the claims of the document, if taken literally, are flatly false. On the other, if one asserts that the words do not literally refer to reality—then to what do they refer? The answer can only be that they refer to a fiction, a fantasy, some sort of wishful thinking.

Bentham begins with the claims of freedom and equality. Article I of the Declaration of the Rights of Man provides that "*Men (all men) are born and remain free, and equal in respect of rights.*"¹⁶² Bentham responds:

All men are born free? All men remain free? No, not a single man: not a single man that ever was, or is, or will be. All men, on the contrary, are born in subjection, and the most absolute subjection—the subjection of a helpless child to the parents on whom he depends every moment for his existence.¹⁶³

As Bentham elaborates:

All men are born equal in rights. The rights of the heir of the most indigent family equal to the rights of the heir of the most wealthy? In what case is this true? . . . The madman has as good a right to confine anybody else, as anybody else has to confine him. The idiot has as much right to govern everybody, as anybody can have to govern him. The physician and the nurse, when called in by the next friend of a sick man seized with a delirium, have no more right to prevent him throwing himself out of the window, than he has to throw them out of it. All this is plainly and incontestably included in this article of the Declaration of Rights: in the very words of it, and in the meaning—if it has any meaning.¹⁶⁴

Bentham's intention is partly to point out that it is just factually incorrect to say that human beings are free and equal, and partly to suggest that we would not even want this

161. *Id.* at 49.

162. *Id.* (paraphrasing DECLARATION OF THE RIGHTS OF MAN, *supra* note 153, art. 1).

163. Bentham, *supra* note 160, at 49.

164. *Id.* at 50-51.

state of affairs to actually take place. We obviously don't want both the qualified and the unqualified to have equal rights to perform surgery;¹⁶⁵ and if we say that the former may perform surgery and the latter may not, then we have committed ourselves both to inequality and to restrictions on freedom. So what does it mean—in the face of actual inequality and restrictions on freedom, to insist on the “existence” of rights? In the end, Bentham argues, it makes no sense to speak of rights—literally, the word “right” has no referent. As much as we may wish for some natural entitlement to freedom or equality, prior to and independent of the acts of particular governments, there is no such thing; and insisting on its existence will not in fact bring it into existence.

In proportion to the want of happiness resulting from the want of rights, a reason exists for wishing there were such things as rights. But reasons for wishing there were such things as rights, are not rights;—a reason for wishing that a certain right were established, is not that right—want is not supply—hunger is not bread.¹⁶⁶

Bentham's and Hume's empiricist criticisms make starkly clear that the assertions about the existence and origin of rights, taken at face value, are not only counterfactual, but patently ridiculous. What does it mean to say that rights are “inherent?” This claim seems to suggest that they are natural and not artifacts; that they are discovered rather than invented. If they are inherent, why were they not known for thousands of years after the beginning of human society? When they are identified as “inherent” in a particular document, at a particular historical moment, are they not in fact being bestowed by virtue of their pronouncement? Which is to say: they are not inherent at all; they are invented, claimed, bestowed.

In what sense are these rights self-evident? Our experience in fact suggests the opposite—that if we look around us at human lives and human society, we in fact see very little evidence that all persons are happy, or are free, or are fraternal, or are prosperous. What is self-evident seems to be the oppo-

165. While the Declaration of the Rights of Man does say that social distinctions should be based on “common utility,” Bentham points out that this does not resolve the problem, but only creates a contradiction.

166. *Id.* at 53.

site: that more often than not, human beings suffer; more often than not, that they are restricted and oppressed in innumerable ways; more often than not, they live their lives in hunger and poverty. And if these are the circumstances in which human beings generally live, then in what sense are rights to property, fraternity, liberty and equality "inalienable?" Of course these rights are "alienable"—it is possible to have a human life without them. In fact, most of us do.

Bentham and Hume are quite right: what is striking is how implausible the claims about rights are. The notion of rights is perhaps so familiar to us that the language and claims of rights seem obvious and plausible. But they are not. "Man is born free," writes Rousseau,¹⁶⁷ but in fact, human beings are born helpless and dependent. "[E]very man has a Right to every thing," writes Hobbes of the state of nature,¹⁶⁸ because everyone may make use of anything that will contribute to his self-preservation. But in fact, in a state of war of all against all, there is no "right" at all, only power: those who are stronger will take and use whatever they choose. The French and American Declarations of Rights would seem to be even more absurd. It is not self-evident that people are equal. What is evident is the opposite: that at all times in history and in all sectors of society, there are great inequalities in status, in power, in abilities, in property and in entitlements.

Thus, we seem to have a paradox on our hands. The rights which are held to be natural are, in fact, quite unnatural. The rights which are held to be inalienable are not only "alienable," but in fact quite rare. The rights which are held to be self-evident are in fact quite inconsistent with all of the evidence.

What, then, is a "right" exactly? What can we coherently argue that we actually "have" which is inherent, inalienable and self-evident? I suggest that it is at most either a moral imperative or a conception of the good: The claim that all people ought to be equal and all people ought to be free; or that it would be good if everyone were equal and it would be good if everyone were free. This means, however, that we are not talking about a "right" anymore, but a statement of universal desire—a description of the human ideal, not something which

167. ROUSSEAU, *supra* note 136, at 17.

168. HOBBS, *supra* note 114, at 190.

must in fact happen, or has ever happened, or will ever happen. At most, what is "inherent" or "self-evident" is a universal conception of the good.

V. TWO CONTEMPORARY PHILOSOPHICAL THEORIES OF RIGHTS

We saw that the notion of rights that emerged in the political thought of the Enlightenment has four features.

First, rights are abstract. One can have a right to property, but at the same time have no actual property. The fact that one has no property presents no conflict or disproof of the existence of the right to property, since the right is neither an offer nor a promise of property.

Second, rights are political. These rights concern the relation of the individual to the state. The right to liberty means only that the state will not deprive an individual of liberty except under certain circumstances (although individuals may deprive other individuals of liberty in many circumstances, for example, by owning land and excluding others from its use).

Third, rights are very broadly conceived. The rights in the state of nature constitute an entitlement literally to everything; the rights under the social contract assert an entitlement to everything not prohibited by the state; and in the revolutionary proclamations, rights are stated as unconditional entitlements to such things as "freedom" and "equality."

Fourth, the notion of rights involves claims which are counterfactual. They have the curious feature of purporting to be natural, inalienable and eternal, even though, as a description of ordinary reality, they are quite false.

Fifth, rights are "reified" claims of entitlement. The notion of reification is used where a relationship, or process, or idea comes to be thought of as a thing or substance. Thus, the claim that one ought to be free is "reified" when it is said that one has a "right" which is implicitly treated as a thing insofar as it is seen as something which can be possessed.

Where the Enlightenment thinkers proclaimed the existence of rights, on the grounds that rights are inherent or natural, contemporary philosophers offer a more sophisticated structure for the justification of rights as ethical claims. One of the standard assumptions in this literature is that a right is some form of justified claim¹⁶⁹—but also that a "right" is

169. For example, Joseph Raz writes, "x has a right' means that, other things

something that is held, or enjoyed, or possessed, even when material reality is to the contrary. Consequently, I will argue, the contemporary philosophical discussion of the nature and justification of human rights reiterates the fundamental paradox of the Enlightenment notion of rights without resolving it. In this section, I will briefly review two of the attempts to address this issue in the contemporary philosophical literature.

Maurice Cranston maintains that a human right is a type of moral right. "[W]e justify the moral rights of an individual," he writes, "by arguing that those rights have been earned or that they have been acquired by gift, bequest, sale or some other contractual undertaking."¹⁷⁰ Human rights, while they "clearly belong to the category of moral rights," cannot be justified in this fashion, since they are not dependent upon a particular act of creation or contract. Cranston contends that these rights "belong to a man simply because he is a man."¹⁷¹ Gewirth makes the same point: "Human rights are rights or entitlements that belong to every person; thus, they are universal moral rights."¹⁷² Gewirth maintains that "[a]t bottom, the idea of human rights is a moral one. It becomes a legal and political idea only because of its supreme moral importance."¹⁷³

being equal, an aspect of x's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty." See Joseph Raz, *Right-Based Moralities*, in THEORIES OF RIGHTS 182, 183 (Jeremy Waldron ed., 1984). In A THEORY OF JUSTICE, John Rawls says that "[a] conception of right is a set of principles, general in form and universal in application, that is to be publicly recognized as a final court of appeal for ordering the conflicting claims of moral persons." JOHN RAWLS, A THEORY OF JUSTICE 135 (1971). Henry Shue says that "[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." HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 13 (2d ed. 1996). Shue continues to contend that "[a] right provides the rational basis for a justified demand. If a person has a particular right, the demand that the enjoyment of the substance of the right be socially guaranteed is justified by good reasons and the guarantees ought, therefore, to be provided." *Id.* Sarat and Kearns state that "rights are assumed to be entitlements of persons whose status as persons is fixed and from which rights are said to issue." Austin Sarat & Thomas R. Kearns, *Introduction*, in IDENTITIES, POLITICS, AND RIGHTS 1 (Austin Sarat and Thomas R. Kearns eds., 1995).

170. CRANSTON, *supra* note 87, at 22.

171. *Id.* at 24.

172. ALAN GEWIRTH, HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATIONS 42 (1982).

173. *Id.* at ix.

And what is a human right, exactly? In *The Epistemology of Human Rights*, Gewirth addresses the question of the "existence" of rights. "Human rights are rights which all persons equally have simply insofar as they are human. But are there any such rights? How, if at all, do we know that there are?"¹⁷⁴ It is with this question of knowledge and the related question of existence that I want to deal in this paper.

Gewirth argues that human rights are "personally oriented, normatively necessary, moral requirements."¹⁷⁵ Human rights are "personally oriented" in that they are "requirements that are owed to distinct Subjects or individuals for the good of those individuals."¹⁷⁶ Human rights are "normatively necessary" in that compliance with them is morally mandatory, rather than supererogatory. Human rights are "moral requirements" in that they are: (1) necessary needs; (2) justified entitlements; and (3) claims or demands addressed to other persons.¹⁷⁷ Thus, the justifying basis of human rights is "a normative moral principle that serves to prove or establish that every human morally ought, as a matter of normative necessity, to have the necessary goods as something to which he is personally entitled, which he can claim from others as his due."¹⁷⁸

Gewirth observes that:

In the phrase, "there are human rights", "there are" is ambiguous as between positive and normative meanings. In the sense of "existence" that is relevant here, the existence of human rights is independent of whether they are guaranteed or enforced by legal codes or are socially recognized.¹⁷⁹

Thus, Gewirth resolves the ambiguity by essentially adopting the position that a human right is a type of "ought," and is binding as an "ought" insofar as a rational moral argument can be constructed in its support.¹⁸⁰ Human rights, then, share the features of all moral claims, morality being "a set of cate-

174. Alan Gewirth, *The Epistemology of Human Rights*, in HUMAN RIGHTS 1 (Ellen Frankel Paul et al. eds., 1984).

175. *Id.* at 2.

