

*Clark Butler*

## THE REDUCIBILITY OF ETHICS TO HUMAN RIGHTS

### 1. A Morally Unlimited Realm of Rights

Michael Freeman, reviewing recent attempts to ground human rights, surveys a number of current thinkers. They include Jack Donnelly, Ronald Dworkin, Alisdair MacIntyre, Richard Rorty, and Alan Gewirth. Freeman concludes what many suppose: there is no uncontested theoretical foundation of human rights.<sup>1</sup> Yet he rightly senses the importance of such a foundation to both individual conduct and national and international institutions. I wish to develop here a theory of human rights influenced by a thinker not included in Freeman's survey, Jurgen Habermas. My central claim is Kantian: ethical conduct and respect for human rights are identical. Ethics ought be taught as the theory and application of human rights. A body of human rights declarations and conventions since 1945 exists to be brought to life in the discussion of individual and public policy. The United Nations has expended energy to promote the teaching of human rights, promoting special study of United Nations documents and the integration of such study in all education.<sup>2</sup> Yet international organizations may not have fully realized how well-adapted the ethics classroom is to human rights instruction, though such instruction is best

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M. Freeman, "The Philosophical Foundations of Human Rights," *Human Rights Quarterly*, Vol. 16 (1994), 491-514.

<sup>2</sup> *Activities of the United Nations in the Field of Human Rights*. New York: 1992, Chapter 15, Section k.

carried out autonomously, with the stimulus of the United Nations literature, but without explicit dependence on its prestige and authority.

An equation of ethics with human rights is of course controversial. Adam Bedau has written that "we live at a time that some writers have described (and deplored) as a 'rights explosion,' an overemphasis on rights to the exclusion of other moral considerations."<sup>13</sup> Ronald Dworkin in *Taking Rights Seriously* does not take them quite so seriously as to suppose that they exhaust morality: "Claims of political right must be understood as functional, as claims to trump some background collective justification that is normally decisive."<sup>14</sup> Judith Jarvis Thomson has tried to limit the rights explosion in her book *The Realm of Rights*.<sup>5</sup> Thomson holds that "claims [rights against others] do of course have significance, ... but they are not the only things that do."<sup>6</sup> "I suggest that we should take the stringency of a claim to vary with how bad its infringement would be for the rightholder."<sup>7</sup> An individual's just claim may be infringed upon if the good done for others sufficiently outweighs the evil suffered by the individual.<sup>8</sup>

Thomson holds that moral intuitions show it is sometimes permissible if not obligatory to act for the good of others in violation of the rights of certain individuals. I agree, but do not think it shows that the realm of rights is morally limited. Doing what is good for rational agents can only mean assisting them in the voluntary pursuit of their own goals. It does not mean deciding paternalistically what is good for them independently of their goals. The basic human right is the right to liberty, to the voluntary pursuit of chosen goals. What is "good for" an individual is help in his or her voluntary pursuits, in the exercise of his or her basic human right. But if doing what is good for others means active respect for their right to freedom of choice (e.g., by removing obstacles to such freedom), it does not lie beyond the realm of rights.

## 2. Beneficence

Whether the realm of rights is morally unlimited is tested by reviewing commonly recognized rules of ethics, to see if any are independent of justice understood as the equal promotion of respect for the human rights of all. William Frankena assigns to an obligation of *beneficence* equal standing with *justice*.<sup>9</sup> This is because he understands justice as an obligation to give proportionately equal consideration to all in distribution, apart from an obligation to produce any good to distribute. But a duty of fair distribution is empty without a duty to fairly distribute

H.A. Beats, Review of Judith Jarvis Thomson's *The Realm of Rights*, *Human Rights Quarterly*, Vol. 14(1992), p. 540.

<sup>4</sup> R. Dworkin, *Taking Rights Seriously*. Cambridge: Harvard University Press, 1977, 364.

<sup>5</sup> J.J. Thomson, *The Realm of Rights*. Cambridge: Harvard University Press, 1990.

