

[From] *Social Philosophy*

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CHAPTER 6

Human Rights

1. Moral Rights

Legal and institutional rights are typically conferred by specific rules recorded in handbooks of regulations that can be observed and studied by the citizens or members subject to the rules. But not all rights are derived from such clearly visible laws and institutional regulations. On many occasions we assert that someone has a right to something even though we know there are no regulations or laws conferring such a right. Such talk clearly makes sense, so any theory of the nature of rights that cannot account for it is radically defective.

The term "moral rights" can be applied to all rights that are held to exist prior to, or independently of, any legal or institutional rules. Moral rights so conceived form a genus divisible into various species of rights having little in common except that they are not (necessarily) legal or institutional. The following are the main specific senses of "moral rights": (1) A *conventional right* is one derived from established customs and expectations, whether or not recognized by law (e.g., an old woman's right to a young man's seat on a subway train). (2) An *ideal right* is not necessarily an actual right of any kind, but is rather what *ought* to be a positive (institutional or conventional) right, and would be so in a better or ideal legal system or conventional code. (3) A *conscientious right* is a claim the recognition of which as valid is called for, not (necessarily) by actual or ideal rules or conventions, but rather by the principles of an enlightened individual conscience. (4) An *exercise right* is not, strictly speaking, a right at all, though it is so-called in popular usage; it is simply moral justification in the exercise of a right of some other kind, the latter right remaining in one's possession and unaffected by considerations bearing on the rightness

or wrongness of its exercising. When a person speaks of a moral right, he may be referring to a generically moral right not further specified, or to a right in one of these four specific senses; sometimes the context does not reveal which sense of "moral" is employed, and the possibility of equivocation is always present.

2. Human Rights

Among the rights that are commonly said to be moral in the generic sense (that is, independent of legal or other institutional recognition) are some also called "human rights." Human rights are sometimes understood to be ideal rights, sometimes conscientious rights, and sometimes both. In any case, they are held to be closely associated with actual claims. If a given human right is an ideal right, then human rightholders do or will have a claim against political legislators to convert (eventually) their "moral right" into a positive legal one. If the human right in question is a conscientious right, then it is an actual claim against private individuals for a certain kind of treatment—a claim that holds *now*, whatever the positive law may say about it.

I shall define "human rights" to be generically moral rights of a fundamentally important kind held equally by all human beings, unconditionally and unalterably. Whether these rights are "moral" in any of the more precise senses, I shall leave an open question to be settled by argument, not definition. Of course, it is also an open question whether there are any human rights and, if so, just what those rights are. All of the rights that have been characterized as "natural rights" in the leading manifestoes¹ can also be called human rights, but, as I shall be using the terms, not all human rights are also by definition natural

rights. The theory of natural rights asserts not only that there are certain human rights, but also that these rights have certain further epistemic properties and a certain metaphysical status. In respect to questions of moral ontology and moral epistemology, the theory of human rights is neutral. Finally, it should be noticed that our definition includes the phrase "*all human beings*" but does not say "*only human beings*," so that a human right held by animals is not excluded by definition.

In addition to the characteristics mentioned in our definition, human rights have also been said to be "absolute." Sometimes this is simply a redundancy, another way of referring to the properties of universality and inalienability; but sometimes "absoluteness" is meant to refer to an additional characteristic, which in turn is subject to at least three interpretations. Human rights can be absolute, first, only in the sense that all rights are absolute, namely, unconditionally incumbent within the limits of their well-defined scope. Second, a human right might be held to be absolute in the sense that the rights to life, liberty, and the pursuit of happiness, as proclaimed in the Declaration of Independence, are most plausibly interpreted as absolute, namely, as "ideal directives" to relevant parties to "do their best" for the values involved. If the state has seriously considered Doe's right to his land, done its best to find alternative routes for a public road, and compensated Doe as generously as possible before expropriating him by eminent domain, it has faithfully discharged its duty of "due consideration" that is the correlative of his "right to property" conceived simply as an ideal directive. If a human right is absolute only in the sense in which an ideal directive is absolute, then it is satisfied whenever it is given the serious and respectful consideration it always deserves, even when that consideration is followed by a reluctant invasion of its corresponding interest.

