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An Ethics of Human Rights: Two Interrelated Misunderstandings

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An Ethics of Human Rights: Two Interrelated Misunderstandings

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Within the subject of an ethics of human rights are subsumed some of the most controversial debates in current philosophical and political discourse. It is helpful to begin by analyzing the debates on the underlying questions, before examining the overall subject of an ethics of human rights. The debates surrounding an ethics of human rights are similar, and a proper understanding of the parts leads to a clarification of the whole.

I. WHAT ETHICS?

The first part of the equation is ethics. Recent political discourse in the West shows great sensitivity to ethical issues. Whether the discussion revolves around humanitarian intervention for the Kurds, ethnic cleansing in the former Yugoslavia, relief efforts in Somalia, responsibility for the spread of contaminated blood in France, or the amount and type of aid to the former Soviet Union, ethical language has been and continues to be used by political figures.¹ This heightened sensitivity to ethical issues is a welcome change from the power politics that dominated discussions during the post-World War II period. Ethical issues, which had been considered secondary because of the imperatives of Realpolitik, have come to the fore. Nevertheless, the mere use of ethical language does not necessarily mean there is clarity of ethical thought.

A. *The First Level of Confusion: The Subject of Ethical Discourse*

The confusion surrounding ethical discussions has two levels. The first level concerns the subject of the ethical discourse. Normal ethical discourse concerns people. Any debate surrounding questions such as

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1. See Leslie Gelb, *Iran-Contra: Crimes Not Patriotism*, INTERNATIONAL HERALD TRIBUNE, Dec. 28, 1992, at 8; Garry Wills, *Bush Granting Pardons is Simply Unpardonable*, INTERNATIONAL HERALD TRIBUNE, Dec. 28, 1992, at 8.

"the good life" or "justice" ultimately reverts back to people. Specifically, in normal ethical discourse discussions focus on people within a certain geopolitical space. Political theory has fixed borders, whether within a community or a state. The limits of the community are not considered ethical problems. These border problems are reserved for metaethical discussions, that are usually deemed irrelevant to normative considerations.² In normative discourse, it is the problems involving the relations between a fixed group of people that draw our attention.

Traditional language concerning people has developed in interesting ways. Discussions about the limits of the community and the people involved are increasing. Even prior to the break-ups of the Soviet Union and Yugoslavia, theorists were broaching the frontiers of traditional normative political theory. Whereas John Rawls' *Theory of Justice*³ and Michael Walzer's *Just and Unjust Wars*⁴ focused within the state, others expanded normative arguments beyond the state.⁵ While cosmopolitan arguments have not been widely accepted, recent political events have strengthened the belief that traditional normative political theory that is limited within fixed borders is outmoded. Traditional normative political theory is seen as insufficient to the realities of an interdependent world. The first problem involved in ethical discourse, therefore, involves the parameters of the subjects involved and their geopolitical delimitation. Therefore, discussions about collectives are increasing.⁶

Notions of group rights and collective goods transpose normal ethical language to more than one person. Whereas the above discussion points to the expanding geography of the people involved in ethical discourse, the focus here is on the expanding numbers of the subjects involved in an expanding space. Movements away from limited borders also involves movements away from individual subjects, although the two are not directly related.⁷

2. See, e.g. TRADITIONS OF INTERNATIONAL ETHICS, (Terry Nardin and David Mapel eds., 1992) (discussions of certain ethical traditions without any focus on the subject of the traditions of the geopolitical delimitations of those subjects).

3. JOHN RAWLS, A THEORY OF JUSTICE (1971).

4. MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS (1977).

5. See CHARLES BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS (1979); STANLEY HOFFMAN, DUTIES BEYOND BORDERS (1981); ANDREW LINKLATER, MEN AND CITIZENS IN THE THEORY OF INTERNATIONAL RELATIONS (1982).

6. See Vernon Van Dyke, *The Individual, the State and Ethnic Communities in Political Theory*, 29 WORLD POL. 343 (1977).

7. It should be noted, however, that these discussions of collectivities often treat the group as an individual through the use of methodological individualism. In discussions about more than one person, the language of the individual continues to be used. Language hampers the ability to understand the complexity of group dynamics. It seems impossible to look inside the group, and at the relationship

Recent debate about the subject of ethics has pushed beyond the individual and collectivities to discussions of kinds of subjects. While there has been geographic and numerical expansion in the subjects of ethical discourse, a fundamental change in the very nature of the geographic-numerical subject discussed has evolved. This appears most clearly in discussions of state morality, where the state is merely a juristic entity. Thus, debates surround the tension between state morality and individual morality where the categories of the two are completely different.⁸ This same juristic debate also arises when we look at the ethical behavior of organizations⁹ and businesses.¹⁰ Discussions of the morality of international organizations and corporations are similar to discussions of state morality in that they turn around the elusive question of the subject. Whereas the objects and consequences of certain actions can be measured, identifying the subjects of the action is difficult. For example, there may be acts with no doers, such as the organization of a company considered responsible for an airline crash.¹¹

This non-human aspect of the subject of ethical debate includes the international system. The subject level can be elevated from the individual, state, or a specific organization to the entire international system. Thus, from Kenneth Waltz's description of the three levels of actors in the cause of war—man, state, and the international system—one can take each of the subjects and analyze it in terms of ethical discourse and ethical agency.¹² For each of the subjects, the problem in the West is the lack of an ethical vocabulary to deal with non-person actors. In situations dealing with actors beyond limited borders,

between the group and the outside at the same time. It is difficult to discuss the collectivities' rights in language other than individual rights. For a helpful discussion of methodological individualism, see Steven Lukes, *Methodological Individualism Reconsidered*, BRIT. J. OF SOC. 119 (1968). See generally Vernon Van Dyke, *Collective Entities and Moral Rights: Problems in Liberal Thought*, 44 J. POLITICS 21 (1982); Vernon Van Dyke, *Justice as Fairness: For Groups?*, 69 AM. POL. SCI. REV. 607 (1975).