176. *Id.* at 2-3.

177. *See id.* at 2.

178. *Id.*

179. *Id.* at 3.

180. *See id.*

gorically obligatory requirements for action."¹⁸¹ They also share the general features of rights: "a person's rights are what belong to him as his due, what he is entitled to, hence what he can rightly demand of others."¹⁸² Gewirth justifies this position in terms of the nature of human action and the attribute of dignity: "By virtue of the voluntariness of his actions, the agent has a kind of autonomy or freedom . . . [the agent] can and does make his own decisions on the basis of his own reflective understanding . . . By virtue of these characteristics of his action, the agent has worth or dignity."¹⁸³ Consequently, he says "all humans are held to have rights to the necessary conditions of their action."¹⁸⁴

Danto's criticism of Gewirth's claim could have been written by Bentham. He describes a situation in which he was on a committee charged with developing a disciplinary procedure for the university:

We all wondered . . . what right we had to do what was asked of us, and a good bit of time went into expressing our insecurities. Finally, a man from the law-school said, with the tried patience of someone required to explain what should be as plain as day . . . : "This is the way it is with rights. You want 'em, so you say you got 'em, and if nobody says you don't then you do." In the end he was right. We worked a code out which nobody liked, but in debating it the community acknowledged the rights. Jefferson did not say that it was self-evident that there were human rights and which they were: he said we *hold* this . . . self-evident This is the way it is with rights. We *declare* we have them, and see if they are recognized. After that it is a matter of lobbying or something more extreme¹⁸⁵

It is not clear that Gewirth is in a position to offer a satisfactory response to Danto's (or Bentham's) position. If his intention was to show that rights "exist," he has fundamentally shown only that there are certain justifications for saying that

181. GEWIRTH, *supra* note 172, at 45.

182. *Id.* at 48.

183. *Id.* at 22-23.

184. *Id.* at 24.

185. Arthur C. Danto, *Comment on Gewirth. Constructing an Epistemology of Human Rights: A Pseudo Problem?*, in HUMAN RIGHTS 25, 30 (Ellen Frankel Paul et al. eds., 1984).

people ought to act in a certain way. His argument in the end is an ethical rather than ontological one. Yet he wants to say that when we speak of how people ought to act, that this somehow translates into a thing that we possess. Gewirth claims that he rejects the reification of rights. Gewirth contends that "[a]lthough Thomas Jefferson wrote that all humans 'are endowed by their Creator with certain inalienable rights,' it is not the case that humans are born having rights in the sense in which they are born having legs."¹⁸⁶ Yet the language of reification continues to appear: rights are things that we "have;"¹⁸⁷ they are "normative property;"¹⁸⁸ "a person's rights are what belong to him as his due."¹⁸⁹

Unlike Gewirth, Dworkin explicitly frames rights as in terms of their political context: "Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish . . ."¹⁹⁰ Thus, "rights" are the claims invoked by individuals against the collective or community interests. "If someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so."¹⁹¹ In *TAKING RIGHTS SERIOUSLY*, Dworkin explores the issue of whether "citizens have *some* moral rights against their Government."¹⁹² The particular political rights for which Dworkin argues are derived, in turn, "from the abstract right to concern and respect taken to be fundamental and axiomatic."¹⁹³ Dworkin notes that he presumes "that we all accept the following postulates of political morality."¹⁹⁴ He further states:

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 on intelligent conceptions of how their lives should be lived. Government must not only

186. Gewirth, *supra* note 174, at 3.

187. GEWIRTH, *supra* note 172, at 19-20.

188. *Id.* at 10.

189. *Id.* at 48.

190. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1977).

191. *Id.* at 269.

192. *Id.* at 184.

193. *Id.* at xv.

194. *Id.* at 272.

treat people with concern and respect, but with equal concern and respect.¹⁹⁵

Rejecting the positivist view, Dworkin argues for a theory of law that holds that political rights pre-exist legal rights, since they are to be invoked against the state. Yet these political rights are at the same time moral rights and they are justified in terms of the moral personality of the individual. Thus, Dworkin's position is ultimately that a right is a proposition about how government ought to act, as Gewirth's is fundamentally a position about how a person ought to act in the face of certain claims. Both fundamentally offer theories about which imperatives can be best justified. They are theories of how individuals and governments ought to act, based upon the assertions that individuals "have" dignity, or "are" equal. But no matter how much more sophisticated these contemporary theories of justified claims are than the earlier claims of the Enlightenment thinkers and political actors, they are no less problematic. Thus, the paradox remains: if we claim that a right is something we "have," then either the claim is often patently false, or what we "have" is just an empty abstraction. On the other hand, if a right is a statement of aspirations, of a goal toward which we are striving, then many of the descriptions of rights—that they are inalienable, universal and so on—simply make no sense.

Dworkin and Gewirth reject positivist arguments that rights are only those claims which are recognized and enforced and they offer arguments and a vision as to how human beings and governments ought to act. Yet, the vision is not purely normative; it is ontological as well. The arguments are not simply that "it would be good if governments treated individuals with equal respect and concern," but rather that individuals "have the right" to be treated with equal respect and concern; and that is why governments should do so. The thing that we have when we "have" a right would therefore be something more abstract than the (empirically observable) enforcement actions of the state; and more solid (indeed, reified) than an argument about how people and states should act. Gewirth and Dworkin, along with others, thus inherit the

195. *Id.*

Enlightenment's paradoxical project of devising a moral claim with an actual "existence."

VI. RESOLVING THE PARADOX: MARX AND THE METAPHYSICS OF RIGHTS

So let us re-ask Bentham's question of two hundred years ago: what is it you actually *have* when you have a right? What is it you actually are, when you are free or equal, in the sense used in proclamations of rights?

The problem is this: there are these claims—that we "have" something or that we "are" something—and that "something" is absolute, binding and eternal. Yet this eternally existing state is often or even always simply contrary to fact. "All men are free"—but of course they are not. Some are imprisoned, some are incapacitated. "All men are equal," yet some are stronger, richer, more powerful than others. "All persons have dignity," yet many are humiliated in their homes, in their workplaces, by the state, or in public discourse.

If claims about rights were simply and directly aspirational or normative statements—"All persons should be free and equal"—there would be no paradox. There might well be a very different sort of problem: we would disagree over what we should aspire to, or how people should act. But that is not how assertions about rights are framed. They are presented not as normative or aspirational, but as statements about our current (not to say eternal) condition; or as possessions we now (and since the beginning of time) have (and have had).

Under positive law theories, a "right" is just a description of how the state will act under certain circumstances.¹⁹⁶ In this view, "I have a right not to be assaulted" means that if I am assaulted, I can call the police and they will arrest the assailant, the district attorney will prosecute the assailant and so on. Legal positivism maintains that there is no such thing as a "right" independent of the institutional processes of the

196. See H.L.A. HART, *THE CONCEPT OF LAW* 203 (1961) (summarizing some of the basic ideas of the legal positivists). Hart asked what the underlying "concern of the great battle-cries of legal positivism" was, referring to Austin's "[t]he existence of law is one thing; its merit or demerit another;" Gray's "[t]he law of a State is not an ideal but something which actually exists . . . it is not that which ought to be, but that which is;" and Kelson's "[l]egal norms may have any kind of content." *Id.*

state which define and explicate the rights that it will enforce. Under legal positivism, if we ask "what rights exist other than those which the state recognizes and enforces," the answer is "none." If the state changes its policy and its conduct, the right simply disappears. In this view, an individual has no entitlements prior to or outside of the acts of government. The "right" to inherit property or to collect a debt is a right created by the state, enforceable only on the terms dictated by the state and by means of procedures established by the state.

Alternatively, natural law asserts that there is some higher law which positive law aspires to, or approaches.¹⁹⁷ In this view, natural law is where justice resides; it operates as a regulative ideal, a standard toward which actual, particular laws aspire. If a "right" is something given by natural law, then we would speak of that toward which we strive—freedom, equality—but do not have. Natural law is the measure we use to gauge the justness of actual laws. But natural law is not concrete or enforceable in the way that the right to inherit is; natural law by definition transcends the state, which is the source of actual and particular laws, their articulation and their enforcement.

However, the thinkers of the Enlightenment, as well as contemporary philosophers of rights, maintain both that "rights" are that toward which we aspire; and that rights are nevertheless something we *have*, or describe what it is that we *are*.¹⁹⁸ The Enlightenment conception of rights does not fit cleanly within the framework of either natural law or positive law. It holds that, in contradistinction to positive legal entitlements, there exist legal rights inherent in the individual, prior to and outside of the state and society. Indeed, the relation between state and individual is a precise inversion of the one given in positive law: it is no longer the individual who looks to the state to determine his entitlements, but the state which looks to the contract among individuals to justify its very existence. And, in contrast to natural law, the Enlighten-

197. Hart notes that the notion of natural law includes the idea that "there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid." *Id.* at 182.

198. The problem is made explicit in the grammar of statements about rights. They are statements made in the present tense, indicative mood; but which are in fact counterfactual imperatives in the subjunctive mood.

ment conception of rights very much anticipates enforcement in concrete ways: the Enlightenment rights were presented as things that we *have*, or the condition in which we *are*, and these possessions or factual states of affairs were presented as the grounds for revolutions and political institutions.

Thus, "rights" in the Enlightenment view had a curious ontological status from the beginning: they are neither positive laws, articulated by actual, particular governments; nor are they natural laws which guide positive law, but which in themselves transcend both explication and enforcement. Rather, the Enlightenment view holds that rights are in a sense justified by their other-worldly origin, though they equally lay claim to being present and active in this world. Marx argues that, for this reason, the Enlightenment conception of a right is thus, in a sense, simultaneously sacred and profane.

In his essay, *On the Jewish Question*, Karl Marx criticizes Bruno Bauer for addressing the question of political emancipation without examining the prior matter of human emancipation.¹⁹⁹ Marx explicitly rejects the entire Enlightenment treatment of rights for the same reason. This applies to the rights of equality, liberty, security and property from the Declaration of the Rights of Man, as well as the similar rights articulated in the American Declaration of Independence. Marx observes that these documents see the individual as a "self-sufficient monad," whose rights concern the pursuit of egoistic self-interest, with security serving as the guarantee of that egoism.²⁰⁰

If Marx's only response to the Enlightenment conception of rights was that such rights are bourgeois and self-serving, then his criticism would indeed be shallow and without much philosophical value. But, I would argue, the heart of his critique is not that "people should care about others and not be selfish and individualistic," or some comparable platitude. His critique, as I understand it, is that the notion of rights involves an idealist metaphysics;²⁰¹ that this idealism serves to not

199. See Karl Marx, *On the Jewish Question*, in KARL MARX, EARLY WRITINGS 211-16 (Rodney Livingstone & Gregor Benton trans., 1975).

200. *Id.* at 230. Note that these observations are generally the only part of Marx's critique of rights which are acknowledged or discussed by most commentators. See, e.g., Asbjorn Eide, *National Sovereignty and Human Rights*, in HUMAN RIGHTS IN PERSPECTIVE: A GLOBAL ASSESSMENT 10-11 (Asbjorn Eide & Bernt Hagtvet eds., 1992).