<sup>6</sup> *Ibid.*, 165.

*Ibid.*, 154.

<sup>8</sup> *Ibid.*, 152.

<sup>1</sup> W. Frankena, *Ethics*, Englewood Cliffs: Prentice Hall, 1973.

*something.* I argue that what is distributed by a moral duty of justice must intrinsically be morally good. Proportionately equal distribution of suffering without a moral purpose satisfies no moral obligation. Justice as a categorical rule of ethics is not distributing ice-cream cones for a pure pleasure of consumption. There is no rational moral obligation to distribute pleasure or any non-moral good as such, however much we are inclined to do so by the social sentiments. Though non-morally good, pleasure may or may not, depending on the situation, be morally good for us. As a categorical rule of morality, justice directs us to distribute conditions for rational agency, an ability to make decisions based on information and discussion, without compulsive subjection to external authority.

It may be asked: how do we know this? One answer is that rational agency is a value to which some in practice attach themselves as ultimate value, and that it is the only such value that can be consistently commended by a non-instrumental concept of dialogical rationality. Rational justification of the suppression of dialogical rationality fails either by employing an irrationally limited rationality, or by employing full, universal rationality to justify its limitation. A rational denial of rationality confirms rationality. Whether equal consideration of all members of a group in the distribution of cones, or relief of pain, is required by categorical justice in a situation depends on whether such consideration promotes the universal enjoyment of human rights which would be necessary for universal rational agency. Doing what is non-morally good for others must be justified by just promotion of the enjoyment of their rights. Beneficence towards others is an application of justice: it is the obligation to promote an equal enjoyment of human rights by all others, without privileging one's own interests or that of any minority. Such an obligation of beneficence follows from the obligation to promote justice, the equal enjoyment of human rights by all. Beneficence is the exclusion of injustice in the favor of any minority, including oneself.

The rule of beneficence applies the rule of justice to situations in which the agent is tempted to be egoistic or otherwise partial, for example, to put his or her self-interest unfairly ahead of the moral rights of others. Thus interpreted, beneficence is not a basic teleological moral duty, since the end it pursues is not of purely *non-moral value*. It pursues justice, a moral value. Moreover, the basic individual moral duty is not just to respect the idea of possible human rights, but to promote the actual enjoyment of human rights. Human rights which are not enjoyed and exercised can still, like the rights of concentration camp inmates, be possessed and respected. Until it is possible to respect the enjoyment of human rights, the duty of justice and, if need be, beneficence is interventionist. It would have us do what is morally good for others.

A conflict is possible between passive respect for an individual's human right (not interfering in the exercise of the individual's human right) and assisting others supportively in the exercise of their human rights. A battlefield surgeon might face the choice of saving one individual's life while sacrificing another's, through an inability to attend to two persons at once. Active respect for the right of one individual may conflict with active respect for that of another. But if ought implies can and we cannot actively assist all, we have no actual moral duty to do so. Assisting

some is better than assisting no one if it promotes enjoyment of rights by as many as possible, but the choice of whom to assist is an element of objective, blameless injustice in the struggle for justice. Only greater resources and knowledge can eliminate this injustice. Our present duty is passive respect for the rights of all (non-interference), and active beneficent respect for the rights of as many as possible.

Ethical rules of non-injury and compensation may be considered special applications of the rule of beneficence just considered. Doing good is not doing evil, and compensation is a substitution of good for evil done.

### 3. Promise-Keeping

As for the duty not to lie, few would follow Kant in taking it to be absolute. Whether one has such a duty depends on commitments made. In taking the initiative to speak in a context of inquiry, one tacitly contracts with hearers to speak the truth. But if one is abruptly addressed by an unknown or menacing person, no such compact may exist, and hence no obligation to speak the truth. The role of a tacit promise in acquiring an obligation not to lie brings us to promise keeping.

No human rights declaration, to my knowledge, asserts a right to have promises kept. Nor does any declaration proclaim a human right not to be lied to, although truth in lending may be enforced by some national legislation. Such declarations at most presuppose a moral obligation to keep all promises that promote and implement respect for human rights.