8. See, e.g. JOHN DUNN, *INTERPRETING POLITICAL RESPONSIBILITY* ch. 8 (1990) (distinguishing between theoretical reason at the state level and practical reason at the level).

9. See generally Klaus-Gerd Geisen, *International Organization and Ethics: Cognitive Interests and the case for Pragmatic Constructivism* (Paper Presentation, The Inaugural Pan-European Conference in International Studies, Heidelberg, Germany, Sept. 16-20, 1992).

10. John C. Coffee Jr., *No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment*, 7 MICH. L. REV. 386 (1981).

11. See David Luban et al., *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2371-372 (1992) (discussion of the 1979 crash of an Air New Zealand jet where the blame was placed on the organization and not individuals); See also PETER FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* 145-54 (1984); Paul Thompson, *Why Do We Need A Theory of Corporate Responsibility?*, in SHAME, RESPONSIBILITY AND THE CORPORATION 115-35 (Hugh Cutler ed., 1986).

12. KENNETH WALTZ, *MAN, THE STATE AND WAR* (1959).

collectivities, and non-persons, the ethical vocabulary in the West lacks precision.

The level-of-analysis debate is a fundamental problem in theoretical discussions in international relations.¹³ This debate can be transposed to the level of modern ethical discourse. Not only is there not a consensus on what is the subject of international relations, but even if a consensus existed, the situation arises wherein there is no ethical language to deal with the subject chosen. The choice of the subject itself may be an ethical decision, and discussions about the subject of ethical discourse are metaethical debates. In sum, the metaethical debate surrounding the subject of ethical discourse, focused within the substantive debate surrounding non-individual or non-human subjects, raises perplexing questions.

B. The Second Level of Confusion: Two Concepts of Morality

The second level of confusion surrounding ethical discussions concerns the ethical perspective from which one discusses the subject once the subject has been decided. Thus, related to the ethical questions involving the choice of subject is the parallel question of the choice of ethical positions. The ethical position from which one observes the defined subject or the actions of that subject must be clarified. On what basis are there judgments? Who is to decide? While these problems are similar to those elucidated in the previous discussion of the subject of ethical discourse, they are not exactly the same. In the Western tradition, ethical positions are divided between the absolute and the situational.¹⁴ The absolute position involves a hierarchical given. The rules and principles from which behavior can be judged are usually otherworldly, as is the ultimate judgment. Situational ethics are horizontal and emerge from and interact with a given culture or society. A similar distinction between the vertical aspect of absolute ethics and the horizontal aspect of situational ethics can be found in the distinction in the sources of international law between formal treaty law and custom. Formal treaty law becomes a given, while customary law emerges from practice. This distinction represents two concepts of morality.¹⁵

13. J.D. Singer, *The Level-of-Analysis Problem in International Relations*, 14 *WORLD POL.* 77 (1967).

14. See Neil Cooper, *Two Concepts of Morality*, in *THE DEFINITION OF MORALITY* 72 (G. Wallace & A. Walker eds., 1970).

15. See HENRY SIDGWICK, *NATIONAL AND INTERNATIONAL RIGHT AND WRONG* 17 (1919).

There are two distinct ways of treating ethical questions . . . We may begin by establishing fundamental principals of abstract or ideal morality, and then proceed to work out deductively the particular rules of duty or practical conceptions of human good or well-being through the adoption of which these principals may be as far as possible realized under the actual

The first concept, what might be called ideal morality or just morality, focuses on the relation between something otherworldly and an individual. The rules by which persons are judged are given, and the judgment concerning the individual's response to those rules is beyond the individual or society. Social morality or ethics, on the other hand, concerns norms that emerge from interactions between people and the rules that emerge from those interactions. While the judgment in ideal morality is otherworldly, ethical judgment comes from the same interactions from which the norms emerged. Absolute ethics, ideal morality, or morality all focus on vertical relationships between rules and individuals. Situational ethics, social morality, or ethics all focus on horizontal relationships between social norms and people.

These two fundamental positions are traceable within different Western ethical and religious traditions. And, it is interesting to note the importance of these traditions when related to certain political cultures and systems.¹⁶ Amid all the current debates surrounding the spread of democracy and free-market economics, insufficient attention is given to the underlying philosophical assumptions behind specific political and economic systems; little attention is given to the development of what is called the "civic culture."¹⁷ Interest in the civic culture heightened during the 1960's with development programs in Africa. Most of the programs were failures and their failures were improperly analyzed. Today is a renewed burst of enthusiasm involving Eastern Europe, but the problem of creating civic culture from the experiences of the 1960's in the developing world has not been transformed. The relationship between different ethical and religious traditions and the socio-economic systems that have emerged out of those traditions is not seen. Democracy and free market economics are not mere political and economic tools to implant on a neutral body politic. Political and economic systems are directly related to larger ethical and cultural phenomenon. The ethical position one chooses, as well as the ethical subject one is focusing on, have direct bearings on political and economic decisions.

While this previous discussion may seem a digression from the subject of an ethics of human rights, it is a necessary prelude. Beneath the interest in human rights throughout the world is a major misun-

conditions of human life. Or, we may contemplate morality as a social fact-'positive morality' as it has been called-i.e. the body of opinions and sentiments as to right and wrong, good and evil, which find prevalent in the society of which we are members.

See also LYNNE RIENNER, *AN ETHIC OF RESPONSIBILITY IN INTERNATIONAL RELATIONS* 2-3, 23 (1991).