201. By "idealist metaphysics" I refer to the position that concepts or abstrac-

only trivialize the concrete, but to literally deny the reality of the concrete; that, consequently, gratuitous human suffering is tolerated and justified; and that the delusion proffered by the idealism results in a crippling self-incapacitation, which prevents those who suffer unjustly from acting to alter the social structure.

In feudalism, Marx says, civil society had a directly political character. That is, "the elements of civil life such as property, family and the mode and manner of work were elevated in the form of seignory, estate and guild to the level of elements of political life."²⁰²

The political then becomes the realm of "the *universal* concern of the people, ideally independent of those *particular* elements of civil life."²⁰³ Modern bourgeois society is characterized by a profound experience of bifurcation: we exist in two realms—the political and the civil, the universal and the particular, the ideal and the material, the abstract and the concrete. Politically, a democracy "regards man—not just one man but all men—as a *sovereign* and supreme being."²⁰⁴ As citizen, each person in a democracy is literally deemed to be the sovereign. The leaders are chosen "by the people;" their election indicates "the will of the people;" their jobs are to "represent the people." A sovereign is the source of law and the enforcer of law; the sovereign ultimately holds all political power; a crime committed by an individual against another individual is an offense to the sovereign; the sovereign chooses to make war or not; property, freedom and security are all granted to individuals by the sovereign. As sovereign, then, the citizen is all-powerful, subject to the whims and laws of no one, has at his discretion the right to avail himself of all the wealth of the land and has an army to carry out his will abroad and a police force to enforce his will domestically. Yet, of course, the ordinary citizen—the one who is neither king nor president nor prime minister—does not have such a life, at least on the concrete level of day-to-day existence. The ordinary citizen will be careful to obey the law so as not to be jailed. He will hope he

tions are treated as entities that are quite real and in fact more real than material entities.

202. MARX, *supra* note 199, at 232.

203. *Id.* at 233.

204. *Id.* at 225-26.

has enough money to pay his rent and meet his needs. He will be at the mercy of a dozen different forces: the whim of his employer may send him out to the streets with no job; the market may drive the cost of fuel so high he cannot afford heat in the winter; he may be conscripted into the army and sent off to kill or to be killed. The concrete reality of his daily life will be characterized by fear, anxiety and helplessness in the face of these forces. The power and privileges held by a sovereign just do not characterize the texture of daily life for the individual. This is "man in his uncultivated, unsocial aspect, man in his contingent existence, man just as he is, man as he has been corrupted, lost to himself, sold, and exposed to the rule of inhuman conditions and elements by the entire organization of our society" ²⁰⁵

Yet with the Enlightenment notion of rights, the ideal state we are in—insofar as we are citizens—is seen not as less real, nor is it seen as fantasy or aspiration, but rather as the higher reality. The language of rights posits a "true," original, human nature, which is characterized by liberty, equality, security, fraternity. It is in civil society that "the real man" has his "sensuous, individual and *immediate* existence."²⁰⁶ The citizen or the political man "is simply abstract, artificial man, man as an *allegorical, moral* person. Actual man is acknowledged only in the form of the *egoistic* individual and *true* man only in the form of the *abstract citizen*."²⁰⁷

Where the political state is fully developed as something distinct from civil society, then, Marx says, man

leads a double life, a life in heaven and a life on earth, not only in his mind, in his consciousness, but in *reality*. He lives in the *political community*, where he regards himself as a *communal being*, and in *civil society*, where he is active as a *private individual*, regards other men as means, debases himself to a means and becomes a plaything of alien powers . . . Man in his *immediate* reality, in civil society, is a profane being. Here, where he regards himself and is regarded by others as a real individual, he is an illusory phenomenon. In the state, on the other hand, where he is considered to be a species-being, he is the imaginary member of a ficti-

205. *Id.* at 226.

206. *Id.* at 234.

207. *Id.*

tious sovereignty, he is divested of his real individual life and filled with an unreal universality.²⁰⁸

We need only look at the grammatical form in which the social contract theorists and the revolutionary documents of the Enlightenment declare the existence of rights to see what Marx is talking about: the declarations of rights are not in the future tense, the conditional tense, or the subjunctive mood. They are in the present tense and the indicative mood, as though they are descriptions of a present reality; and the descriptions of the state of nature in the social contract writings are in the past tense, as though they are descriptions of an historical reality. In the introduction to his *Discourse on the Origin of Inequality*, Rousseau actually says:

O man, whatever country you may be from, whatever your opinions may be, listen: here is your history, as I have thought to read it, not in the books of your fellowmen, who are liars, but in nature, who never lies. Everything that comes from nature will be true²⁰⁹

Marx's description of the metaphysical dualism describes well the paradox of the Enlightenment conception of rights: they are abstractions which are reified and claim to be possessions; they are ideals which claim to be factual states of affairs.

Let us now look at the basic structure of the paradox. Why is it that a declaration of rights operates as a statement of a present condition or a present possession, even though such a claim is patently counterfactual? What are the underlying assumptions, such that these claims are not dismissed immediately as fiction, fantasy, or moral aspiration? The assumption must be that claims such as "All men are free and equal" refer to a present reality—but an ideal reality, not the material one. However, such a claim involves more than the notion of dual realities. The declarations of rights do not say: "In one sense we are free, in another, we are not. In an ideal sense we are free, though obviously on a material level we are not. On one level, all human beings are entitled to dignity and equality; yet, on another level, most human beings do not have that to

208. *Id.* at 220.

209. Jean-Jacques Rousseau, *Discourse on the Origin of Inequality*, in, ROUSSEAU, *supra* note 136, at 119, 119.

which they are entitled, since they are routinely reduced to desperation and humiliation, used and discarded by others, their poverty deepening alongside of the increasing wealth of others. In one realm we have many rights, in the other realm we have no rights at all, only good or bad luck."

Obviously, the political and philosophical claims about rights are *not* of this form. Rather, they operate *only* on the level of the ideal—for example, "everyone has the right to be treated with equal dignity and respect." This suggests a hierarchy within the dualism: it is the ideal reality which is the truer reality and the material world is in some sense less real. It seems to me that this is what Marx is speaking to when he distinguishes between "true reality" and "actual reality." In our "true" nature, we are free, equal and entitled to dignity, prosperity and security. In our actual lives, however, which are corrupt and distorted versions of our true selves, deformed and limited by the conditions of material reality, we have none of these qualities. The question demanded by the Enlightenment conception of rights is: "How is it that our actual human condition does not constitute an irrefutable disproof of the claims about the 'true nature' and 'inalienable entitlement' of human beings?" The answer must be that there is a hierarchy: the abstract and absolute claims are deemed real, while the historical and factual dimension of human existence are deemed to be merely an appearance—a transient, contingent state, subject to change and consequently subject to disregard or trivialization.

This also tells us something about what I referred to earlier as the "asymmetry" of the standard conception of human rights. Not only does the standard conception reflect a certain political and cultural perspective—that of Western First World countries with highly developed formal political rights and extreme economic disparities—but it also reiterates the paradoxical structure of the Enlightenment notion of rights. Thus, the standard notion treats political rights (which for most people will be purely abstract or flatly counterfactual) as essential and sees economic rights as vague, inessential, difficult to justify and difficult to implement.

VII. THE POLITICAL AGENDA OF HUMAN RIGHTS CLAIMS AND THE SUPPRESSION OF MORAL DISCOURSE: THE EXAMPLE OF NUREMBERG

At this point I would like to return to the Nuremberg tribunal to explore the relationship between what was at stake, on one hand, and the legitimacy of the concept and the suppression of moral discourse, on the other. In the contexts of both international law and ethical thought, the Nuremberg tribunals hold a central role: they established the legal precedent for all war crimes and human rights tribunals thereafter. They also served as the prototype in international relations for the moral denunciation of the acts of other nations as "crimes against humanity."²¹⁰ Yet, I will argue, even the Nuremberg tribunals—which purported to be the unequivocal triumph of justice and the rule of law over barbarity and evil²¹¹—are deeply intertwined with underlying political and rhetorical agendas. Furthermore, while the Nuremberg tribunals purported to explore the legal and moral issues raised by the conduct of the Nazi regime, in fact they controlled and severely restricted moral and legal discourse. Because our contemporary human rights discourse has all of these features, it may be valuable to look at Nuremberg as the occasion on which they first emerged.

I will look specifically at the legal structure of the Nuremberg trials and the tension between the political agenda and judicial legitimacy. The tribunal has been criticized as "victors' justice" on many occasions before, including by defense counsel at Nuremberg. It might be observed that the tribunal's structure would indeed offend our most basic sense of justice and law were it not for the nature of the accusations. But it seems to me compelling to go one step further as well and to

210. At the trial of Adolf Eichmann in Jerusalem in 1961, the Nuremberg Trials were cited as precedent for the Israeli court's claim of jurisdiction. See HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 254 (1963).

211. The opening statement of Robert Jackson, the prosecutor for the United States, refers to the acts being condemned and punished as "calculated" and "malignant," and refers to the defendants as "evil" and "sinister." Opening Statement for the United States of America by Robert H. Jackson, Chief of Counsel for the United States at the Palace of Justice, Nürnberg, Germany, Nov. 21, 1945 [hereinafter Jackson, Opening Statement], in ROBERT H. JACKSON, *THE NÜRNBERG CASE* 30-31 (1947).

look at how it was that the question of the *legality* of the tribunal could be so completely subsumed and trivialized by the *urgency* of the tribunal. I will suggest that the political and moral urgency of the trial not only was used to justify the tribunal's patent illegality; but made it politically impossible and morally impermissible to even raise the question of its illegality.

The result, I would argue, is that our legacy from Nuremberg is twofold. We have a notion of human rights, which is commonly recognized in treaties, in international law and in international organization; and for which there are now established tribunals for the indictment, prosecution and punishment of those who commit human rights violations.²¹² Yet at the same time, we inherit the view that "human rights violations" involve a moral claim which is not only sound and good, but is flatly unquestionable. We inherit the view that no rational member of the moral community could even question the validity of such claims. It is as if to say: "Of course the acts of the Nazis were unspeakable atrocities. How could any decent human being defend the Nazis, on any grounds whatsoever? Such a person would either have to be insane or devoid of moral sensibilities. And of course the Nazis should be punished. What moral or rational person could dispute that? And if there isn't exactly a law which was actually broken, the need for decrying the Nazis as criminals is far greater than the duty to abide by legal technicalities."

Indeed, this was the very language that appeared in the documents establishing the Nuremberg tribunal, as well as the documents generated by the tribunal. I will argue that the need to achieve the moral end of punishing awful acts and the need to achieve the political end of doing so publicly, not only outweighed, but precluded altogether the possibility of discussing the correctness of the concept or the law.