To promise is to place an obligation upon oneself, and all obligations I should say result from promises. That you "ought" in some sense keep promises is tautological. But a promise by a terrorist to punish by assassination establishes no moral obligation. Not all promises or promissory obligations are moral. And even many moral obligations are not in themselves universal human obligations of all to all. Many moral obligations simply apply universal rights in particular situations. The culturally-determined promissory obligation of parents to their children is not an obligation by all parents to thasechildren. Yet the particular obligation may apply a universal principle: "Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child."

### 4. Human Rights Justified from Below

So far we have asserted human rights ethics by questioning any moral rules independent of human rights. But what justifies human rights ethics? We may distinguish two sorts of justification: prudential justification from below, and non-prudential justification from above. Justification from above is in the name of non-prudential values such as beauty or knowledge. Modern natural law justifications tend to be justifications from below, while ancient natural law justifications were mixed with theology. God was nature, and human nature expressed the divine nature. Since God does everything for the best, human nature

<sup>10</sup> United Nations General Assembly Convention on the Rights of the Child (1989), Article 18.

is good, and its innate inclinations are a reliable guide in morality. <sup>11</sup> We ought live in accordance with Nature, and hence with human nature. Modern natural law theoreticians like Hobbes and Grotius have separated theology from human rights. The justification of human rights must be theologically neutral to be universally persuasive.

First briefly consider Hobbes. Divorcing theology from both human rights and natural law, he held that in the state of nature everyone had a natural right to freely pursue his or her self-interest, though attainment of this self-interest might be impeded by others." By human nature we seek security. We have an inalienable liberty, power, or right to do what we in any case seek to do by our nature. In the state of nature there is no law to regulate the pursuit of self-interest, or to give assurance of the security we seek. But it is unclear than anyone has a right, as distinct from a power, to act according to his or her nature. A claim to exist, or be secure in one's possessions, which one makes by nature upon others, is not automatically justified. It is only a biological fact. If cancer cells could make claims, in the state of nature they, too, I think, would claim a right to exist and grow. A human power of predatory behavior in the state of nature is no more a moral right than a hypothetical right of cancer cells. Human liberty becomes a moral right only ~Nbeing limited by respect for the rights of others. But this limitation is also justified by nothing more than a fact of human nature, namely that we all seek safety. To those who seek as much freedom as is consistent with safety, such a limitation on natural freedom is justified. It is not justified by human nature, but by the ultimate standard of action chosen by those individuals. Individuals are also free to choose frustrating ultimate standards which lead them to strive against their nature. Human nature that imposes no commitment to act in accordance with it., cannot justify moral rights.

Unlike Hobbes, Grotius justified human rights by human nature viewed as social. <sup>13</sup> Because of our natural social inclinations we ought respect the natural claims of others to their property, and to our faithfulness in keeping promises. But the same question arises as in Hobbes' case. Our nature is morally relevant only in placing limits on what we can and thus ought do. Because we can do something it does not follow that we ought. Because we feel obliged due to our sociability nothing follows concerning the moral obligations we have to the holders of rights. If animosity were internal to human nature instead of sociability, no one would argue that ,, feeling -, . . - obliged to injure others justifies an obligation to do so`:

Locke is also in the modern natural law tradition.<sup>14</sup> He distinguishes nature and convention, the state of nature and civil government. The state of nature reveals natural human powers or liberties,<sup>15</sup> including a liberty of acquiring property by

Cicero, *On the Purposes Goods and Evils* (46-43 B.C.), Book 3, 19.

<sup>12</sup> "... I authorize and give up my [natural] right of governing myself, to this man, or to this assembly, on this condition, that thou give thy right to him." T. Hobbes, *Leviathan*, Part 2, Chapter 17.

H. Grotius, *De Juri belli et pads* (1624). Preliminary Discourse.

<sup>14</sup> J. Locke, *Second Essay on Civil Government* (1690). Chapter 2, § 6-7.