16. MAX WEBER, *THE PROTESTANT ETHIC & THE SPIRIT OF CAPITALISM* (1977).

17. GABRIEL ALMOND & SIDNEY VERBA, *THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS: AN ANALYTICAL STUDY* (1965).

derstanding concerning the nature of human rights. Paralleling the recent heightened interest in ethics without clarifying the subject and ethical position involved in discussing ethics, there has also been heightened interest in human rights without clarifying the human rights involved. The fundamental misunderstanding concerning the nature of human rights is related to the ambiguity within one's understanding of ethics. If the hypothesis is correct, the debates surrounding what is ethics and human rights are related. In sum, an ethics of human rights contains two interrelated misunderstandings.

II. WHAT HUMAN RIGHTS?

Debates on human rights have often focused on the split between civil and political rights and economic, social and cultural rights. These debates have been "noisy"¹⁸ and revelatory of deep philosophical and cultural biases. As has been noted, "the term 'human rights' is now used in non-Western cultures, and increasingly in the West, with content that is not identical with that of Western liberal rights."¹⁹ The division between these two sets of rights is represented within the International Bill of Human Rights. In following this premise, I will briefly examine the division within the Universal Declaration of Human Rights before describing the historical division between the two covenants on human rights. Having shown this division, I will discuss the relationship between the two sets of rights. In conclusion, we will examine the relationship between the two sets of rights in terms of our initial discussion of ethics, to show how the two sets of debates are interrelated.

A. *The Universal Declaration of Human Rights*

The Universal Declaration of Human Rights²⁰ was adopted by the General Assembly on 10 December 1948. The Declaration consists of a preamble and 30 articles. The articles are based on two major premises.²¹ Article 3 states the first major premise: "Everyone has the right to life, liberty and the security of person."²² This statement defines the basis of the individual rights which have been enveloped within civil and political rights. Article 3 introduces articles 4 to 21,

18. STANLEY HOFFMAN, DUTIES BEYOND BORDERS 100 (1981) (Hoffman refers to this debate as "the cause of a great battle").

19. Virginia A. Leary, *Postliberal Strands in Western Human Rights Theory: Personalist-Communitarian Perspectives*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 105 (Abdullah Ahmed An Na'im ed., 1992).

20. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

21. J. Morsink, *The Philosophy of the Universal Declaration*, 6 HUM. RTS. Q. 309, 331-332 (1984) (suggesting that Articles 1 and 22 are "lead" articles for a different type of list of rights).

22. G.A. Res. 217A (III), *supra* note 20, art.3.

which set out the civil and political rights contained within the Declaration. Among these rights are: freedom from slavery or servitude; freedom from torture or cruel, inhuman or degrading treatment or punishment; the right to recognition as a person before the law; the right to equal protection before the law; the right to effective legal remedy; freedom from arbitrary arrest, detention or exile; the right to a fair trial and public hearing by an impartial and independent tribunal; the right to be presumed innocent until proven guilty; freedom from interference with privacy, home or correspondence; freedom of movement and residence; the right of asylum; the right to nationality; the right to marry and to have a family; the right to own property; freedom of thought, conscience and religion; freedom of opinion and expression; the right to peaceful assembly and association; the right to take part in the government of one's country; and, to have equal access to public service in one's country.

Article 22 states the second major premise of the Universal Declaration:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.²³

Articles 23 through 27 set out the other economic, social and cultural rights contained in the Declaration. Among these rights are: the right to work and to equal pay for equal work; the right to just and favorable remuneration; the right to form and join trade unions; the right to rest and leisure, including reasonable limitations on working hours and holidays with pay; the right to a standard of living adequate for health and well-being; motherhood and childhood are entitled to special care and assistance; the right to education; the right to participate in the cultural life of the community.

Within the Universal Declaration are two major premises and two sets of rights. The separation between the two groups of rights is accentuated by the introduction to Article 22 which begins "Everyone, as a member of society . . ." ²⁴ Why is this parenthetical phrase necessary? If one re-reads the first group of articles, it is obvious that the rights described are actualized within society. The civil and political rights described can only be actualized within a society where there is a legal system. In spite of this obvious statement, the introduction to Article 22 is an important reminder how civil and political rights are often distinguished from economic, social and cultural rights. The parenthetical introduction to Article 22 infers a distinction between non-

23. G.A. Res. 217A (III), *supra* note 20, art.22.

24. *Id.*

social and social rights. As Craig Scott has noted, "[t]he political rights in Articles 1 to 21 and the economic rights in Articles 22 to 27 are said to be based on two different philosophical anthropologies: humans as rational or natural agents, and humans as social beings."²⁵

B. *The International Covenants on Human Rights*

The history of the International Covenants on Human Rights is highly informative of the debate surrounding the two sets of rights and their separation.²⁶ This history reinforces the division between the two premises in the Declaration and the inclusion of the parenthetical aside in Article 22. In 1948, the General Assembly requested the Human Rights Commission to prepare a draft covenant on human rights. One covenant was envisioned. In 1949, the Commission examined the text of the draft and in 1950 revised the first 18 articles.

As part of the revision of the Draft International Covenant on Human Rights, the General Assembly adopted Resolution 421 (V) in December 1950.²⁷ Section E of the Resolution said:

Whereas the Covenant should be drawn up in the spirit and based on the principles of the Universal Declaration of Human Rights,

Whereas the Universal Declaration regards man as a person to whom civic and political freedoms as well as economic, social and cultural rights indubitably belong,

Whereas the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent,

Whereas, when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal of the free man,

7. (a) *Decides* to include in the Covenant on Human Rights economic, social and cultural rights and an explicit recognition of

25. Craig Scott, *The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights*, 27 OSGOODE HALL L.J. 769, 804-805 (1989).