212. This was the case, for instance, with the recent war crimes tribunals held at the Hague concerning the Bosnian conflict. See Mark R. von Sternberg, *A Comparison of the Yugoslavian and Rwandan War Crimes Tribunals: Universal Jurisdiction and the "Elementary Dictates of Humanity"*, 22 BROOK. J. INT'L L. 111, 111 (1996); Anthony Goodman, *U.N. Council Sets Up Yugoslav War Crimes Tribunal*, in REUTER LIBR. REP., May 25, 1993, available in LEXIS, News Library, Curnws File.

A. *The Establishment of the Tribunal*

The basic notion of the rule of law is the distinction between the "rule of law" and the "rule of men"—that is, that the law is distinct from the will and desires of the king.

[T]he doctrine of the rule of law means first "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the influence of arbitrariness of prerogative, or even of wide discretionary authority on the part of government;" and secondly it means "equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts."²¹³

The "rule of law" involves the notions that the law exists outside of particular rulers and particular subjects; that a "crime" consists of violating the law, not simply displeasing the ruler; that the person judging a claim must be different from the person who claims to be injured; that an individual cannot be punished for breaking a law which did not exist at the time the individual acted; that law prohibits certain acts, rather than simply naming and punishing individuals. The rule of law "is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint."²¹⁴ "Arbitrariness," in this context, includes laws directed to particular individuals or particular acts (rather than general principles or classes of acts); laws which are retroactive and penalize acts which were not illegal at the time they were done; and laws whose meaning is uncertain or whose application is unpredictable.²¹⁵

213. 10 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 649 (1938) (quoting ALBERT VENN DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 198 (7th ed. 1908)).

214. DICEY, *supra* note 213, at 188.

215. See Richard Flathman, *Liberalism and the Suspect Enterprise of Political Institutionalization: The Case of the Rule of Law*, in *THE RULE OF LAW* 297, 303 (Ian Shapiro ed., 1994). Friedrich Hayek suggests that the notion of the "rule of law" originates with Aristotle (although the phrase is often associated with Hobbes), who wrote in the *Politics* that "it is more proper that the law should govern than any of the citizens." FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 164-65 (1960) (citations omitted). According to Hayek, one of the "achievements of the [English] Civil War was the abolition in 1641 of the prerogative courts and especially the Star Chamber which had become, in F.W. Maitland's often quoted words, 'a court of politicians enforcing a policy, not a court of judges

Some of the most basic precepts of the U.S. Constitution and American legal practice invoke this distinction. Criminal defendants are presumed to be innocent until proven guilty. The bill of attainder clause in the Constitution prohibits the legislature from passing a law which names individuals and imposes penalties on them, while the ex post facto clause prohibits the legislature from passing a law which punishes individuals retroactively for acts which did not violate any explicit law at the time they were committed.²¹⁶ Judges who are related to either of the parties, or have an interest in the outcome of a proceeding, must recuse themselves, or inform both parties of the judge's interest and give the parties the opportunity to request recusal. If a judge had a material interest in the outcome of a case and refused to recuse himself, the parties would be entitled to appeal that determination to a higher court.

The "rule of law" entails that the rules of procedure for court actions, such as rules of evidence, are generated by a legislative or administrative body. They are articulated and published prior to any court proceedings. If a judge issues a ruling which is not consistent with the rules of procedure, a party may appeal this error to a higher court. The court's jurisdiction is conferred prior to any case, before any particular claims are brought; not as a vehicle for imposing a predetermined punishment. Jurisdiction is granted by the constitution or legislature, not created by the members of the same tribunal upon which jurisdiction is conferred.²¹⁷ The parties are entitled to challenge a court's jurisdiction and the court may not

administering the law." *Id.* The debate for the next twenty years focused on the arbitrariness of law and government. The rule of law and the absence of arbitrariness meant "that there must be no punishment without a previously existing law providing for it, that all statutes should have only prospective and not retrospective operation, and that the discretion of all magistrates should be strictly circumscribed by law." *Id.* at 169 (citations omitted). Hayek notes that the rule of law was applied to legislatures by Locke in the SECOND TREATISE ON CIVIL GOVERNMENT—a legislature "cannot assume to itself a power to rule by extemporary arbitrary decrees, but is bound to dispense justice, and decide the rights of the subject by promulgated standing laws, and known authorized judges." *Id.* at 171 (citations omitted).

216. See U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

217. See *id.* art. III, § 1 (vesting the "judicial Power of the United States" in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

prohibit the parties from raising questions about the competence or appropriateness of the court to hear the case.

In a hearing in an American court in an ordinary matter, it is hard to imagine a scenario in which these precepts were violated without a reaction of shock or indignation. Imagine a judge who is the brother of the plaintiff, where the plaintiff and the judge discussed beforehand who the plaintiff could sue such that the judge could guarantee a favorable outcome for his brother. Would we not simply call that corruption? Imagine a group of individuals who signed an agreement in which they determined first that certain individuals should be punished; then, consequently, the acts of those individuals must be declared criminal; that the signatories themselves would be prosecutors and judges; and that the defendants would be prohibited from questioning the legitimacy of the judges, the procedure, or the tribunal itself. Would we not call that a "kangaroo court?" And finally, imagine a situation in which a group of persons declared themselves to be legislators and created a law to punish their enemies; and the same parties who had created the law then declared themselves empowered to prosecute their enemies, judge the defendants and execute their own judgments. Would we not consider this a gross violation of the principle of separation of powers upon which the Constitution is structured?

I use examples from American law in part because the design of the Nuremberg tribunal was primarily attributable to the Americans.²¹⁸ The problematic implications of the tribunal's legitimacy and jurisdiction were discussed at length by the architects of the tribunal, who included Francis Biddle (the U.S. Attorney General, who was later one of the judges at the tribunal) and Robert Jackson (the U.S. Supreme Court

218. As one scholar writes:

[T]he Nuremberg trial system was created almost exclusively in Washington by a group of American government officials. The system was developed, altered, and redrafted during the last ten months of the European war and was then presented to the British, Soviet, and French governments for comment and concurrence at a four power conference held in June-July 1945. America's allies modified and shifted features in the United States plan, but its basic elements remained intact and were embodied in the London Charter and the indictments that became the legal ground rules for the main Nuremberg proceedings and for a series of subsequent trials of Nazi and Japanese leaders.

BRADLEY F. SMITH, *THE ROAD TO NUREMBERG* 4-5 (1981).

justice who was Chief Counsel for the U.S. prosecution team). There were in fact lengthy exchanges over the design of the tribunal, which involved the Departments of War, State, Treasury, Justice, Navy, Office of Strategic Services and the White House.²¹⁹ Yet what was unquestioned was the fundamental commitment to achieve a political aim by means of a judicial process; accompanied by indifference to or denial of the fundamental incompatibility of the political and judicial.²²⁰ I do not suggest here that the architects of the tribunal publicly and explicitly acknowledged the political purpose of the trial, or that they conceded that the claims to judicial legitimacy were hollow. Indeed, it was the reverse. Robert Jackson's opening statement to the tribunal lauds the triumph of the rule of law: "That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of law is one of the most significant tributes that Power has ever paid to Reason."²²¹ Jackson also pointed to the value the trial would hold for posterity: "To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this trial will com-

219. TAYLOR, *supra* note 20, at 33. Note, however, that discussion of punishment for Axis and Japanese war crimes had in fact been going on for some time by the governments in exile and the UN War Crimes Commission (UNWCC). In January 1942, the governments-in-exile of Belgium, Czechoslovakia, France, Greece, Holland, Luxembourg, Norway, Poland and Yugoslavia met in London, where they drafted the St. James Declaration, calling for the "punishment, through the channel of organized justice, of those guilty of or responsible for these crimes" *Id.* at 25. In October 1943, the UNWCC was formed to document war crimes. Its members were Australia, Belgium, Britain, Canada, China, Czechoslovakia, France, Greece, Holland, India, Luxembourg, New Zealand, Poland, South Africa, the United States and Yugoslavia. In the end, however, the individual countries held trials for war crimes committed specifically in their territory; and the United States (rather than the UNWCC) was the dominant force in the design and operation of the Nuremberg tribunal for the prosecution of war crimes which were not limited to a specific country. *Id.* See also Jonathan A. Bush, *Nuremberg: The Modern Law of War and its Limitations*, 93 COLUM. L. REV. 2022, 2057 (reviewing TELFORD TAYLOR, *NUREMBERG: THE MODERN LAW OF WAR AND ITS LIMITATIONS* (1992)).

220. In a memorandum of June 1945, Telford Taylor, associate counsel for the U.S. prosecution team, wrote that "the thing we want to accomplish is not a legal thing but a political thing." Quoting the memorandum, he wrote later in his memoirs that the "ex post facto problem"—that the tribunal was prosecuting individuals for laws which did not exist at the time of their acts—was "not a bothersome question 'if we keep in mind that this is a political decision to declare and apply a principle of international law.'" TAYLOR, *supra* note 20, at 50, 51.

221. JACKSON, *supra* note 211, at 31.

mend itself to posterity as fulfilling humanity's aspirations to do justice."²²²

Yet the Nuremberg tribunal was indeed a political event and it was indeed devised to address a political problem. Jackson observed, in his June 1945 report to President Truman, that there are men whom we have cause to accuse of culpability in atrocities.²²³ "We have many such men in our possession," he wrote, "What shall we do with them?"²²⁴ He answered:

We could, of course, set them at large without a hearing. But it has cost unmeasured thousands of American lives to beat and bind these men. To free them without a trial would mock the dead and make cynics of the living. On the other hand, we could execute or otherwise punish them without a hearing. But indiscriminating executions or punishments without definite findings of guilt, fairly arrived at, would violate pledges repeatedly given and would not set easily on the American conscience or be remembered by our children with pride. The only other course is to determine the innocence or guilt of the accused after a hearing as dispassionate as the times and horrors we deal with will permit, and upon a record that will leave our reasons and motives clear.²²⁵

Thus the most immediate political problem that the tribunal was to solve was simply: "now that we have all these Nazis in our possession—what exactly are we supposed to do with them?" It is worth noting that the idea of holding a trial was quite controversial among the Allied governments. This is not because there were questions of how to justify the legitimacy and jurisdiction of a judicial process used for political aims.²²⁶

222. *Id.* at 34.

223. Report to the President by Mr. Justice Jackson, June 6, 1945 [hereinafter Report to the President] in ROBERT H. JACKSON, REPORT OF ROBERT H. JACKSON: UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 42, 46 (1945) [hereinafter LONDON CONFERENCE REPORT] (Dep't. of State Publication No. 3080, 1949) (providing a "documentary record of negotiations . . . culminating in . . . the International Military Tribunal").

224. LONDON CONFERENCE REPORT, *supra* note 223, at 46.

225. *Id.*

226. I do not mean to suggest that no one was concerned about the judicial legitimacy of the tribunals. Within the U.S. government, during the period of internal debate over the nature and structure of the tribunal, there were some who did indeed question the legitimacy of certain aspects of the project. In December 1944, an attorney in the Judge Advocate General Corps, Lieutenant Alwyn Vernon

Rather, it was because a trial was seen as a cumbersome and uncertain way of dealing with the Nazis held by occupation forces. The more expeditious solution was simply to shoot them.