The strongest and most interesting sense of "absolute" attributed to rights is that of being "absolutely exceptionless" not only within a limited scope but throughout a scope *itself* unlimited. The right to free speech would be absolute in this sense *if* it protected all speech without exception in all circumstances. In that case, the limits of the right would correspond with the

limit of the form of conduct specified, and once these wide boundaries had been defined, no further boundary adjustments, incursions or encumbrances, legislative restrictions, or conditions for emergency suspensions would be permitted. For a human right to have this character it would have to be such that no conflicts with other human rights, either of the same or another type, would be possible.

Some formulations of human rights might be passed off as absolute in the strongest sense merely because they are so vaguely put. Some are formulated in conditional language ("a right to adequate nutrition *if* or *when* food is available") and then held to be absolute *qua* conditional. Other rights, put in glittering and general language ("a right to be treated like a human being," "a right to be treated like a person, not a thing") are safely held to be absolute because without detailed specification they yield few clear and uncontroversial injunctions. Others are formulated in language containing "standard-bearing terms" such as "reasonable," "proper," or "worthy," without any clue to the standards to be employed in applying these terms. Thus it is said that all men (like all animals) have a right not to be treated cruelly. So far, so good; there can be no exceptions to that right. But its "absoluteness" can be seen to be merely formal when one considers that cruel treatment is treatment that inflicts *unnecessary, unreasonable, or improper* suffering on its victim. The air of self-evidence and security beyond all controversy immediately disappears from this human right when men come to propose and debate precise standards of necessity, reasonableness, and propriety.

We should not despair, however, of finding explicit standards of (say) cruelty that will give human rights content and yet leave them plausible candidates for absoluteness in the strong sense. The right not to be *tortured*, for example, comes close to exhaustive definability in non-standard-bearing terms, and may be such that it cannot conflict with other rights, including other human rights, and can therefore be treated as categorical and exceptionless. If torture is still too vague a term, we can give exact empirical descriptions of the Chinese Water Torture, the Bamboo Fingernail Torture, and so on, and then claim that everyone has an absolutely exception-

less right in every conceivable circumstance not to be treated in any of those precisely described ways. Does this right pass the test of nonconflict with other rights?

Suppose a foreign tyrant of Caligulan character demands of our government that it seize certain political critics, imprison them, and slowly torture them to death, and threatens that unless that is done, his police will seize the members of our diplomatic staff in his country and torture them to death. At first sight this appears to be an authentic case of conflict between human rights, in that it would be impossible to do anything that would have as its consequence the fulfillment of everyone's right not to be tortured. What we should say about this blackmail situation if we wish to maintain that the right not to be tortured is nevertheless absolute (exceptionless and non-conflictible) is as follows. If the political critics in our grasp have a human right never to be tortured, then we have a categorical duty not to torture them. Thus, we ought not and will not torture them. We know, however, that this is likely to lead to the torture of the diplomatic hostages. We should therefore make every effort to dissuade Caligula, perhaps even through military pressure, not to carry out his threat. If Caligula nevertheless tortures his hostages, their rights have been infringed, but by Caligula, *not by us*.

All cases of apparent conflict of rights not to be tortured can be treated in this way. Whenever it is possible to honor all of them, the situation causing that impossibility is itself the voluntary creation of human beings. Nothing in nature itself can ever bring such a conflict into existence. A tyrant's threat is in this respect unlike a plague that renders it impossible for everybody to get enough to eat. It would be idle to claim that the right to enough food is an absolute, categorical right, exceptionless in every conceivable circumstance, because we cannot legislate over nature. But we can legislate for man (the argument continues), and this is a plausible way to do it: *No acts of torture anywhere at any time are ever to be permitted*. All human beings can thus be possessed of a right that is absolutely exceptionless. That we have no guarantee that some people somewhere won't violate it or try to force us to violate it is no argument against the "legislation" itself.

There is therefore no objection in principle to the idea of human rights that are absolute in the sense of being categorically exceptionless. It is another question as to whether there are such rights, and what they might be. The most plausible candidates, like the right not to be tortured, will be passive negative rights, that is, rights not to be done to by others in certain ways. It is more difficult to think of active negative rights (rights not to be interfered with) or positive rights (rights to be done to in certain ways) as absolute exceptionless. The positive rights to be given certain essentials—food, shelter, security, education—clearly depend upon the existence of an adequate supply, something that cannot be guaranteed categorically and universally.

If absoluteness in this strong sense is made part of the very meaning of the expression "human rights," then it would seem that there is a lamentable paucity of human rights, if any at all. Clarity will best be served, I think, if we keep "absoluteness" out of the definition of "human right." Two questions can then be kept separate: (1) Are there any human rights, i.e., generically moral, unforfeitable, irrevocable rights held equally and universally by human beings (at least)? (2) If so, are any of these rights absolute? We turn now to a consideration of the grounds for thinking that there are human rights, so defined.