26. See generally Memorandum by the Secretary-General on the Draft International Covenant on Human Rights and Measures of Implementation (Historical Analysis of the Question), 6th Sess., U.N. Doc. A/C.3/559 (Nov.5, 1951) and Draft International Covenant on Human Rights, 10th Sess., U.N. Doc. A/2929 (1955). At about the same time that this debate was going on, a group in France drafted a declaration of rights which tried to correct what was believed to be the individualism of the 1789 French Declaration of the Rights of Man and Citizen. The revised French Declaration of Rights was adopted in 1946 and incorporated a recognition of economic and social rights. For a fascinating account of this Declaration, see LEARY, *supra* note 19, at 116-124. The International Covenants on Human Rights, G.A. Res. 2200 Annex, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, reprinted in 99 U.N.T.S. 171, 6 I.L.M. 368 (1967).

27. G.A. Res. 421, U.N. GAOR, 5th Sess.

equality of men and women in related rights, as set forth in the Charter of the United Nations;

(b) *Calls upon* the Economic and Social Council to request the Commission on Human Rights, in accordance with the spirit of the Universal Declaration, to include in the draft Covenant a clear expression of economic, social and cultural rights in a manner which relates them to the civic and political freedoms proclaimed by the draft Covenant;

(c) *Calls upon* the Economic and Social Council to request the Commission on Human Rights to take steps as are necessary to obtain the co-operation of other organs of the United Nations and of the specialized agencies in the consideration of such rights;

(d) *Requests* the Economic and Social Council to consider, at its twelfth session, the methods by which the specialized agencies might co-operate with the Commission on Human Rights with regard to economic, social and cultural rights;

Why were economic, social and cultural rights not included in the original draft? Why is there this inclusion after the drafting of the first 18 articles? As in the Universal Declaration, economic, social and cultural rights came after civic and political rights.

The debate that surrounded the inclusion of economic, social and cultural rights in the one covenant was highly contentious. Even after the General Assembly had resolved to have one covenant and had called upon the Economic and Social Council to request the Commission on Human Rights to include economic, social and cultural rights in the one covenant, the debate surrounding the number of covenants and the inclusion of economic, social and cultural rights continued. Resolution 384 (XIII) of the Economic and Social Council²⁸ adopted on 29 August 1951 includes the Report of the Commission on Human Rights (seventh session). Section C of Resolution 384 (XIII) said:

Having noted General Assembly resolution 421 (V) calling upon the Council to request the Commission on Human Rights to include in the draft Covenant on Human Rights a clear expression of economic, social and cultural rights in a manner which related them to the civic and political freedoms proclaimed by the previous draft of the Covenant,

Noting that the revised draft Covenant, prepared by the Commission on Human Rights at its seventh session in response to this request, contains provisions relating, *inter alia*, to such rights,

Considering that these provisions provide for two different methods of implementation, without indicating which method or methods are to apply:

(a) To political and civic rights

(b) To economic, social and cultural rights,

Conscious of the difficulties which may flow from embodying in one covenant two different kinds of rights and obligations,

28. E.S.C. Res. 384, U.N. ESCOR.

Aware of the importance of formulating, in the spirit of the Charter, the Universal Declaration of Human Rights and General Assembly resolution 421 (V), economic, social and cultural rights in the manner most likely to assure their effective manipulation,

Invites the General Assembly to reconsider its decision in resolution 421 E (V) to include in one covenant articles on economic, social and cultural rights, together with articles on civic and political rights.

The Third Committee devoted almost two months to the question whether one or two covenants on Human Rights should be drafted by the Commission on Human Rights. The debate is fascinating reading; a reminder of the political and ideological differences that separated countries at that time, but also a reminder that the schism between the two sets of rights was very profound. Many of the arguments turned on the problem of implementation, as Mrs. Roosevelt aptly states:

[considering] the longer period of time which it will take and the long-range planning which will be necessary to achieve the objectives of the economic and social provisions of the covenant . . . [T]he draft covenant on Human Rights submitted to us by the Commission on Human Rights recognizes that the enactment of legislation is generally sufficient to put into effect civil and political rights, while legislation is not sufficient for the attainment of economic and social rights. A much broader programme of action is necessary.²⁹

But, the arguments reflected more deep-seated differences than merely implementation.

Through Resolution 384 (XIII)³⁰, the Economic and Social Council was asking the General Assembly to reverse its decision on one covenant, a covenant that included economic, social and cultural rights in the same document with civic and political rights. Whereas the Gener-

29. U.N. GAOR, 6th Sess., 374th plen. mtg. at 83-84, U.N. DOC. (Feb. 4, 1952) (statement of Mrs. Roosevelt). The same type of argument was made by the United States many years later:

We are, therefore, ready to subscribe enthusiastically to the proposition that respect for civil and political rights, for free speech, and free election, goes hand in hand with economic progress. We would not shy away from going further in this discussion, but ask whether that should be done under the rubric of human rights.

U.N. Hum. Rts. Comm., 48th Sess. (statement of Richard Schifter, U.S. Assistant Secretary of State for Human Rights and Humanitarian Affairs). *See also* Morris B. Abram, *Human Rights and the United Nations: Past as Prologue*, 4 HARV. HUM. RTS. J. 69 (1991). *But see* CYRUS R. VANCE, BUREAU OF PUBLIC AFFAIRS, U.S. DEPT OF STATE, PR 194, HUMAN RIGHTS POLICY 1 (Apr. 30, 1977). *But cf.* WARREN CHRISTOPHER, BUREAU OF PUBLIC AFFAIRS, U.S. DEPT OF STATE, PR 374, HUMAN RIGHTS: PRINCIPLE AND REALISM 1 (Aug. 9, 1977) (position was re-affirmed).