<sup>15</sup> J. Locke, *Ibid.* Chapter 2, § 27.

removing objects from the state of nature through labor. These powers are called innate "rights". But what makes natural powers into moral rights?

Alan Gewirth is a recent philosopher who has sought to justify human rights from a prudential point of view.<sup>17</sup> He claims that as rationally calculating agents we must claim a right to freedom of action and a degree of well-being. Further, we must, to be consistent, generalize this claim to all other rational agents. But the conclusion from this, I think, is only that all agents as a matter of fact must claim freedom and well-being, not that this claim is justified.

Justifications of human rights from below by Hobbes, Grotius Locke, and Gewirth attempt to justify a moral claim by appeal to a biological fact about one's species nature. Because one is self-seeking, sociable, or a rational agent, one claims before others the moral right to be such. Further, each agent must acknowledge that all others make such a claim by nature as well. However, to recognize that a claim is made is never to endorse it.

### 5. Human Rights Justified from Above

Justifications of human rights from above attempt to show, not merely that human rights are consistent with human nature, but that they condition the possibility of some value beyond human nature which human nature serve. Habermas claims that the moral point of view is assumed in discussion aimed at a consensus about the truth. He argues that moral truths consist in the shared presuppositions of such discussion. He offers no full elaboration of these presuppositions, but does illustrate them: "the principle of public access [to discussion], equality of participation, the sincerity of participants, the uncoerced adoption of positions." It is not difficult to see a reference here to rights. If we take the standpoint of partnership in discussion to be a universally valid moral point of view, the rights are universal human rights: "Human rights ... manifestly incarnate universalizable interests, and they can be justified from the point of view of what we might all will."<sup>19</sup>

Benevolence for Habermas is political as well as moral: it aims at the construction of a moral world order in which conscience exercises a decisive influence on law and opinion. Habermas distinguishes between morality and morally-inspired politics, between the foundations and applications of morality." He speaks of a "passage from moral theory to the theory of law." From a more Hegelian perspective, I think we should expect rules, in special situations and institutional applications, to amplify and recast the sense of foundational theory. Politics is ethical only as an attempt to institutionalize, socially and legally, human rights.

Morality is respect for persons, for a moral right to liberty of action. It is by freedom of action, assigning to oneself the goal of one's existence, that a person is

<sup>16</sup> J. Locke, *Ibid.* Chapter 2, § 3.

<sup>17</sup> A. Gewirth, *Reason and Morality*. Chicago: University of Chicago Press, 1978, Essay 1.

<sup>18</sup> J. Habermas, *Erläuterungen zur Diskursethik*. Frankfurt: Suhrkamp, 1991, 132.

<sup>19</sup> *Ibid.*, 22.

<sup>20</sup> *Ibid.*, 84, 95-95.

<sup>21</sup> *Ibid.*, 198.

an end in him- or herself. For Kant this respect for persons is categorically commanded. He suggests no deeper reason. Habermas makes respect for persons a condition of inquiry and dialogue. Since it is a necessary or internal condition, persons are not merely an external means to discussion or truth. The standpoint of partnership in dialogue, unlike the original Kantian moral point of view and unlike John Rawls' original position, is institutionalized in the world. For Habermas, it is a standpoint which we (or at least many of us) in fact take, not merely one which we simply ought take." But it is not the only standpoint we take, nor necessarily the prevailing standpoint in our action.

Kant distinguished noumenal moral agency from phenomenal political history. Yet in the French Revolution he found a surprising collusion between the two. Commenting on the Declaration of the Rights of Man and the Citizen, he wrote: "Such a phenomenon in the history of man will never be forgotten, for it has revealed in human nature a disposition to progress and a capacity for realizing it which no statesman, considering the previous course of history, could ever have conceived." The realm of social and legal rights for Kant is "external."<sup>24</sup> It is the realm of individual liberty constrained only by the similar liberty of others, as finally enforced by a sovereign state. Morality does not consist in exercising human rights, even purely moral (externally unendorsed) human rights; it consists in respecting them.