3. Grounds for Equality

Despite its current popularity, the theory that there are rights held equally by all human beings continues to trouble philosophers. It is natural for them to imagine skeptics asking: "Why *all* human beings *equally*, and not only, or primarily, the deserving ones?" The skeptical question still has great force. To appreciate this we have only to consider that the theory of human rights requires that in certain basic ways we treat even congenital idiots and convicted mass murderers the same as everyone else.

To appreciate fully how revolutionary the idea of equal human rights was, recall how European society was organized during the centuries preceding the revolutionary period. The feudal system recognized distinct hereditary castes, each with its peculiar and irreducible legal status defined by

elaborate sets of rights and duties. A legal *status* in the relevant sense differs from mere social roles like father, promiser, and farmer, in part because it is entirely hereditary and unmodifiable by voluntary arrangements. The rights men had as a matter of status were theirs as royalty, nobility, clergy, serfs, and so on; there was nothing "equal" about these status rights. Human rights, as a revolutionary idea, were associated with the idea of a single status society where the powers of the high and mighty were limited everywhere by the rights all persons derived from their "status" as human beings.

The single status society differs strikingly from a society with fixed hereditary caste distinctions as well as from a purely meritocratic society in which *all* political rights are based on merit alone. Gregory Vlastos, in an important article,² has argued that the doctrine of universal equal human rights presupposes a concept of equal and universal human *worth* that is to be sharply distinguished from the idea of human merits. We grade persons according to their talents, skills, character and personality traits, and other rankable qualities, but in respect to "human worth" (by definition) all men must get equal grades. Indeed, "human worth" is not a "grading concept" at all. In this it differs from every kind of merit, including, of course, moral merit, in respect to which there are vast inequalities among persons. In a society based on human rights, at least some rights will belong irrevocably to fools and rogues as well as to everyone else. These are the rights, Vlastos suggests, that are based on the worth human beings have as individuals, quite apart from their valuable qualities.

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"Human worth" itself is best understood to name no property in the way that "strength" names strength and "redness" redness. In attributing human worth to everyone we may be ascribing no property or set of qualities, but rather expressing an attitude—the attitude of respect—toward the humanity in each man's person. That attitude follows naturally from regarding everyone from the "human point of view," but it is not grounded on anything more ultimate than itself, and it is not demonstrably justifiable.

It can be argued further against skeptics that a world with equal human rights is a *more just*

world, a way of organizing society for which we would all opt if we were designing our institutions afresh in ignorance of the roles we might one day have to play in them. It is also a *less dangerous* world generally, and one with a *more elevated and civilized* tone. If none of this convinces the skeptic, we should turn our backs on him to examine more important problems.

4. Absolute and Nonabsolute Human Rights

In December 1948, the General Assembly of the United Nations adopted a Universal Declaration of Human Rights. Unlike the eighteenth-century manifestoes of natural rights, which were concerned almost exclusively with the individual's rights not to be interfered with by others, the U.N. Declaration endorses numerous basic positive rights to receive benefits and be provided with the means to satisfy basic human needs. Even the conception in the U.N. document of a basic need (in contrast to an unneeded but valuable commodity) reflected changes in the world's outlook and hopes since the eighteenth century. The U.N. Declaration contains the old-style negative rights, mostly pertaining to civic and political activities and criminal procedures, as well as the new "social and economic rights" that are correlated with the positive duties of others (usually of the state). Rights of the former kind impose duties upon private citizens and the state, alike to keep hands off individuals in certain respects, to leave them alone.

Other articles, however, impose duties upon others that are so difficult that they may, under widely prevalent conditions of scarcity and conflict, be impossible for *anyone* to discharge. Articles 22–27, for example, state that "everyone, as a member of society . . . has the right to work, to free choice of employment . . . to protection against unemployment . . . to just and favorable remuneration . . . to rest and leisure . . . and periodic holidays with pay . . . to food, clothing, housing, and medical care . . . to education . . . to enjoy the arts and to share in scientific advancement and its benefits."³ Now, as we have seen,⁴ these positive (as opposed to negative) human rights are rights in an unusual new "manifesto sense," for, unlike all other claim-rights, they are not necessarily correlated with the duties of any

assignable persons. The Declaration must therefore be interpreted to say that all men as such have a claim (that is, are in a position to make claim) to the goods therein mentioned, even if there should temporarily be no one in the corresponding position to be claimed against.