This was the policy proposed by Henry Morgenthau, the Secretary of the Treasury, which was initially adopted by Roosevelt. Morgenthau proposed that the names of the major war criminals should be distributed to the Allied Forces, with instructions to capture, identify and shoot anyone on the list. Morgenthau also proposed the "pastoralization" of Germany, which involved stripping Germany of its industrial capacity and reducing it to a nation of farmers.²²⁷ Ironically mirroring Nazi policy, Morgenthau proposed putting all members of the SS in concentration camps, but then eventually relocating them outside of Germany, noting that they could not be interned in concentration camps forever.²²⁸ Older children would be confined and banished as well. It was unclear what would happen to children under six.²²⁹ In September 1944, Roosevelt met with Churchill in Quebec to discuss post-war policy. Morgenthau attended the meeting and presented his plan. Churchill and Roosevelt initialed a summary of the Morgenthau plan and Roosevelt came out in favor of summarily executing the Nazi leaders.²³⁰

This was also the position held by the British. A British

Freeman, wrote a detailed legal memorandum questioning the validity of the notion that launching a war was a "crime" which could be punished. According to one historian, this document represented the views of two of the generals at Judge Advocate General Corps (JAG). See SMITH, *supra* note 218, at 103. At the same time, Assistant Attorney General Herbert Wechsler addressed other issues of this sort in a memo to his superior Francis Biddle. Biddle would later be one of the judges at the tribunal. Wechsler objected to the idea of trying Nazi organizations as defendants, inasmuch as the idea of a trying an organization was without precedent. There was, of course, the notion of conspiracy, but conspiracy was peculiar to Anglo-American law; it did not exist in continental law. Wechsler also objected to bringing charges against German nationals that were based on *ex post facto* crimes. See ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* 57 (1984) (additionally observing that continental legal systems did have some concepts—the *association criminelle* of France, Germany's Criminal associates, the "sweeping charges" Russia designed to "deal with banditry"—that bore a family resemblance to conspiracy but did not treat "the mere act of conspiracy . . . as a crime."). The objections of both Wechsler and Freeman were overridden.

227. See SMITH, *supra* note 218, at 36-37 (discussing the Morgenthau Plan).

228. See *id.* at 28.

229. See *id.*

230. See *id.* at 47.

memorandum from April 1945 stated:

It being conceded that these leaders must suffer death, the question arises whether they should be tried by some form of tribunal claiming to exercise judicial functions, or whether the decision taken by the Allies should be reached and enforced without the machinery of a trial. But H.M.G. are also deeply impressed with the dangers and difficulties of this course and they wish to put before their principal Allies, in a connected form, the arguments which have led them to think that execution without trial is the preferable course.²³¹

The British held this position consistently until late May 1945.²³²

The reason for this course of action was twofold: a trial would be "exceedingly long and elaborate," but also it might reveal the illegitimacy of the proceedings. Many of the Nazi transgressions "are not war crimes in the ordinary sense, nor is it at all clear that they can properly be described as crimes under international law."²³³

While the immediate purpose of the tribunals was to simply do something with the Nazi prisoners on hand, there were other objectives as well, which were somewhat grander in scope: to justify the casualties suffered in the war by the Allies, to preserve the truth for future historians, to teach a lesson to all humanity, to prove that—by virtue of the Allies'

231. Aide-Mémoire from the United Kingdom, April 23, 1945, in LONDON CONFERENCE REPORT, *supra* note 223, at 18, 18; see also RICHARD H. MINEAR, VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIAL 9 (1971) (discussing the initial British preference for "executive action," as opposed to "judicial proceedings.").

232. In August 1942, Anthony Eden told the European leaders that it was "undesirable" to pursue "a policy of bringing [the Nazi leaders] to trial." TUSA & TUSA, *supra* note 226, at 61-62.

In May 1944 Eden proposed compiling a short list of Nazi war criminals (less than fifty) who were sufficiently notorious that their guilt could be assumed without resort to legal proceedings and without offending public opinion. See *id.* at 63.

In April 1945, Lord Simon, the Lord Chancellor, presented a memorandum to the Americans reiterating the British objections to a trial, objections the British maintained through the end of May 1945. A proper hearing would allow the defendants to put forth evidence that would be embarrassing to the Allies. The better route to take would be for the Allies to proceed by "joint executive action," which meant summary execution. See *id.* at 64.

233. See Aide-Mémoire from the United Kingdom, April 23, 1945, in LONDON CONFERENCE REPORT, *supra* note 223, at 19. See also MINEAR, *supra* note 231, at 9.

triumph—justice was vindicated in the end.²³⁴ I would suggest that perhaps the singular and most compelling purpose was simply for the Allies to demonstrate the righteousness of their own cause and the evil of their enemies. Jackson was quite candid in his opening statement in saying that the trial did not have all that much to do with the actual defendants; it was rather their symbolism that was of value.

In the prisoners' dock sit twenty-odd broken men. . . . Merely as individuals, their fate is of little consequence to the world.

What makes this inquest significant is that these prisoners represent sinister influences that will lurk in the world long after their bodies have returned to dust. They are living symbols of racial hatreds, of terrorism and violence, and of the arrogance and cruelty of power. They are symbols of fierce nationalisms and of militarism, of intrigue and war-making which have embroiled Europe generation after generation, crushing its manhood, destroying its homes, and impoverishing its life.²³⁵

For clearly the purpose of the Nuremberg tribunal was not to examine "the war crimes and crimes against humanity com-

234. In his memo of June 2, 1945 to the prosecution team, Taylor argued that the two most important things to be accomplished by the trials were "[t]o give meaning to the war against Germany[,] [t]o validate the casualties we have suffered" and "[t]o establish and maintain harmonious relations with the other United Nations in the presentation and successful prosecution of the case." TAYLOR, *supra* note 20, at 50.

In his closing address to the tribunal, made on behalf of the United Kingdom, Sir Hartley Shawcross said that the tribunal has conducted the proceedings "both that justice may be done to these individuals as to their countless victims, and also that the world may know that in the end the predominance of power will be driven out and law and justice shall govern the relations between States." Sir Hartley Shawcross, Closing Address for United Kingdom, Great Britain and Ireland, in OFFICE OF UNITED STATES CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION 61, 62 (Supp. A 1947) [hereinafter NAZI CONSPIRACY AND AGGRESSION].

M. Champetier de Ribes, France's chief prosecutor, believed that "the interesting point of these trials is above all that of historical truth. Thanks to them, the historian of the future, as well as the chronicler of today, will know the truth about the political, diplomatic and military events of the most tragic period in our history; he will know the crimes of Nazism as well as the hesitations, the weaknesses, the omissions of the pacific democracies." M. Champetier de Ribes, Introduction to M. Dubost, Closing Argument for the Provisional Government of the French Republic, in NAZI CONSPIRACY AND AGGRESSION, *supra*, at 159, 159 (Supp. A).

235. Jackson, Opening Statement, *supra* note 211, at 31.

mitted during the course of the war." If this were the case, then all such acts would have been examined. All persons—who had committed them would have been potential defendants. But this was not the case. Rather, it would seem that the fundamental purpose of the Nuremberg proceedings was for the victors to display to the world the evil done by the vanquished. Thus, the victors created the tribunal, legislated the crime, appointed themselves prosecutors, appointed themselves justices and found the vanquished guilty.

B. *The Structure of the Tribunal*

Although both the prosecutors and the tribunal itself purported at various times to be acting on behalf of mankind in general,²³⁶ all civilized nations,²³⁷ civilization itself,²³⁸ or "an overwhelming majority of all civilized people,"²³⁹ in fact

236. In his closing argument for the Soviet Union, Lt. Gen. R.A. Rudenko stated that "[m]ankind calls the criminals to account; and on the behalf of mankind we, the prosecutors, accuse at this trial." R.A. Rudenko, Closing Argument for Union of Soviet Socialist Republics, in NAZI CONSPIRACY AND AGGRESSION, *supra* note 234, at 199, 199 (Supp. A).

237. The judgment of the tribunal states that the making of the Nuremberg Charter was the exercise of the four powers' "sovereign legislative power." "[T]he undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world." Judgment, in 1 OFFICIAL DOCUMENTS OF THE TRIBUNAL, *supra* note 21, at 171, 218.

238. "The wrongs which we seek to condemn and punish," said Jackson in his opening statement, "have been so calculated, so malignant and devastating, that civilization cannot tolerate their being ignored Civilization can afford no compromise with the social forces which would gain renewed strength if we deal ambiguously or indecisively with the men in whom those forces now precariously survive." Jackson, Opening Statement, *supra* note 211, at 30-31. The Allied response to the German threat is described in the following terms: "At length bestiality and bad faith reached such excess that they aroused the sleeping strength of imperiled Civilization. Its united efforts have ground the German war machine to fragments." *Id.* at 32.

239. In addressing the Nuremberg Tribunal, Jackson explained that their charter "does not express the views of the signatory nations alone. Other nations with diverse but highly respected systems of jurisprudence also have signified adherence to it. These are Belgium, The Netherlands, Denmark, Norway, Czechoslovakia, Luxembourg, Poland, Greece, Yugoslavia, Ethiopia, Australia, Haiti, Honduras, Panama, New Zealand, Venezuela and India. You judge, therefore, under an organic act which represents the wisdom, the sense of justice and the will of twenty-one governments, representing an overwhelming majority of all civilized people." Jackson, Opening Statement, *supra* note 211, at 80. It is interesting to note that this portion of Jackson's Opening statement allows for the inference that the many nations not participating—those making up most of Asia, Africa and Latin America—are outside the majority of civilized people and therefore are generally not

they were acting explicitly and solely on behalf of the victors in the European theater. This is explicit in the formal structure of the tribunal and in the documents of its establishment, including the very caption of the case.²⁴⁰ The tribunal was established pursuant to the London Agreement of August 8, 1945.²⁴¹ The signatories on the London Agreement consisted of the four powers—the United States, France, the United Kingdom and the USSR. Nineteen other countries, all of them Allies, expressed their “adherence.” The accompanying Charter of the International Military Tribunal (Nuremberg Charter) provided for the composition, jurisdiction and powers of the tribunal. Article 1 of the Nuremberg Charter provided that, “[i]n pursuance of the Agreement signed on the 8th day of August 1945 . . . there shall be established an International Military Tribunal . . . for the just and prompt trial and punishment of the major war criminals of the European Axis.”²⁴² Thus, the document itself is a bill of attainder: it is an act of legislation passed for the purpose of punishing particular persons (only those in the Axis nations), rather than a law of general applicability, which names the acts to be punished, regardless of who commits them. The Nuremberg Charter, in framing the Tribunal’s jurisdiction this way, literally precluded the tribunal from hearing claims of war crimes committed by the Allies (though that would have been unlikely in any event,

civilized.