A lawful state enforces respect for many human rights. It enforces some morality. Such enforcement of morality is often judged a contradiction in terms. It is also a contradiction to enforce it by public opinion. Morality can only be enforced by moral conscience. Legal enforcement of respect for persons is perhaps a stage in a still unfinished moral education of mankind. Yet even if moral perfection were attained, unintentional violations of rights in the domain of civil law would recommend the services of a state. The social and legal institutionalization of human rights, embodying vast experience in application, complements purely moral enforcement by conscience.

But what justifies a person's claim to freedom of action? Consideration of Hobbes, Grotius, Locke, and Gewirth suggests that justification from below fails. Kant illustrates justification from above. "Since only in such a society, which offers the maximum of freedom (with an implied general antagonism of its members), and which shall have determined with the maximum of precision and guarantee the limits of this freedom so it is compatible with the freedom of others - since only in such a society can nature realize within humanity its supreme intention of developing all humanity's aptitudes, nature also intends that humanity realize this design by itself ..." <sup>25</sup> The purpose nature ..' . assigns to morality is not to honor uniform claims to security or inclinations to sociability based in our common human nature,

<sup>22</sup> Ibid., 14.

<sup>23</sup> I. Kant, *Streit der Fakultäten* (1798), Section 2.

<sup>24</sup> I. Kant, *Ober den Gemeinspruch: das mag in Theorie richtig sein, taugt aber nicht für die Praxis* (1793). Section 2.

<sup>21</sup> I. Kant, *Zu einer allgemeinen Geschichte in weltbürgerlichen Absicht* (1784), Proposition .5.

but to facilitate the earnest striving of individual human talent and genius, directed to transcendent values.

Habermas suggests that realization of cognitive talents by means of public inquiry more clearly presupposes respect for human rights than other talents. "... the ethics of discussion goes beyond the purely interior, monological approach of Kant, who called upon everyone to undertake *in foro interno* ("in the solitude of the life of the soul") the examination of his or her maxims of action... The ethics of discussion, however, counts on a shared understanding of the universalizability of interests being the result of a *public discussion* realized intersubjectively."<sup>26</sup> "In the ethics of discussion, it is the procedure of ethical [ethically regulated] argumentation which takes the place of the categorical imperative."<sup>21</sup> Artistic pursuits can remain monological, like Kantian morality. Religious dialogue may not be between human beings. Political ambition and the quest for economic gain insincerely exploit the semblance of dialogue. The cognitive point of view for Peirce, Royce, and Mead<sup>21</sup> is an intersubjective point of view of creating and testing hypotheses. Knowledge is no longer the monological consultation of private intuition. Inquiry presupposes norms regulating relations between partners in the dialogue. These norms are socially and/or legally respected human rights. Fundamentally, they are a right to liberty. Politics, economic life, art, and religion become ethical only when they subordinate themselves to the demands of inquiry.

The basic ideal human right is to be treated as a potential partner in dialogue with all other human beings (Perelman 21). Others should be treated as such potential partners even if they do not behave as actual partners, even if they are violent. For potentially they are actual partners. Treating merely potential partners as real partners is part of a moral education aimed at realizing the potentiality. Yet even if they never enter into dialogue, let alone universal dialogue, we may still learn from their exercise of freedom. A conscious intention to participate in a quest for truth is not necessary to such participation. The basic human right is not the right to dialogue, but the right to freedom, including within limits a right not to dialogue. Repression of a right to strike in discussion is immoral.

A final note on Hegel. He is a principal exception in modern thought to the separation of human rights and theology. His *Society of Logic* is an attempt to show that personality (the self-concept) defines the Absolute, and is the most comprehensive achievement of the absolute."<sup>28</sup> This achievement is one of self-knowledge; as persons we are the vehicles of divine self-knowledge in art, religion, and philosophy. Such ambitious Hegelian claims may be true, but human rights would seemingly be in trouble if their justification depended on the establishment

<sup>28</sup> J. Habermas, op. cit., 20-21.