30. E.S.C. Res. 384, *supra* note 28.

al Assembly had given specific orders for one covenant in Resolution 421 (V)³¹ at the Fifth Session in 1951—explicitly placing economic, social and cultural rights together with civic and political rights—the General Assembly reversed itself in Resolution 543 (VI)³² at the Sixth Session in 1952. Resolution 543 (VI) on the Preparation of two Draft International Covenants on Human Rights said:

Whereas the Economic and Social Council, by resolution 303 I (XI) of 9 August 1950, requested the General Assembly to make a policy decision concerning the inclusion of economic, social and cultural rights in the Covenant on Human Rights,

Whereas the General Assembly affirmed, in its resolution 421 E (V) of 4 December 1950, that “the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent” and that “when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal of the free man”,

Whereas the General Assembly, after a thorough and all-round discussion, confirmed in the aforementioned resolution the principle that economic, social and cultural rights should be included in the Covenant on Human Rights,

Whereas the General Assembly, at the request of the Economic and Social Council in resolution 384 (XIII) of 29 August 1951, reconsidered this matter at its sixth session,

The General Assembly

1. Requests the Economic and Social Council to ask the Commission on Human Rights to draft two Covenants on Human Rights, to be submitted simultaneously for the consideration of the general Assembly at its seventh session, one to contain civil and political rights and the other to contain economic, social and cultural rights, in order that the General Assembly may approve the two Covenants simultaneously and open at the same time for signature, the two Covenants to contain, in order to emphasize the unity of the aim in view and to ensure respect for and observance of human rights, as many similar provisions as possible, particularly in so far as the reports to be submitted by States on the implementation of those rights are concerned.³³

The International Covenant on Civil and Political Rights³⁴ was adopted by Resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976. The International Covenant on Economic, Social and Cultural Rights³⁵, also adopted and opened for signature,

31. G.A. Res. 421, U.N. GAOR, 5th Sess.

32. G.A. Res. 543, U.N. GAOR, 6th Sess.

33. *Id.*

34. International Covenant on Civil and Political Rights, G.A. Res. 2200 Annex, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966).

35. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 Annex, U.N. GAOR, 21st Sess., Supp. No. 16, (1966), reprinted in 993 U.N.T.S. 3.

ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976. Although various General Assembly resolutions have reaffirmed that civic and political and economic, social and cultural rights are "interconnected and interdependent,"³⁶ and although the two covenants were adopted by the same Resolution, there are two separate covenants³⁷ and there is no denying that "[t]his division has influenced international activities in the field of human rights."³⁸

The two premises within the Universal Declaration and the division of the Covenant into two covenants reflect ideological and philosophical differences. The "Western doctrine" has assumed that "although it is not really possible to rank human rights in order of preference, civil and political rights appear to be of primary importance."³⁹ Economic, social and cultural rights have been defended by socialist States and the developing world.⁴⁰ Without entering into the ideological struggle, I will now examine the relationship between the two sets of rights.

36. See *Conference Resolution XVII*, The International Conference on Human Rights in Teheran (1968), endorsed in G.A. Res. 2442, U.N. GAOR, 23rd Sess.; G.A. Res. 32/130, U.N. GAOR, 32d Sess., Supp. No. 45, at 150, U.N. Doc. A/32/45 (Dec. 16, 1977); G.A. Res. 40/114, U.N. GAOR, 40th Sess., (establishment of the Committee on Economic, Social and Cultural Rights); G.A. Res. 41/117, U.N. GAOR, 41st Sess., (20th Anniversary of the Covenants); *Declaration on the Right to Development*, G.A. Res. 41/128, U.N. GAOR, 41st Sess.

37. For a detailed analysis of the reasons for separate instruments, see Scott, *supra* note 25, at 791-799.

38. *Preliminary Report of The New International Economic Order and the Promotion of Human Rights: Realization of Economic, Social and Cultural Rights*, ORGAN?, SESSION?, MEETING/ITEM at 5, U.N. Doc. E/CN.4/Sub.2/1989/19, (June 28, 1989)(Mr. Danilo Türk, Special Rapporteur); *Final Report of The New International Economic Order and the Promotion of Human Rights: Realization of Economic, Social and Cultural Rights*, MEETING/ITEM at 3, U.N. Doc. E/CN.4/Sub.2/1992/16 (1992). Louis Henkin analyzed the division as follows:

Western States fought for, and obtained, a division into two covenantsThe two Covenants recognize the difference in the character of rights in various subtle ways. For example, the Covenant on Civil and Political Rights is drafted in terms of the individual's rightsThe Covenant on Economic, Social and Cultural Rights, on the other hand, speaks only to States, not to the individualThere was wide agreement and clear recognition that the means required to induce compliance with social-economic undertakings were different from those required for civil-political rights.

Louis Henkin, *Introduction*, in *THE INTERNATIONAL BILL OF RIGHTS* 10 (Louis Henkin ed., 1981).

39. ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 297 (1986).

40. *Id.* at 301, 307-08.

*C. The Relationship Between Civic and Political Rights and Economic, Social and Cultural Rights*⁴¹

The relationship between the two sets of rights has been set out in various ways. In almost all cases, one finds variations on similar themes that have become part of accepted thought over the years.⁴² Historically, it is noted, the first phase of human rights focused on civil and political rights and traditional Western sources. While these rights have generally been associated with the eighteenth century and the French and American Revolutions, they can be traced back to the Magna Carta of 1215 and the thoughts of traditional Western philosophers.⁴³ The second phase of human rights resulted from the ideas of the late nineteenth and early twentieth centuries, and the Mexican and Russian Revolutions. Ideas of economic and social justice which grew out of the Industrial Revolution, produced economic, social and cultural rights which were carried on by newly independent States in their drive for development. In this sense, economic, social and cultural rights were "second generation rights". As Adam Seligman notes: "The addition of social rights to the civil and political rights of citizens manifests not only a greater extension and universalization of citizenship but also a mediation of that extreme individualism that had characterized nineteenth-century liberal-individualist political theory."⁴⁴

A simple list of the relationship between economic, social and cultural rights and civil and political rights might look like this.⁴⁵

<i>Economic, Social and Cultural Rights</i>	<i>Civil and Political Rights</i>
1. Positive	vs.Negative
2. Resource-Intensive	vs.Cost-Free
3. Progressive	vs.Immediate
4. Vague	vs.Precise
5. Unmanageably Complex	vs.Manageable

41. Our discussion will focus mainly on economic and social rights. For a good discussion of cultural rights that criticizes the liberal individualist perspective, see Chandran Kukathas, *Are There Any Cultural Rights?*, 20 POL. THEORY 105 (1992).