These social and economic human rights, therefore, are certainly not *absolute* rights, since easily imaginable and commonly actual circumstances can reduce them to mere claims. Moreover, these rights are clearly not nonconflictible. For example, where there are two persons for every job, there must be conflict between the claims of some workers to "free choice of employment," in the sense that if one worker's claim is recognized as valid, another's *must* be rejected.

Can any human rights plausibly be construed as absolutely exceptionless and therefore nonconflictible in principle, or must all rights in their very natures be vulnerable to legitimate invasion in some circumstances? The most plausible candidates for absoluteness are (some) *negative rights*; since they require no positive actions or contributions from others, they are less likely to be affected by conditions of scarcity. To say of a given negative right that it is nonconflictible is to say: (1) if conflicts occur with rights of other kinds, it must always win, and (2) no conflict is possible with other rights of its own kind. The right to speak freely is a plausible human right and is conferred by Article 19 of the U.N. Declaration, but it is certainly not nonconflictible in the sense defined above, for it cannot plausibly be said always and necessarily to win out whenever it conflicts with another's right to reputation, privacy, or safety. In theory, of course, we could consistently hold that the free expression right always overrides rights of other kinds, but then that right would fail to satisfy the second condition for non-conflictability, no matter how stubbornly we back it. The requirement that the right in question be incapable in principle of conflicting with another person's right of the *same* kind is the real stumbling block in the path of absoluteness. Consider an audience of hecklers exercising their "free speech" to shout down a speaker, or some scoundrel using his "free speech" to persuade others to cut out the tongue of his hated rival. In these cases, free speech must be limited

in its *own* interest. Similar examples can be provided, *mutatis mutandis*, for freedom of movement, free exercise of religion, the right to property, and to virtually all of the characteristically eighteenth-century rights of noninterference.

There remain at least three kinds of human rights that may very well be understood (without obvious absurdity) to be absolute and nonconflictible. Positive rights to "goods" that cannot ever, in the very nature of the case, be in scarce supply, are one possibility. Perhaps the right to a fair trial (really a package of positive and negative rights) or the right to equal protection of the law,⁵ or "the right to equal consideration,"⁶ fall into this category.

A second possibility is the negative right not to be treated inhumanely or cruelly, not to be tortured or treated barbarously. Whether we as legislators (actual or ideal) should confer such an absolute right on everyone is entirely up to us. There may be good policy reasons against it, but if we are convinced by the powerful policy and moral reasons in favor of it, we needn't be deterred by the fear of conflictability. As I argued in the previous section, we can *decide* without absurdity to let this right override rights of all *other* kinds, and there is nothing in nature to bring this right into conflict with other persons' rights of the *same* kind. Article 5 of the U.N. Declaration, which forbids "torture or . . . cruel, inhuman . . . treatment," may be conceived as conferring a human right in a very strong sense, namely one which is not only universal and inalienable, but also absolute. It is still not a human right in the very strongest sense—one that applies absolutely and unalterably to all and *only* humans—for it is presumably the one right that the higher animals have, if they have any rights at all.

A third possibility is the right not to be subjected to exploitation or degradation even when such subjection is utterly painless and therefore not cruel. It is possible to treat human beings with drugs, hypnosis, or other brainwashing techniques so that they become compliant tools in the hands of their manipulators, useful as means to their manipulators' ends, but with all serious purposes of their own totally obliterated. Once human beings are in this condition, they may have no notion that they are being exploited

"absolute" (exceptionless and nonconflictible), and universally and *peculiarly* human.

NOTES

1. E.g., the American Declaration of Independence (1776), the Virginia Bill of Rights (1775), and the French Declaration of the Rights of Man and of Citizens (1789).

2. Gregory Vlastos, "Justice and Equality," in *Social Justice*, ed. Richard B. Brandt (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1962), pp. 31-72.

3. UNESCO, *Human Rights, a symposium* (London and New York: Allan Wingate, 1949).

4. *Supra*, pp. 66 f.

5. "Notice . . . that there is one ['natural'] right which . . . is to all intents and purposes an absolute right. That is the right to equal consideration—the right to be treated as the formula for justice provides. For this right is one which is the most basic of all, one which is under no conditions to be violated." Lucius Garvin, *A Modern Introduction to Ethics* (Boston: Houghton Mifflin Company, 1953), p. 491.

6. See *supra*, pp. 86-88.