<sup>17</sup> Ibid., 12.

<sup>21</sup> Ibid., 97-

<sup>26</sup> C. Perelman, "Can the Rights of Man Be Founded?" in *The Philosophy of Human Rights: International Perspectives*, ed. A. Rosenbaum. Westport: Greenwood Press, 1980, 45-51.

<sup>21</sup> G.W.F. Hegel, *The Science of Logic*, translated by AN. Miller.. London: Allen & Unwin, 1969, 824.

of such metaphysical claims. Yet a more modest interpretation of Hegel, free of theology, is possible. Think of the absolute as the whole world, and think of knowledge pursuits as an activity of human inhabitants of this world. Working through its human inhabitants, the world comes to "know itself." What the part accomplishes, the whole world accomplishes through the part which acts on behalf of the whole. It is not clear that Habermas is saying anything different.

## 6. Abstract Morality and Ethical Institutions

As Habermas notes, the position adopted by making a rule of justice morally absolute is deontological " It is a version of rule deontology, though this rule cannot decide by itself between more particular rules. Particular rules and institutional applications must be invented. To take the moral point of view of dialogue is to seek to realize an external moral world order. To take the moral point of view in an immoral world is to confront immense interference from others on the path to truth even about building a better mousetrap. If only you respect the personality of a slave, the slave is still disabled as a full partner in discussion. He or she is not free to act according to insight. To take the moral point of view is to strive for a universal emancipation constraining some to respect the freedom of others.

Abstract morality (*Moralität*) leads to a quest for implementation by ethical institutions (*Sittlichkeit*). The moral law which says persons have a right to respect in their goal-directed action is too abstract to guide moral behavior. Concretely applied human rights exist in the institutions upon which human rights declarations are based. The United Nations human rights declaration did not create human rights; rather, it sought to explicitly declare, beyond the general right to freedom, particular rights already recognized in the conscience of civilized humanity. These rights are recognized in human life in general (Articles 1-3, 5, 29-30), in family life (12, 16, 25, 26), economic life (4, 13, 17, 22-23, 25, 26), political (15, 20-21, 28) and judicial activity (6-11, 14), leisure activities (13, 20, 24), and cultural life (18-20, 22, 26-27).

Since the United Nations is an association of sovereign states, the twenty-five commandments or "rights" contained in the 1948 Declaration function as an historically situated declaration and application of the universal moral law of respect for individual freedom. Human rights declarations are more or less authoritative or complete enumerations of ethical maxims for our consideration as students of moral philosophy. Since the only power of enforcement which the United Nations has is through the mobilization of public opinion and through non-obligatory intervention by the Security Council, the United Nations Declaration depends on "the conscience of mankind" (Preamble).

Each particular human right applies the general right to freedom in a particular, possibly transitory situation. Thus a non-ideal, actual right to a job presupposes an historical situation and institutions which in some countries cannot be taken for granted. Various hypothetical or actual applications of the right to freedom in

<sup>31</sup> J. Habermas, *op. cit.*, 174.

different situations show concretely what that right means. It means a right not to undergo torture, not to be prevented from assembling, not to have one's future choices curtailed by deprivation of primary education, etc.

Itemized applications of one basic human right help interpret the assertion of that right pragmatically by seeing how it applies to oneself, and empathetically by seeing how it applies to people in situations different from one's own. The unemployed understand the human right to freedom in part as the right to unemployment benefits. A child may understand the same human right in part as the right of the father or mother to remarry. The right to freedom by itself, without applications in different institutions, is an uninterpreted abstraction. Interpreting the assertion of a human right to freedom by applications to existing persons shows that some work has been accomplished towards realizing human rights. It also focuses attention on the work that remains. Such interpretation results in redefinition and expansion of the original abstract concept of the right to freedom. The best known example is the expansion of the right to freedom to include not only civil and political rights but also interventionist economic and welfare rights.