42. Philip Alston helpfully lays out these "received" wisdoms and discusses them in *Prevention Versus Cure as a Human Rights Strategy*, in DEVELOPMENT, HUMAN RIGHTS AND THE RULE OF LAW 49-54 (Pergamon Press 1981) (Conference Report April 27-May 1, 1981, International Commission of Jurists).

43. Robert H. Kapp, *Some Preliminary Views on the Relationship between Civil and Political Rights and Economic, Social and Cultural Rights in the Context of Development and on the Right to Development* 3, (1978) (Mimeo, The International Commission of Jurists, Geneva).

44. ADAM SELIGMAN, *THE IDEA OF CIVIL SOCIETY* (1992).

45. See Scott, *supra* note 25, at 833.

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|---|---------------------------------------|
| 6. Ideologically Divisive/
Political | vs. Non-Ideological/
Non-Political |
| 7. Non-Justiciable | vs. Justiciable |
| 8. Aspirations or Goals | vs. "Real" or "Legal" Rights |

Attempts at resolving the division between the rights have been done by several authors, among them Craig Scott,⁴⁶ Philip Alston,⁴⁷ Asbjorn Eide,⁴⁸ Henry Shue,⁴⁹ and Danilo Türk.⁵⁰ These efforts have focused on showing that even negative rights — which are supposed to entail only government abstention — require positive action. Further, that notions of personhood, basic rights, minimum sufficiency, minimum core content and dignity require that economic, social and cultural rights be considered along with civil and political rights. All of these authors argue against a hierarchy of rights and against the second-class status of economic, social and cultural rights — a second-class status that can be observed through the enormous disparity between the UN committees mandated to supervise the rights.⁵¹ Since economic, social and cultural rights have been under constant attack in the West, and especially in the United States, these authors have tried to salvage these rights. According to Danilo Türk, "the era of the hierarchization of human rights is more or less over and that a unified approach is to be sought in the interpretation of the relationship between the two major sets of human rights."⁵² Rather than repeat the work of these authors, I conclude this paper with an investigation that leads back to the original discussion of the complexity of understanding ethics. I have shown certain differences within understanding ethics and human rights. Thus, I conclude by examining how these differences are interrelated.

III. INTERRELATED MISUNDERSTANDINGS

The major argument followed in this examination is one proposed by Joseph Raz.⁵³ Raz' basic point is that "morality is not right-

46. *Id.*

47. Alston, *supra* note 42, at 49-54.

48. ASBJORN EIDE, RIGHT TO ADEQUATE FOOD AS A HUMAN RIGHT 10-16 (Centre For Human Rights Study Series 1, 1989).

49. HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY (1980).

50. See Türk, *supra* note 38.

51. See Philip Alston, *Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 332 (1987). For an interesting discussion of the legal differences, see Marc Bossuyt, *La Distinction Juridique Entre Les Droits Civils et Politiques et Les Droits Economiques, Sociaux et Culturels*, 8 REVUE DES DROITS DE L'HOMME 783 (1975).

52. Türk, *supra* note 38, AT 9.

53. JOSEPH RAZ, *Rights-Based Moralities*, in THEORIES OF RIGHTS 182 (Jeremy

based."⁵⁴ He sets this out by endorsing the principle that "the explanation and justification of the goodness or badness of anything derives ultimately from its contribution, actual or possible, to human life and its quality."⁵⁵ Thus, Raz' "humanism" is not in and of itself a moral theory. Rather, it is a basis on which to judge moral theories.

Raz' humanistic argument leads away from right-based moralities that focus on a morality of rights and duties. In describing the impoverishment of rights-based moralities, he notes that they: (1) do not give reasons for actions which do not amount to duties; (2) do not account for the nature of acts which are praiseworthy and yet their omission is not morally wrong (supererogation); and, (3) do not allow moral value to virtue and the pursuit of excellence.

What are the implications of Raz' argument concerning the impoverishment of right-based moralities? Raz argues that right-based moralities are usually individualistic, and that "individualistic moralities are humanistic moralities which hold that collective goods have instrumental value only."⁵⁶ Raz posits that humanism is compatible with holding collective goods to be intrinsically valuable, and not instrumentally valuable. He uses this example of art, "A life with art is a good in itself, the existence of works of art is a constituent good and the quality of life with art which explains its value is the ultimate good. All three are intrinsic goods."⁵⁷ Raz uses this argument to show that right-based theories which insist upon duties are limited. He says that "if . . . others' duty to me is confined to not violating my integrity as a person and providing me with basic needs, then I have no right to collective goods as my interest in them is not among my basic needs for survival. Generally, since the maintenance of a collective good affects the life and imposes constraints on the activities of the bulk of the population it is difficult to imagine a successful argument imposing a duty to provide a collective good which is based on the interest of one individual."⁵⁸ The example of art is used to show that not only life and its quality are intrinsically valuable. Raz' major point is that right-based theories "tend to be individualistic and to deny the intrinsic value of collective goods."⁵⁹

Raz's argument, to this point, is very similar to the initial distinction made between ideal morality and social morality. Ideal morality is individualistic in that the rights deriving from ideal morality come down to the individual. That is why in the discussion of ideal morality,

Waldron ed., 1984).

54. *Id.* at 182.

55. *Id.* at 183.

56. *Id.* at 186.

57. *Id.* at 189.

58. *Id.* at 190.