240. The caption of the case reads:

THE UNITED STATES OF AMERICA, THE FRENCH REPUBLIC, THE
UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND,
AND THE UNION OF SOVIET SOCIALIST REPUBLICS

—against—

HERMANN WILHELM GOERING, RUDOLF HESS, JOACHIM von
RIBBENTROP, ROBERT LEY, [et al.]

NAZI CONSPIRACY AND AGGRESSION, *supra* note 234, at iii (Supp. A).

241. Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter London Agreement].

242. Nuremberg Charter, *supra* note 21, art. 1, 59 Stat. at 1546, 82 U.N.T.S. at 284. This is reiterated in Article 6, which stated that “[t]he Tribunal . . . shall have the power to try and punish persons who, acting in the interests of the *European Axis countries*, whether as individuals or members of organisations, committed any of the following crimes.” *Id.* art. 6, 59 Stat. at 1547, 82 U.N.T.S. at 286 (emphasis added).

since the prosecutors *were* the Allies).

This was quite intentional: the architects of the tribunal intended to ensure that claims of war crimes committed by the Allies, or a description of the pre-war condition of Germany, would not be heard. The fire-bombing of Dresden, the use of atomic weapons in Hiroshima and Nagasaki and the violation of rules of submarine warfare were all acts committed by the Allies which would have been well-suited for treatment as war crimes, if the tribunal had been concerned with war crimes as such, rather than the war crimes of the European Axis. The drafters of the Nuremberg Charter were concerned that the defendants would raise the issue of Allied war crimes and were careful to prevent such "propaganda." Robert Jackson voiced this concern at the conference in London that drafted the tribunal's charter:

There is a very real danger of this trial being used, or of an attempt being made to use it, for propaganda purposes . . . , It seems to me that the chief way in which the Germans can use this forum as a means of disseminating propaganda is by accusing other countries of various acts which they will say led them to make war defensively. That would be ruled out of this case if we could find and adopt proper language which would define what we mean when we charge a war of aggression. Language has been used in a number of treaties which defines aggression and limits it in such a way that it would prevent their making these counter-accusations which would take lots of time and cause lots of trouble.²⁴³

That the tribunals were designed to punish persons—rather than to establish and enforce a law applicable to all—is also explicit in the discussions in 1944 and 1945 in which the idea of the tribunal was formulated. At the London conference where the Nuremberg Charter was drafted, for example, the chief British representative, Sir David Maxwell Fyfe, made it clear that he did not want certain individuals to escape prosecution:

What is in my mind is getting a man like Ribbentrop or Ley. It would be a great pity if we failed to get Ribbentrop or Ley

243. Minutes of Conference Session, July 17, 1945, in LONDON CONFERENCE REPORT, *supra* note 223, at 262, 273. See also MINEAR, *supra* note 231, at 55-56.

or Streicher. Now I want words that will leave no doubt that men who have originated the plan or taken part in the early stages of the plan are going to be within the jurisdiction of the Tribunal. I do not want any argument that Ribbentrop did not direct the preparation because he merely was overborne by Hitler, or any nonsense of that kind.²⁴⁴

There was no presumption of innocence; indeed, the tribunal was designed specifically to ensure that trial would result in conviction. This conclusion was reached by one historian, Richard Minear, who wrote that

[a]t least three of the four parties to the London Conference explicitly presupposed the conviction of the accused. The British Government began an early aide-memoire: "H.M.G. assume that it is beyond question that Hitler and a number of arch-criminals associated with him (including Mussolini) must, so far as they fall into Allied hands, suffer the penalty of death for their conduct leading up to the war and for the wickedness which they either themselves perpetrated or have authorized in the conduct of the war." The Soviet representative at the London Conference stated: "We are dealing here with the chief war criminals who have already been convicted and whose conviction has been already announced by both the Moscow and Crimea declarations . . ." And Robert H. Jackson, while attacking the assumption behind the Soviet representative's statement, nevertheless felt "bound to concede" that "[t]here could be but one decision in this case."²⁴⁵

Perhaps the most striking feature which undermined the tribunal's claim to judicial legitimacy was simply that exactly the same parties—in some cases, the same individuals—were the legislators, prosecutors and judges. The "legislature" was not a neutral or broad-based international organization. The "legislature" consisted of the four powers, the victors, simply negotiating among themselves as to what should be done with the vanquished. Negotiating for the United States was Robert Jackson; for France, Robert Falco; for the United Kingdom, Jowitt; and for the U.S.S.R., Major General I.T. Nikitchenko and A. Trainin. These parties quite literally determined by

244. Minutes of Conference Session, July 19, 1945, in LONDON CONFERENCE REPORT, *supra* note 223, at 295, 301. See also MINEAR, *supra* note 231, at 37.

245. MINEAR, *supra* note 231, at 18.

agreement that the acts of the Nazis had been "crimes," and that there would be a court before which these crimes could be tried. Neither the prosecutors in this newly-created court nor the judges would be drawn from neutral countries, but rather would come from the victors-turned-legislators.²⁴⁶ The legislative, judicial and prosecutorial functions were deeply intertwined; this was particularly obvious where exactly the same individuals simply changed hats and took on new roles. Jackson, who had negotiated the final charter on behalf of the United States, was the lead prosecutor for the United States. Francis Biddle, the U.S. Attorney General who had also been deeply involved in formulating the structure of the tribunal,²⁴⁷ was the judge appointed by the United States. Sir David Maxwell-Fyfe, who was involved in negotiating the Nuremberg Charter for the United Kingdom, was deputy chief prosecutor for the U.K. at the trial. The Soviet Union appointed Nikitchenko, who had negotiated the Nuremberg Charter on behalf of the U.S.S.R., as judge. The French appointed Falco, who had negotiated the Nuremberg Charter on behalf of France, as judge.

The Allies justified this partly by maintaining that there were no neutral countries and that it would make no sense to let the Germans judge themselves. Thus, by process of elimination, the victors must take on the task. Jackson himself said:

Unfortunately, the nature of these crimes is such that both prosecution and judgment must be by victor nations over vanquished foes. The world-wide scope of the aggressions carried out by these men has left but few real neutrals. Either the victors must judge the vanquished or we must leave the defeated to judge themselves.²⁴⁸

246. Article 2 of the Nuremberg Charter provides that "[t]he Tribunal shall consist of four members, each with an alternate. One member and one alternate shall be appointed by each of the Signatories." Nuremberg Charter, *supra* note 21, art. 2, 59 Stat. at 1546, 82 U.N.T.S. at 284. Article 14 provides that "[e]ach Signatory shall appoint a Chief Prosecutor for the investigation of the charges against and the prosecution of major war criminals." *Id.* art. 14, 59 Stat. at 1549, 82 U.N.T.S. at 292.

247. Biddle co-authored the "Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, January 22, 1945," which concerned the structure and justification of the tribunals. See *Editorial Note to Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General*, in LONDON CONFERENCE REPORT, *supra* note 223, at 3.

248. Jackson, Opening Statement, *supra* note 211, at 33.

Yet this was not so. Within Europe, Switzerland, Sweden and Portugal were neutral; and outside of Europe, many countries in Latin America and Africa were neutral, or had very limited involvement in the war.²⁴⁹

The tribunal's jurisdiction and legitimacy were alternatively justified, by the Tribunal itself, as occupation law:

The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. . . .

The Signatory Powers created this Tribunal, defined the law it was to administer and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.²⁵⁰

Yet this flies in the face of the claim that it is not victory that gives the right of the victors to judge the vanquished, but rather law.

The procedural rules likewise reflected the Allies' concern to control the proceedings and determine their outcome. In American law, the rules of judicial procedure are promulgated either by the court or the legislature and are equally applicable to all parties. However, the Nuremberg Charter provided that the prosecutors were to draw up rules of procedure, which they were to submit to the tribunal for review, acceptance, or rejection.²⁵¹ The defense had no input into this process. The defense was not permitted to submit alternate rules, or in fact to

249. Article 5 of the London Agreement provided that "[a]ny Government of the United Nations may adhere to this Agreement by notice given through diplomatic channel to the Government of the United Kingdom, who shall inform the other signatory and adhering Governments of each such adherence." London Agreement, *supra* note 241, art. 5, 59 Stat. at 1545, 82 U.N.T.S. at 282. Only nineteen countries did so: Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay and Paraguay. See TUSA & TUSA, *supra* note 226, at 85, n.*.

250. Judgment, in 1 OFFICIAL DOCUMENTS OF THE TRIBUNAL, *supra* note 21, at 171, 218.

251. Nuremberg Charter, *supra* note 21, art. 14(e), 59 Stat. at 1549, 82 U.N.T.S. at 292.

comment or contribute in any way to the formulation of the rules of procedure.

Not surprisingly, the defense attempted to object to these features of the tribunal:

[T]he Defense consider it their duty to point out at this juncture another peculiarity of this Trial which departs from the commonly recognized principles of modern jurisprudence. The Judges have been appointed exclusively by States which were the one party in this war. This one party to the proceeding is all in one: creator of the statute of the Tribunal and of the rules of law, prosecutor and judge. It used to be until now the common legal conception that this should not be so; just as the United States of America, as the champion for the institution of international arbitration and jurisdiction, always demanded that neutrals, or neutrals and representatives of all parties, should be called to the Bench. This principle has been realized in an exemplary manner in the case of the Permanent Court of International Justice at The Hague.²⁵²

The defense counsel did not ask that the tribunal be disbanded, but rather that the tribunal seek an opinion by “internationally recognized authorities on international law on the legal elements of this Trial under the Charter of the Tribunal.”²⁵³

The question of jurisdiction is not trivial, since jurisdiction entails the basic right of the court to hear a case and render judgment. The proceedings of a court are not legitimate or binding if the court does not have jurisdiction. Given that the tribunal had not existed prior to 1945 and that jurisdiction was conferred by the victors upon themselves, the challenge to the tribunal’s jurisdiction was predictable. The designers of the tribunal had anticipated such objections—and prohibited them. Article 3 of the Nuremberg Charter provided that “[n]either the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Counsel.”²⁵⁴ There were no additional grounds for conferring jurisdiction, other than the Nuremberg Charter and the London

252. Motion Adopted by All Defense Counsel, Nov. 19, 1945, in 1 OFFICIAL DOCUMENTS OF THE TRIBUNAL, *supra* note 21, at 168-70.

253. *Id.* at 170.

254. Nuremberg Charter, art. 3, 59 Stat. at 1546, 82 U.N.T.S. at 286.

agreement.²⁵⁵ The jurisdiction question was "resolved" by simply prohibiting its introduction before the Tribunal or any other international body. The defendants' motion was rejected immediately.²⁵⁶

The Tokyo trials of the Japanese leaders had the same obvious and explicit features of a political show trial by the victors. The Tokyo tribunal was not even created by agreement

255. It must be mentioned that the nature and legitimacy of the tribunal's jurisdiction was thoroughly researched and hotly debated, particularly by the U.S. officials who were involved in devising the plans for the tribunal. *See generally SMITH, supra* note 218. In the end, the rationale for the tribunal relied heavily on two sources. The first involves the customary rules of war, which prohibit direct attacks on civilians and wounded combatants and also prohibit torture, the summary execution of prisoners of war, etc. However, there was no precedent for a foreign power to bring criminal charges against individuals who are not their own citizens, nor to try and punish them. The second source consisted mainly of treaties and declarations issued in the aftermath of World War I, denouncing war as a means of international dispute resolution. The tribunal and the Allies relied heavily on the Kellogg-Briand Treaty (the Pact of Paris) of 1928, which was binding on 63 nations, including Germany, Italy and Japan. Articles I and II of that treaty read:

Article I. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations to one another.