By itself the freedom to do whatever does not violate the equal freedom of others is indeterminate. The discovery that indoors smoking, as a health hazard, is not included in this freedom is recent. The right to freedom is a determinable right; its non-deducible determinations are discovered by empirical research. Many applications are not universal unless stated hypothetically. A right to housing, depending on weather, may not be a justified claim for certain nomadic populations.

Kant, despite his distinction between the phenomenal and noumenal worlds, pursued phenomenal traces of the noumenal in public political history. Morality is transformed into a phenomenal process of cause and effect if it is conformed to out of fear of punishment.

The idea of *jus gentium* understood as a right to war is strictly inconceivable, since it would be to decide what is right not according to external universally valid laws limiting the liberty of each individual, but by force and according to particular maxims... In the eyes of reason, there is no other means for states engaging in reciprocal relations to emerge from the absence of legality causing declared wars except, like individuals, by renouncing their anarchical liberty in order to adapt to the public constraint of laws, thus forming a "State of nations."<sup>32</sup>

A chief of state who declares war is a responsible moral person, if not a physical person.<sup>33</sup> A rule of making war when in a position of relative strength is not universalizable, since the war-making country may fall into a position of weakness. A chief of state or person acting on behalf of the state falls under moral judgment. If not a world government, then at least an "alliance" similar to the United Nations

<sup>32</sup> 1. Kant, *Zur ewigen Freiheit* (1795), Section 2, Article 2.

<sup>33</sup> 1. Kant, *Ober den Gemeinspruch: das snag in Theorie richtig sein, taugt aber nicht für die Praxis* (1793). Section 2.

<sup>3a</sup> 1. Kant, *Zur ewigen Freiheit* (1795), Section 2, Article 2.

is necessary to enforce the morality of peace. War is a violation of human rights of such horror that it must be prohibited by law, not just by conscience. The United Nations envisages the legal construction of human rights as international customary law.

### 7. Justified Commendability of Human Rights

In conclusion we return to the theoretical foundation of human rights. This question can only be answered by considering the justification of action in general. The justification of action is not mere commendation; it is commendation by some standard. Further, the commendability of a choice is always commendability to an agent who accepts the particular standard used. Commendation means giving a prospective agent a reason to act, and the only possible reason is that the commended action is required (or at least in conformity with) a standard already adopted by the agent. An action is ultimately commendable only if it conforms to the agent's ultimate standard. A standard is a benchmark with which an agent compares his or her actual achievement, acting insofar as possible to close the gap should any discrepancy be detected.

Different agents act by different ultimate standards. Our choice as advisors is whether or not to make any recommendation at all. It is sometimes justified to recommend action according to a standard we do not accept if we think the recommendation could advance moral education, the substitution of a more coherent for a less coherent standard.

Habermas's standard of discussion and human rights directed to truth emerges, from a Hegelian perspective, out of less coherent standards, in a struggle for recognition, passing through lordship and bondage. This struggle is the story of freedom. Robert Pippin criticizes Habermas for supposing that mutual recognition could be grounded merely in discussion.<sup>35</sup> Yet Habermas himself admits that relations of domination historically distort the practice of discussion. "The conditions necessary for all those concerned to be at every turn enabled to participate according to the rules in a practical discussion cannot be fulfilled by discussion itself."<sup>35</sup> Ethical discussion notoriously suffers from interference by, for example, the unbalanced distribution of wealth between the advanced industrial nations and the Third World.

Human rights largely do not exist in practice, even though local practices exist which, if universalized, would amount to such rights. It is not the existence of human rights which is shown pragmatically or presupposed by the discursive practices of anyone who would question it. But a procedure for justifying the maximum realization of non-existent human rights may be possible. First assume that the intentional non-implementation of these human rights is rationally justified. A contradiction is drawn from this assumption if rational justification consists in

<sup>25</sup> R. Pippin, "Hegel, Modernity, and Habermas," *The Monist*, Vol. 74, No. 3(1991), 348.

<sup>16</sup> J. Habermas, *op. cit.*, 27.