59. *Id.* at 189.

the fact was stressed that collective rights are often seen as individual rights through methodological individualism. Civil and political rights in their negative aspect of non-interference can be seen to be derivative of ideal morality. The individual is given certain rights-by his Creator, according to the preamble of the United States Declaration of Independence⁶⁰-and those rights cannot be interfered with. In this sense, just as ideal morality is hierarchical and vertical, so are civil and political rights. The separate individual who is protected by civil and political rights is part of a historical/religious understanding of the separation of the public and the private. As Adam Seligman has noted:

[T]he differentiation of civic selfhood from communal or collective attributes was a process that, in Western Europe, took place over hundreds of years. It owed much to the religious doctrines of sectarian or ascetic Puritanism, from which the notions of the individual as possessing metaphysical and moral value emerged. That selfhood, which, as both Marcell Mauss and Max Weber realized, was validated in the *Declaration des Droits de l'homme et du citoyen*- stemmed, ultimately, from a religious paradigm whose roots were firmly tied to Reformation religion."⁶¹

One cannot separate civil and political rights from the religious/historical underpinnings from which they emerged.

But what of economic, social and cultural rights, and social morality? Raz' argument is based on his understanding of personal autonomy. He does not begin from a social understanding of the individual, but seeks to reinterpret how people generally view personal autonomy in a social context. First, Raz distinguishes between the autonomous person's life as what it is, but also by "what it might have been and by the way it became what it is."⁶² Autonomy, for Raz, is based on the notion of achievement through choices. Second, for Raz a person is autonomous:

if the conditions of autonomous life obtain. Those are partly to do with the state of the individual concerned (that he is of sound mind, capable of rational thought and action, etc.) and partly to do with the circumstances of his life (especially that he has a sufficient number of significant options available to him at different stages of his life).⁶³

Thus, in both his description of cognizant individual choices and in his notion of sufficient number of significant choices available to the cognizant individual, Raz has moved away from justifying rights merely to protect autonomy. For Raz, "the ideal of personal autonomy (whose realization is clearly a matter of degree) requires not merely the pres-

60. United States Declaration of Independence

61. Seligman, *supra* note 44, at 6.

62. Raz, *supra* note 53, at 191.

63. *Id.*

ence of options but of acceptable ones."⁶⁴ Certain social conditions must exist for there to be personal autonomy.

A person whose every major decision was coerced, extracted from him by threats to his life or that of his children, has not led an autonomous life. Similar considerations apply to a person who has spent his whole life fighting starvation and disease, and has no opportunity to accomplish anything other than to stay alive . . .⁶⁵

Now whereas this last statement sounds very much like the arguments for economic, social and cultural rights being put on the same footing as civil and political rights based on personhood and dignity, remember that Raz is developing his argument in contradiction to right-based theories. Raz is arguing that there are certain collective goods that go beyond rights and duties that are intrinsically valuable. He is pointing to the fact that if autonomy is an ultimate value, which is argued by those who insist on only civic and political rights, then autonomy "affects wide-ranging aspects of social practices and institutions . . . Almost all major social decisions and many of the considerations both for and against each one of them bear on the possibility of personal autonomy, either instrumentally or inherently."⁶⁶ He is saying that there are values at the foundations of morality apart from rights.

Raz suggests that although governments do have duties, these duties do not derive from the rights of individual human beings. One of the difficulties with right-based theories is that they often link rights with duties, but one cannot locate whose duty corresponds to certain peoples' rights. For example, when Shue says that "basic rights . . . are everyone's minimum reasonable demands upon the rest of humanity,"⁶⁷ he footnotes this by adding, "[i]t is controversial whether rights are claims only upon members of one's own society or upon other persons generally."⁶⁸ By arguing for certain intrinsic collective goods which form the foundation of moral values, Raz is suggesting that "governments have duties which do not derive from the rights of individual human beings."⁶⁹

Without going into concrete examples of the kinds of intrinsic duties that governments have that do not refer back to individuals, it is important to note Raz' conclusion where he makes a distinction in defining narrow morality. This point is crucial because it refers to the discussion of the difference between ideal and social morality, and the two sets of rights. I quote Raz at length on this:

64. *Id.* at 192.

65. *Id.*

66. *Id.* at 194-95.

67. SHUE, *supra* note 49, at 19.

68. *Id.* at 178.

69. RAZ, *supra* note 53, at 195.

Morality in the narrow sense is meant to include only all those principles which restrict the individual's pursuit of his personal goals and his advancement of his self-interest. It is not 'the art of life', i.e. the precepts instructing people how to live and what makes for a successful, meaningful, and worthwhile life. It is clear that right-based moralities can only be moralities in the narrow sense. An individual's rights do not provide him with reasons for action (though if he can expect his rights to be respected they inform him of some of his opportunities). It is impossible to assume that an individual can conduct his whole life on the basis of the sole motivation of respecting other people's rights. Nor is there any reason to commend such a mode of existence. It would be a life of total servitude to others. On the other hand, morality in the narrow sense may be right-based. Rights do exactly what narrow morality is supposed to do. They set limits to the individual's pursuit of his own goals and interests. On the plausible assumption that the only valid grounds on which the free pursuit by people of their own lives can be restricted are the needs, interests, and preferences of other people it becomes plausible to regard (narrow) morality as right-based.

[T]he objection is to the notion that . . . one can divide one's principles of action into those concerned with one's own personal goals and those concerned with others, in such a way that the principles are independent of each other. The mistake is to think that one can identify, say, the rights of others, while being completely ignorant of what values make a life meaningful and satisfying and what personal goals one has in life. Conversely, it is also a mistake to think that one can understand the values which can give meaning to life and have personal goals and ideals while remaining ignorant of one's duties to others⁷⁰

Raz is trying to break away from the distinction between a narrow sense of morality focusing on the individual's pursuit of his own's interests and a larger sense of morality involving others. His argument against right-based theories is that they accentuate this individualistic aspect of moral individualism. The very language of rights in the legal sense is inherently individualistic.⁷¹ Raz' examination of intrinsic collective goods puts in the forefront those values which cannot be isolated in terms of an individual's rights and duties. As he notes, "The confrontational view of morality which pitches a person's own interests and goals as not only occasionally in conflict with his obligations to others but as deriving from independent and fundamentally different sources is essentially an individualistic conception."⁷²

70. *Id.* at 198-99.