Article II. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, arts. 1, 2, 46 Stat. 2343, 2345-46, 94 L.N.T.S. 57, 63.

However, the Pact did not provide for a mechanism of enforcement of these promises. Treaty violations had always been addressed diplomatically, or in the form of actions for breach of contract in international courts. The unilateral determination that the treaty constituted criminal law and that the Germans were "criminals" to be tried individually, by foreign powers, was not a concept that had been recognized or a procedure that had ever been employed prior to the Nuremberg Charter. The tribunal also relied heavily on a protocol of the League of Nations which stated that "a war of aggression . . . is an international crime." Protocol for the Pacific Settlement of International Disputes, Oct. 2, 1924, art. 2, L.N.O.J., Spec. Supp., No. 23, at 498. However, the protocol was never ratified; and at the time the Protocol was recommended, Germany was not a member of the League of Nations. *See Judgment, in* 1 OFFICIAL DOCUMENTS OF THE TRIBUNAL, *supra* note 21, at 216-24. The tribunal also relied on other resolutions after World War I which denounced wars of aggression as "international crimes." However, the concept and procedure of trying and punishing individual government officials, as criminals, for their government's war of aggression, was clearly novel.

256. The motion was rejected on November 21, 1945. *See Motion Adopted by All Defense Counsel, Nov. 19, 1945, in* 1 OFFICIAL DOCUMENTS OF THE TRIBUNAL, *supra* note 21, at 168, n.*.

of several countries; it was created by the "Proclamation by the Supreme Commander for the Allied Powers," which was General Douglas MacArthur.²⁵⁷ The charter for that tribunal was written by Americans, primarily Joseph B. Keenan, who would also be the chief prosecutor.²⁵⁸ Like the Nuremberg tribunal, the judges for the Tokyo trials were drawn from the victor nations.²⁵⁹ Like the Nuremberg trials, the Tokyo tribunal did not consider possible war crimes committed by the Allies; evidence regarding the American use of atomic weapons was not admissible.²⁶⁰ Like the Nuremberg trials, the Tokyo tribunal did not promulgate clear rules of evidence.²⁶¹ Despite the claim of the tribunals to be applying law in an impartial manner, the positions of the particular justices did indeed, to some extent, reflect their and their nations' losses. In the Nuremberg trial, the Soviet judge wrote a dissenting opinion in which he objected to the tribunal's leniency.²⁶² In the Tokyo

257. The proclamation read as follows:

NOW, THEREFORE, I, Douglas MacArthur, as Supreme Commander for the Allied Powers, by virtue of the authority so conferred upon me, in order to implement the Terms of Surrender which requires the meting out of stern justice to war criminals, do order and provide as follows:

Article 1. There shall be established an International Military Tribunal for the Far East . . .

Article 2. The Constitution, jurisdiction and functions of this Tribunal are those set forth in the charter of the International Military Tribunal for the Far East, approved by me this day.

Douglas MacArthur, *Special Proclamation: Establishment of an International Military Tribunal for the Far East*, Jan. 19, 1946, reprinted in, 1 THE TOKYO WAR CRIMES TRIAL (1981).

258. See MINEAR, *supra* note 231, at 20.

259. There were eleven judges for the Tokyo trial, one each from Australia, Canada, China, France, Great Britain, India, the Netherlands, New Zealand, the Philippines, the Soviet Union and the United States. See *id.* at 23.

260. See *id.* at 100. It should be noted that the Charter does not explicitly name the Japanese as the objects of prosecution. Article 1 provides that the tribunal is established "for the just and prompt trial and punishment of the major war criminals in the Far East." Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, art. 1, T.I.A.S. No. 1589, 4 Bevens 20, reprinted in MINEAR, *supra* note 231, at 185 (as amended Apr. 26, 1946). Although the tribunal in principle could have exercised jurisdiction over American war crimes, it obviously did not choose to do so.

261. The Charter provides that "The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value." Charter of the International Military Tribunal for the Far East, *supra* note 260, art. 13.

262. The Tribunal acquitted defendants Schacht, von Papen and Fritzsche; sen-

tribunal, two justices dissented: Justice Jaranilla of the Philippines, who was a survivor of the Bataan Death March, objected to the tribunal's leniency; and Justice Pal of India, a country which had suffered very little at the hands of Japan, acquitted all defendants, partly on the grounds that the tribunal was a political rather than judicial entity, which had no right or jurisdiction to try the defendants.²⁶³

C. *What We Inherit From Nuremberg*

How do we make sense of the architecture of the Nuremberg and Tokyo tribunals? How do we make sense of the multiple levels of protection against even the slimmest possibility that someone might mention the war crimes of the Allies or question the legitimacy of the tribunals? These layers of protection ensured not just that the monstrous acts of the Nazis and Japanese would be revealed to the world, but also that the relative goodness of the Allies would be demonstrated and that the Allied nations would feel vindicated and feel their sacrifices justified. Surely this would also have been accomplished with a genuinely judicial tribunal—where the justices were not also representatives of the plaintiff nations; where all those who committed war crimes would be prosecuted, not just the Axis nations. In a legitimate judicial structure, with neutral justices, explicit rules of evidence and so on—surely the result would have been nearly the same. The fire-bombing of Dresden—and even the atomic bombing of Hiroshima and Nagasaki—would still have paled alongside the German death

tenced Hess to life imprisonment and found that the Reichs-cabinet, the General Staff and high command of the armed forces were not criminal organizations. The Soviet dissent objected to all of these. See Dissenting Opinion of the Soviet Member of the International Military Tribunal, in 1 OFFICIAL DOCUMENTS OF THE TRIBUNAL, *supra* note 21, at 342.

263. In his dissent, Pal wrote:

Whatever view of the legality or otherwise of a war may be taken, victory does not invest the victor with unlimited and undefined power now. International laws of war define and regulate the rights and duties of the victor over the individuals of the vanquished nationality. In my judgment, therefore, it is beyond the competence of any victor nation to go beyond the rules of international law as they exist, give new definitions of crimes, and then punish the prisoners for having committed offenses according to this new definition.

Remarks Concerning the Opinion of the Member for India (Pal), in 21 THE TOKYO WAR CRIMES TRIAL 32 (1981). See also MINEAR, supra note 231, at 63-64.

camps. But it seems that *nearly* the same wasn't good enough. This tells us a great deal about the project of the Nuremberg and Tokyo tribunals. The project was not at all about which of the various nations had done the worst things—given that war and aggression are inherently bloody and extreme, it is nothing new in human history when ethics and honor take a back seat in wartime to fear, vengeance, or desire for victory. The Nuremberg and Tokyo trials—in both their structure and their rhetoric—do not concern evil acts, but rather assert an essential distinction between evil human beings and righteous ones.

We can now make sense of the process by which the political is transformed and presented in the garb of the judicial; in which the interest of particular nations is transformed and presented as an interest that is universal (the interest of mankind, the interest of Civilization, the interest of all civilized nations); in which interest itself is transformed and presented as law. The Nuremberg project was never about *acts* which were indefensible, shocking, or evil; but rather about *persons* who were monstrous, beastly, not even human.

This is what lies at the heart of Hannah Arendt's EICHMANN IN JERUSALEM.²⁶⁴ Recall Arendt's elaborate descriptions of Eichmann's ordinariness, his shallowness and self-absorption, his inability to speak without reliance on clichés and his inability to fully separate reality from a trite and hackneyed unreality. Although the work was received in some quarters as a justification of Nazism, a defense of Eichmann personally, or a trivialization of the Holocaust,²⁶⁵ clearly it is none of these things. Rather, it suggests that there

264. Arendt's depiction of Eichmann suggests that it is almost as though he had spent his life in a B-rate movie and the line between fiction and non-fiction was blurred, or occasionally lost altogether. "Adolf Eichmann went to the gallows with great dignity," Arendt writes. She describes his last words:

He began by stating emphatically that he was a *Gottgläubiger*, to express in common Nazi fashion that he was no Christian and did not believe in life after death. He then proceeded: "After a short while, gentlemen, *we shall all meet again*. Such is the fate of all men. Long live Germany, long live Argentina, long live Austria. *I shall not forget them*." In the face of death, he had found the cliché used in funeral oratory. Under the gallows, his memory played him the last trick; he was "elated" and he forgot that this was his own funeral.

ARENDR, *supra* note 210, at 252.

265. See, e.g., Michael A. Musmanno, N.Y. TIMES BOOK REVIEW, May 19, 1963 (review of ARENDT, *supra* note 210).

is nothing intrinsically monstrous about Eichmann—if he had lived in different times, he might have been a vacuum cleaner salesman. If he was so ordinary and the situation gave him the possibility and motivation for behaving monstrously, then in a sense, none of us is “safe”—we all have within us the potential to commit monstrous acts. The acts are no less monstrous for this reason. Yet once we acknowledge Eichmann’s ordinari-ness—once we acknowledge that his acts rather than his person were evil—then we can never in good conscience be certain that any of us is righteous. We can never be certain that we ourselves would not do monstrous things—not out of a conscious bloodthirstiness, but out of indifference, shallowness, or a kind of willing myopia.

Arendt’s insight is echoed by the Costa Rican theologian Franz Hinkelammert, in an article on the Persian Gulf War. Hinkelammert describes some of the language used by George Bush, Norman Schwartzkopf, military officials and soldiers involving the notion of “work.” They use expressions like: “We had a job to do, and we went in there and did it;” “We’ve been getting to our targets and getting the job done,” and so on. Hinkelammert notes that such language treats destruction as a productive process; it is as though the factory that produced Baghdad’s destruction were comparable to a factory that produces shoes. But, he says, only the executioner thinks his is a job like everyone else’s.²⁶⁶

And that is the heart of the problem: there are many means by which executioners convince themselves that their jobs are like everyone else’s. Executioners do not come into the world with the mark of Cain on their brows, any more than the righteous come with a saintly glow. If we deem acts, rather than persons, to be evil, then we acknowledge the possibility (at least in principle) that all of us, any of us, may do evil at some time. If we deem acts, rather than persons, to be evil, then we are compelled to acknowledge that the human condition requires us to struggle not only with temptation and weakness, but with the resolution of moral ambiguity as well. Like the executioners, we may convince ourselves that the particular acts we are doing are justified because we do them

266. See Franz J. Hinkelammert, *Subjectividad y Nuevo Orden Mundial: ¿Qué Queda Después de la Guerra de Irak?*, 1991 PASOS 18, 20.

in the name of the law, or that our acts bear the righteousness of our cause. Consequently, there may be a moment in history, or in our daily lives, in which we indeed *are* the executioners.