<sup>37</sup> *Ibid.*, 30.

testing our intuitions by discussion with as many persons as practically possible among those concerned to contribute testimony. If any such individuals are avoidably excluded from discussion, such as those suffering from avoidable famine, the conclusion of discussion is not rationally justified. Such rational justification can be practiced even if human rights do not exist, so long as every effort is made to include as many voices as possible, ideally all that are concerned to participate. But such efforts are made only by a commitment to implement as far as possible universal human rights. Dialogical justification does not assume that human rights exist, but it does assume that they are an ideal which ought to be realized as closely as possible. So we cannot assume the non-implementation of human rights to be justified without admitting human rights as a standard of conduct. The argument forces opponents of human rights to either abandon their opposition to human rights or reject the concept of rational justification as essentially open, non-exclusive discussion.

This concept of rational justifiability must be distinguished from the notion of justifiability to an agent. If agents have different ultimate standards, an action which is objectively justifiable to one agent may not be justifiable to another. If an action is commendable to an agent, he or she ought perform the action. In fact, to say that he or she "ought perform an action" means, in one sense, only that the action is required by the ultimate standard already adopted by the agent. Whether an agent is committed to an ultimate standard is a matter of behavioral fact. It is an observable fact that the agent does, or does not, seek to narrow the gap between a standard and a detected divergence in the real world from that standard. Therefore, saying that an agent ought do something is a purely factual claim. In one basic sense, ethical naturalism turns out to be true: it is possible to deduce "ought" from "is". If an agent, by promising or making a commitment to him- or herself, places an obligation on him- or herself to live by an ultimate standard, that agent has an ultimate obligation to do so, and so ought do so.

Let us now consider the commendability of human rights. Commitment to what ultimate standard justifies the assertion of universal human rights? For Habermas (as for Perelman), the quest for truth by discussion open to participation by all is such a standard. The assertion of human rights is not an external means to the end of seeking the truth; it is a constituent part of that search. Respect for liberty maximizes the opportunity of all to contribute, implicitly or explicitly, by action or word, to dialogue. Further, Habermas holds that this standard has already been adopted by all who rationally ask for a justification of any claim. To request a justification, to ask "Why?", is rationally to be open to a reply from any quarter.<sup>8</sup> This is his "pragmatic"<sup>39</sup> or "procedural"<sup>40</sup> justification of presupposed universal freedom.<sup>41</sup>

sa Ibid., 185-186.

<sup>39</sup> Ibid., 132.

<sup>40</sup> Ibid., 72.

<sup>41</sup> Ibid., 132.

But Robert Pippin is correct in criticizing such justification.<sup>42</sup> Discussion embracing all persons as contributors may be an idea, but it is not an existing human practice.<sup>41</sup> In admitting that discussion needs to be decompartmentalized,<sup>44</sup> he himself recognizes that cosmopolitan discussion is non-universal. Even if it were universal, xenophobia, sectarianism, and other such parallel conflicting practices would still exist. Further, since torture is practiced in some countries, it is not clear why a procedural justification of the presuppositions of torture would not be possible. Torture is *objectively commendable* to a torturer, but not *rationally commendable*. For the rational commendation of torture would have a justification which would be irrational in denying human rights of the tortured as free contributors to the justificatory dialogue. It is possible to justify human rights procedurally only to persons who are already committed to rational discussion in a potentially universal public. But such discussion is a tenuous creation of a world-historical story of freedom. Some opponents of human rights will reject dialogical reason except in a closed circle.

To conclude, it is not rational in seeking truth to deprive oneself of discussion with any group or individual, even those who retreat within closed circles of discussion. If discussants are not open to responses by all, the discussion seems irrational. To such persons human rights are not objectively commendable. here recourse must be taken by those committed to such rights to moral education, and to legal and social enforcement. Yet those who deny human rights have human rights, which merit special protection by those who explore the ground of rights.

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<sup>42</sup> R. Pippin, op. cit., 343-350.

<sup>43</sup> Ibid., 345-346.

<sup>44</sup> J. Habermas, op. cit., 18.