71. See Robin West, *Taking Freedom Seriously*, 104 HARV. L. REV. 43 (1990) (impassioned argument against "liberal legalism's court-centered and rights-centered strategy for the protection of individual liberty").

72. RAZ, *supra* note 53, at 200.

How then does the concept of ethics of human rights concern two interrelated misunderstandings? On the most superficial level, there is the objection that both ethics and human rights contain dichotomies that are much too narrow. By imagining an ideal morality separated from social interaction, one winds up with such absurd questions as: Did Robinson Crusoe have rights before the arrival of Friday? By imagining civil and political rights separated from economic, social and cultural rights, one imagines such absurd situations as a society of free speech and free elections where there would be no concern for economic, social and cultural rights, or vice versa. The recent demise of Communism should put to rest once and for all the famous Omelette thesis attributed to Lenin: "You can't make omelettes without breaking eggs."⁷³ This thesis has been favored by those who argued that one set of rights had to be sacrificed for the other.⁷⁴ Secondly, and in a deeper sense, Raz' point is that the way to overcome the dichotomy between ideal and social morality is not necessarily through right-based theories. Ideal and social morality may be the foundations for certain values which may be expressed through certain human rights, but they cannot be limited to only human rights.

Thus, ethics and human rights are both misunderstood in an interrelated fashion when they are interpreted in the narrow sense. A wider understanding of ethics allows one to see the role of human rights in a broader context. The difficulty with human rights discussions, even those that accentuate the correlation between duties and rights, is their attempt to narrow the focus of the discussion away from this larger picture to a legalistic conception of rights without a moral foundation. The privileging of rights discussion might work against itself by ignoring the basis on which the rights were based. Morality in the largest sense is not right-based, although human rights are based on morality.⁷⁵ Raz has persuasively shown that human rights are a

73. For a fascinating discussion of the omelette thesis, see Paul Sieghart, *Economic Development, Human Rights and the Omelette Thesis*, 1 DEV. POL'Y REV. 95 (1983) (Sieghart, using very primitive indicators, tried to show that there is a correlation between economic development with the protection and enjoyment of human rights). For a recent attempt to use indicators to measure compliance with the International Covenant on Economic, Social and Cultural Rights, see Thomas Jabine and Denis Johnston, *Socio-economic Indicators and Human Rights* (January 1993) (Background Paper, American Association for the Advancement of Science) (Presented at the Seminar on Appropriate Indicators to Measure Achievements in the Progressive Realization of Economic, Social and Cultural Rights, Geneva).

74. See, e.g., Rhoda Howard, *The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa*, 5 HUM. RTS. Q. 467 (1983).

75. Dorothy V. Jones makes this historical point in her discussion of the evolution of international ethics during the 20th century:

What is frequently overlooked in discussions . . . is that the various civil, political, social, economic, and cultural rights for human beings articulated by the states, especially since 1945, were not set down upon a blank

subset of morality. It is important to understand that both sets of rights examined in this paper are included in the subset, as well as the fact that there are areas outside of the subset that belong to the larger whole — what Raz refers to as intrinsic collective goods. This examination of the interrelated misunderstandings of an ethics of human rights shows that narrow understandings of ethics can include certain aspects of human rights, but that a complete understanding of human rights can only be encompassed within a larger understanding of ethics.

As H.L.A. Hart points out:

The essential connection between the notion of right and the justified limitation of one's person freedom by another may be thrown into relief if we consider codes of behavior which do not purport to confer rights but only to prescribe what should be done [T]he Decalogue is perhaps the most important example . . . it would be a surprising interpretation of (the Ten Commandments) that treated them as conferring rights. In such an interpretation, obedience to the Ten Commandments would have to be conceived as due to or owed to individuals, not merely God, and disobedience not merely as a wrong to (as well as harm to) individuals. The Commandments would cease to read like penal statutes designed only to rule out certain types of behavior and would have to be thought of as rules placed at the disposal of individuals and regulating the extent to which they may demand certain behavior from others.⁷⁶

The claims of rights exist within a larger framework that might include such notions as "Rules are to be respected". There are overriding ethical principles within which we can discuss specific sorts of rights. Friedrich Kratochwil talks of "constitutive principles . . . establishing the practice in which the assertion of specific 'rights' figures prominently."⁷⁷ It is in this sense, he argues, that arguments for certain human rights, such as welfare rights, are based on what *is* right. There is an obvious distinction between 'what is right' and 'having a right,' but one cannot imagine having a right that is not based on 'what is right.'

In order to discuss an ethics of human rights, therefore, focus should be placed on the ethical position that determines the specificity of the human rights under consideration. This discussion showed that

page. They were inserted into a thickly textured mesh of already existing states rights and duties

DOROTHY V. JONES, *ETHICS AND SECURITY IN THE WORLD OF THE WARLORD STATES* 155 (1991).

76. H.L.A. Hart, *Are There Any Natural Rights*, 64 *PHIL. REV.* 175, 182 (1955).

77. FRIEDRICH R. KRATOCHWIL, *RULES, NORMS AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS* 168 (1989).

a narrow conception of morality will lead to a narrow definition of rights. A different conception of ethics based on social morality will lead us away from the dichotomy between civil and political rights, and economic, social and cultural rights. Ethics and human rights are often misunderstood in a related fashion; a proper understanding of ethics allows us to clarify the relationship between ethics and human rights and to conceive of a cogent ethics of human rights.