If we deem persons, rather than acts, to be evil, we create the illusion that we can somehow transcend the moral struggle. If *they* are evil and *we* are acting on behalf of the innocent, the good and mankind as a whole, then there is simply no ambiguity to resolve. There are only two issues we then need address: the list and decorum. Whose names shall we place on the list of those who are evil; and what should we do to them once we have them, that won't be too distasteful?

Far from resolving any ethical questions, the structure and rhetoric of the war crimes tribunals avoid the most pressing of the ethical issues raised by the Holocaust and the Nazi regime. How is it that human beings come to do evil acts? By equating the interests of the Allies with the interests of all humanity and by precluding even the possibility that war crimes by the Allies could even be mentioned, it seems to me that the architects of the tribunals were doing more than simply satisfying the post-war political interests of the Allies. The tribunals' fundamental assumption was that the accusers were righteous and the condemned were evil; this was both explicit and implicit in the structure and rhetoric of the tribunals. This assumption rested on a very basic distinction. *We* are fundamentally different kinds of creatures than *they* are; *we* are civilized, *they* are barbaric; *we* are human and *they* are something less than human—monstrous, animal, demonic. That is a dangerous view to hold. It is also part of the legacy we inherit from the tribunals where the concept of human rights first took on the character of law.

An equally important piece of the Nuremberg legacy is the advancement of a political and moral agenda by judicial means. While the atrocities committed in the Holocaust are bone-chilling, it is nonetheless shocking to see what a travesty the Nuremberg tribunal was from the perspective of judicial legitimacy. If the same method of legislation and procedure for trial had been followed in any domestic court of the Allied nations, it would have been denounced as patently illegitimate; if such a trial were held in American courts, it would have been patently unconstitutional on multiple grounds. We need only imagine such a court today, anywhere in the world, structured in the same manner: where the legislator, prosecutor and

judge were all the same party; the legislation was explicitly created for the purpose of punishing certain individuals; the standards for evidence and procedure left to the discretion of the tribunal; and the tribunal's jurisdiction was created and conferred by the plaintiff, who then prohibited the defense from raising the issue of jurisdiction, before the tribunal itself or elsewhere. If such a court were to operate today in any domestic setting, we would consider it patently illegitimate and void of any judicial integrity. Ironically, we could expect to see Amnesty International denounce such a judicial process as a violation of human rights standards.

I am not suggesting here that it is wrong to document and publicize atrocities committed in wartime, or any other time. Nor am I disputing that such a project would be both morally and politically imperative. I am suggesting that it is important to note that in the Nuremberg tribunal, this moral and political imperative trumped, in an absolute fashion, the most fundamental mandates of law and judicial process. What Nuremberg tells us is that, measured against the moral and political imperative of denouncing atrocities, all competing moral or legal imperatives are completely without weight. It is not surprising that the Nuremberg trials have come to stand for the just and proper denunciation of atrocities; the genocidal project of the Nazis demanded denunciation. What is important to note is how this project of denunciation trumped all other moral issues and did so absolutely—not only the judicial illegitimacy of the tribunals themselves, but also the Allied war crimes, the use of atomic weapons and the callousness and anti-Semitism of the many countries which denied refuge to Jews fleeing the Holocaust.

We have inherited from Nuremberg not only the idea that genocide, torture and slave labor violate principles of human rights which transcend domestic positive law. We have equally inherited the notion that the denunciation of human rights violations is so compelling and consuming that, alongside of it, all else—all acts of other parties which are less than atrocious, which are merely brutal or shameful—not only pale in comparison, but disappear altogether. We inherit from Nuremberg the idea that when there are atrocities to denounce, we need not look at the acts of the denouncers themselves. Indeed, we may even be prohibited from doing so. It is as though the singular monstrousness of human rights violations consumes or inhab-

its the entirety of the moral space. When we are denouncing atrocities, evil acts are not only absolutely evil, but exclusively so; alongside them, acts that are merely wrong, or even awful, are relatively righteous.

Thus, bringing an accusation of atrocities and consequently invoking the notion of human rights, means positing a "bright line" distinction between evil and righteousness—both between evil persons and righteous persons and between evil acts and righteous acts. We inherit from Nuremberg a notion of human rights which posits a realm of evil acts and evil persons—absolutely and exclusively evil. We inherit from Nuremberg the notion that the moral denunciation of human rights violations does not itself have rules or limits, or ambivalence, or ambiguity.

CONCLUSION

In the introduction I suggested that I would explore the concept of human rights in terms of its rhetorical uses and its relation to political and economic agendas. Is it possible to disentangle this very powerful moral concept from its political uses? If not and if it is not universal or impartial but rather deeply political and politicized, then is its validity irredeemably compromised?

In a sense there is a relatively easy solution. If we take the ordinary philosophical standards that are applicable to a moral theory, such as consistency with our ethical intuitions and logical coherence, then we can easily construct three models that each have some reasonable grounds for justification:

1. If by "human rights" we mean that we want to articulate the most minimal and urgent conditions for human life, then a concept of human rights would entail protection from extreme physical violence. It would address "atrocities" of the sort articulated in Just War doctrine—torture, execution, genocide, enslavement.
2. If by "human rights" we mean that we want to articulate everything immediately necessary for human beings to live, then a concept of human rights would entail protection from extreme physical violence *and* economic security. It would include the things described in model one, and it

would also entail the provision of food, shelter, water, clothing, employment and medical care.

3. If by "human rights" we mean that we want to articulate everything necessary for a full and good life, or we are also concerned with everything *indirectly* necessary to protect essential economic and physical needs, then a concept of human rights would include models one and two and would also entail political and civil rights, including speech, press, association, travel and political participation.

The one arrangement that cannot be justified is the currently dominant concept, which holds that protection from atrocities are classed in the same category with political and intellectual activities; and that political and intellectual activities are deemed to be more essential and immediate than economic needs.

But I am not really interested in devising another model to throw into the ring of contemporary philosophical debate. My interest here lies more in exploring the relation between the concept of human rights and the stakes. If there are atrocities taking place and we do not intervene, then we are to some degree complicit. Conversely, if we claim that an atrocity is taking place and thereby justify, for example, military intervention or an economic blockade, then we have the blood of innocents on our hands if we are wrong, or if we are lying and only invoking human rights as rhetoric. My view is that the moral content of the conception of human rights is therefore inseparable from the agenda which is set once claims of human rights violations are invoked, because such claims both demand action and also justify any action short of further human rights violations.

My intention in writing this Article is not to propose and justify my preferred model of human rights. Rather, I am interested in making absolutely clear the relation between the concept and the political interest; and that no purely abstract choice is possible, only a fundamentally interested one. To the extent that I am successful, we will adopt both our concepts and our agendas with our eyes open. Neither states nor individuals will necessarily have more benevolent inclinations. If there is an exhortation, it is not for humanity to become better

or for states to show some sort of moral progress. Has anyone since Comte really believed that this is a possibility? Rather, my ambition is more modest: to make a certain kind of hypocrisy unavailable as a device that may be used by individuals (or states) to delude themselves about their willingness to participate in brutality and to hide their capacity to engage in acts that are at the same time bloodthirsty and casual.

Because the concept of human rights is used to justify military actions (it was one of the justifications for the Persian Gulf War, in which an estimated 100,000 Iraqis were killed) while excluding economic policies (although 37,000 children die each day from "preventable causes" related to extreme poverty) I am deeply concerned with its content and its uses. I am concerned partly about the ways in which the concept of human rights takes on the character of the sacred. The concept of human rights purports to be an absolute and universal moral principle, yet it eludes and in fact prevents moral discourse. The moral position it asserts is seen as simply beyond question, such that no moral and rational person could seriously doubt its soundness. Furthermore, ideal and abstract entities ("rights") are deemed to have a reality and value wholly independent of concrete life activities. In the dominant conception, the danger of this ontological mistake, if you will, is that even those political rights which are purely formal and never actualized are treated as "things" of great substance and worth; and for that reason are placed in the same category as protection from torture, as though these two things have something in common. In this context, I would be inclined to take a materialist and utilitarian position, that one's profane life of eating, sleeping, working and existing on this earth is more real and valuable than one's abstract life, which includes the rights we have that are never actualized and the entitlements which have in fact given us nothing.

The dominant concept of human rights holds that political rights by their very nature cannot be trivial, just as protection from torture is never trivial. Yet we should hear how hollow this rings. I do not think that one has to be a communist to see how easily, for example, the right to vote, which is "sacred" in a democracy, can slip easily into the trivial. As a citizen in a democracy, my act of sovereignty truly lasts only a moment and happens quite rarely—once every two or four years. I vote for one of the candidates, neither of whom I have ever met,

whose views and intentions I know only through carefully staged campaign events and television commercials produced by the same advertising agencies that market dishwashing liquid.

Conversely, the dominant conception of human rights holds that economic activity is less essential, less urgent—by its nature, it is always profane and trumps nothing. But we need to remember that economic activity includes not only going shopping at the mall. It refers also to the life of the body and all that entails—survival, pleasure, fear, struggle, respite, exhaustion, abundance; the daily concrete acts that occupy so very much of our lives—whether you get to work by car, or stand in the rain waiting for a bus, whether you have a doorman at the entrance of your apartment building or a cluster of junkies eyeing your purse and your body as you come home each night.

My concern about the dominant conception is also that, as with any absolute moral claim, it is possible for righteousness to justify acts that simple decency would not permit. Walzer reminds us that holy wars are longer and bloodier than others, because the righteousness of the cause demands nothing less than total conquest or total sacrifice. In the end I wonder if we aren't better off without any notion of absolute rights or moral trumps. I wonder if we aren't better off with adopting some garden-variety utilitarianism and reminding ourselves from time to time of how much of the human condition is characterized by moral ambiguity. I am reminded of Max Weber's discussion in his essay *Politics as a Vocation*.²⁶⁷ Given that politics involves the legitimate use of violence, he suggests it is incumbent upon someone who has a calling to political leadership to understand that there are never clean decisions. The ethic of responsibility is incompatible with the ethic of ultimate ends, yet both are compelling. The political leader with a conscience will be obliged constantly to navigate this ethical paradox. There is nothing impressive, Weber says, about those who intoxicate themselves with the "sterile excitement" of pursuing an absolute end. What is immensely moving, however, is when an individual "is aware of a responsibility for the consequences

267. Max Weber, *Politics as a Vocation*, in MAX WEBER, FROM MAX WEBER 127 (Hans Gerth and C. Wright Mills eds. and trans., 1946).

of his conduct and really feels such responsibility with heart and soul . . . [But] somewhere he reaches the point where he says: 'Here I stand; I can do no other.'²⁶⁸ I wonder if, when we embrace a certain conception of human rights, we don't sometimes find ourselves intoxicated by the righteousness of the cause, at the cost of moral discourse, rather than by the service of it.

268. *Id.*

